

0908575 [2010] RRTA 40 (25 January 2010)

DECISION RECORD

RRT CASE NUMBER: 0908575

DIAC REFERENCE(S): CLF2009/100889

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Ann O'Toole

DATE: 25 January 2010

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, arrived in Australia [in] July 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] July 2009. The delegate decided to refuse to grant the visa [in] October 2009 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] October 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] December 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
21. The applicant claims to be a citizen of India. He provided a copy of his passport which was issued at [[City 2]] in India [in] March 2009. A copy of this passport indicates that [in] June 2009 he was granted a Temporary Business visa for Australia. He arrived in Australia [in] July 2009, having departed India [in] July 2009. He claims that he is married and that his wife and three children remain in India. He claims that he is a lawyer by profession and that he qualified in 1996. He provided a document headed Bar Association [[Town 3]] dated [in] July 2009 [Information deleted: s.431(2)]
22. In a statutory declaration attached to his visa application the applicant made the following claims:
 - He was born in [Town 3] in [State 1]. He came to Australia because he fears persecution in India.

I first became interested in politics in the year of 1993. Being a JAT background my whole family members are support of BJP (Bharatia Janata Party). I believed that through my political involvement I would be able to provide a voice for my community. I had always felt that Congress Party did not govern my area for the interest of all caste. During my three years practice in [City 2] High Court, I worked with the senior BJP legal advisors. In the year 2001, I moved to [Town 3] to practice my law. And between that I worked in offset printing in [City 2] for two years.

When I moved to [Town 3] and started my law practice, I was selected as a legal advisor for BJP. At that time [Politician 1] Legislative Assembly for [Town 3] and he was the Congress Party leader. During his MLA period [Politician 1] got associated with hard core criminal [Person A]. Both of them were from Schedule Caste background. He used him to achieve his political objective and threats opposition members. [Person A] was a simply party member, but his father was Secretary of Congress Party of [Town 3] and his grandfather was a candidate in 1980 for Congress Party. With the help of Congress party [Person A] engaged in kidnap, murder, attempt to murder, money extortion and other serious crime.

Most of his criminal activities were done against Jat and those people came to see me for legal advice against his crime. In 2004, State Legislative Election, I advised to my Jat community to campaign in their area against Congress candidate. The Congress party and used to pay political power for personal fortune. As I worked

very hard for the party in that election and won, I also became well known to senior Congress leader as they knew that my activities played major part at election outcome.

In the Year 2006, [Person A] bought two properties in [Town 3] on dated [date]-11-2006 and [date]-12-2006. The trade was illegal because the landlord sold the properties to other people on agreement basis. When I knew about this deal, I send an objection letter to Sub Divisional Magistrate's office. In response of the objection the S.D.M visited the site and found (sic) that there were already few houses built on the land, which was not mentioned in the deed. The S.D.M. made the order to vacant (sic) as I see the land first before any kind of proceeding.

He found out about my objection and made attempt to kill me number of occasions. I informed the matter to the local police and police warned him about his attempt. I also immediately informed that to my party official what happened to me and the threat of being killed I received. I was told that such occurrences were not uncommon in Indian politics, if he tried to kill me they would face severe political backlash, but through [Person A] they could target me easily. I was very nervous last couple of years though my party was in power.

The situation drastically changed after last year State Legislative Election. The Congress party won the election and [Politician 1] elected as a MLA and became a Minister. I was not prepared for that at all. We thought we will win again. When we lost in election I knew what was coming towards me and I was helpless about it by trying to get police protection. But in the end I was told that it is impossible to protect me from [Person A] while his party in power. I was just changing my address and constantly traumatized over my helpless situation. I could not sleep properly a single night while I was in India last few months, I knew that they were out there and looking for me.

Facing the above situation I was very depressed and afraid about my family members. After having discussion with my family, I decided to leave the country to avoid being killed by the Congress party thug [Person A]. I had to leave my homeland at the earliest and the earliest chance I got was to Australia.

Departmental interview ([in] October 2009)

23. The delegate interviewed the applicant and an interpreter in the Hindi language assisted.
24. The applicant provided to the delegate excerpts from the Indian Penal Code (Folios 60-67). The applicant also provided a document which was addressed to the Subdivisional officer, [Town 3] relating to land conversion (Folio 57). The applicant provided a page from the [Town 3] Legislative Assembly Election Voter List (Folio 50). Underlined were the number 45 and the name [Person A]. The applicant provided a two page document headed Cases Registered against [Person A] at the police station at [Town 3] (Folios 51 and 52).
25. He provided an address where he lived for the past six months prior to coming to Australia. He said he lived there with his wife and three children. His parents remained in the village.

He lived in [Town 3] prior to that for about seven years. That is the same address where his parents live. He was asked why he moved from [Town 3] with his wife and children. He said

his life was at risk. He was asked if his family had houses in any other areas apart from [State 1] and [Town 3]. He said they did not.

26. He said he worked at the Magistrate's Court and the District Court. Both courts are located in the same area. He was asked when he stopped practising at the courts. He said it was in December 2008 when he moved. He was asked how he supported himself during that time. He said he had experience in the printing industry so he was able to get a job in that area. The delegate mentioned his Business visa application in which he said that he had been employed for a period of over two years by a company called [employer deleted: s431(2)] in [Town 4]. He was asked the name of the company he worked for when he moved in December 2008. He said it was called [Company 1]. He was asked if he was not working at [employer deleted: s431(2)]. He said his friend works there and he provided him with a letter of employment from that company so the applicant could come to Australia. He worked at [Company 1] for five months. He was asked why he stopped practising law. He said he had problems with some people and he did not want to go to the court.
27. He was asked about his political affiliation. He said he is a legal advisor for the BJP. He was asked when he had become a member. He said he became a member in 1993. He was asked if he was an office bearer. He said initially he was a member and then in 2002 he was given the post of legal adviser. He was asked if he received any remuneration from the BJP. He said he did not. He said he thought that if they came into power he would get a good position. He was asked what the party was trying to do in his locality. He said they were supporting peace and harmony and Hinduism. He said he canvassed for the BJP in his local constituency during the 2004 and 2008 state elections. He was asked about what role he played in 2004. He said he was concentrating on his people and trying to convince them to vote for BJP. He said the BJP was successful in 2004. He was asked about the state elections in 2008. He said he did his best but they lost their seat. He was asked about the general election early in 2009. He said Congress won the election. He was asked what role he played in the April/May 2009 elections. He said he did some work but Congress won. He was asked the name of his candidate. He said his name was [name deleted: s431(2)].
28. He was asked if he had a membership card or any other evidence of his involvement with the BJP. He said he requested his family to send the documents. He said he received some documents by fax but he did not bring the membership card. He said he did not bring the card with him because he thought they might check him at the airport. He was asked why he was concerned about bringing a political party membership card through the airport. He said he was afraid so he did not bring any documents and he did not want any of his enemies to know about his documents. He was asked how anyone would know. He said he feared his visa would be cancelled if that document was seen. The delegate clarified that what he meant was that he believed the Indian authorities could cancel his Australian visa at the airport. He said he thought that could happen. The delegate said the BJP is one of the two main parties in India and why would the Indian authorities cancel a foreign visa because he had a membership card for the BJP. He said he was scared and he thought that could happen.
29. The delegate confirmed that he was claiming protection on the basis of his political opinion. He was asked how that was relevant in relation to his fear of [Person A]. He said he is a criminal who has committed a lot of criminal offences and the applicant as a legal professional who advised his community people against him. He said [Politician 1] lost his seat in the 2004 election and [Person A] blamed the applicant for that. He said [Politician 1] and [Person A] belong to the same caste, a lower caste.

30. He agreed that [Politician 1] was re-elected in December 2008 and is currently the [ministerial position deleted: s431(2)]. The delegate asked why he still considered the applicant as an enemy if he had regained his seat. The applicant said that [Person A] was involved in a property deal and the applicant was responsible for the cancellation of that deal. He was asked when the property deal was finalised. He said they were finalised [in] December 2006. He was asked when he reported the property deal to the Subdivisional Magistrate's Court. He said he made the report [in] December 2006. He was asked when the Subdivisional Magistrate's Court finalized the proceedings against [Person A]. He said the deal was cancelled [in] December 2006.
31. He was asked about his claim that there were a number of attempts to kill him. He was asked how many attempts were made. He said when [Person A] found out about the cancellation and realized it was because of the applicant he attacked the applicant on one occasion but he could not find him after that. He was asked what happened when the attempt was made to kill him. He said he was in a crowded marketplace when [Person A] approached. He struck the applicant with a hockey stick 3-4 times on his legs and shoulders. He said this occurred [in] December 2006. He was asked if he sustained any injuries. He said there was nothing apart from something on his leg. He was asked why he thought that attack was an attempt to kill him rather than just harm him. He said the property deal involved a lot of money and [Person A] had lost a lot of money because of the applicant so he wanted to kill the applicant. He was asked why [Person A] would attempt to kill him with a hockey stick in a crowded market. The delegate said that did not make much sense. The applicant said if he had been hit on the head he could have been killed. The delegate asked why [Person A] would not be concerned about witnesses. The applicant said he was a hard core criminal and does not fear anyone. He agreed that was the only time [Person A] had attempted to kill him.
32. He stated that since the party returned to power in December 2008 they were after the applicant and that is why the applicant went into hiding. He said [Person A] got his phone number and went to the applicant's home. He was asked what date he went to his house. He said it was in January. He could not remember the date. He was asked if he could remember which day of the week it was. He said he was not at home but his father informed him about it. He was asked when he started receiving phone calls from [Person A]. He said it was after [Politician 1] became the Minister. He said he was calling him on his mobile phone because the applicant moved elsewhere after the election. He was asked if he changed his mobile phone and he said he did. He said he changed it once. He changed his mobile phone in February. He was asked what happened after he changed his mobile phone. He said his friends informed him that [Person A] knew where he was. The delegate asked how [Person A] found out that the applicant had moved. He said [Person A] lives in the same area in [Town 3] and it is easy to find out.
33. He was asked why he thought [Person A] started to harass him two years after the failed property deal. He said it was easier for [Person A] to harm or kill the applicant because [Person A]'s party was in power. He said [Person A] did not know his exact address after the applicant moved. He was asked if any attempt was made after February 2009 to harm the applicant. The applicant said he was living in a big city and [Person A] could not find him. The delegate mentioned that perhaps [Person A] might have some criminal connections which could help him to locate the applicant. The applicant said that is possible in India and if he moved anywhere they could find him. He said now that he has moved out of India he cannot find him. The delegate said that the applicant was contradicting himself. The delegate noted that the applicant said [Person A] could not find him after he moved and asked

why he thought he could find him in other parts of India. The applicant said [Person A] could have found him if the applicant had not left after six months.

34. He was asked when he reported the market incident to the police. He said the incident happened at 4pm and immediately after he reported it to the police. He was asked if he had a copy of the police report. He said the police did not provide him with a copy. He said they did not write a report. He said they did not lodge a first information report. He was asked why they did not prepare a first information report. The applicant was told by the police that there were no witnesses and the applicant had not been seriously harmed. The delegate noted that the applicant had said it occurred in a crowded market and asked why the police would say there were no witnesses. The applicant said there were a lot of witnesses but nobody was willing to give information because they are afraid of [Person A]. The applicant was asked if it was unusual for the police not to provide him with the report. The police told the applicant that they would investigate and if they found a witness they would lodge a complaint and give a copy of the report to the applicant. He never received any report from the police.
35. He was asked if he reported the harassment which started in January 2009. He said after the Congress came into power he did not think he would get any support from the police. He did not report anything to the police. The applicant said that he was told by the President of the BJP in [Town 3] that because their party was not in power he could not do anything. The delegate said she was asking about the attempt to kill him in 2006 when the applicant's party was in power. He said he did not speak to the party president at that time. He spoke to him in 2009. The delegate referred to the applicant's statement attached to his Protection visa application which stated that he "immediately informed to [party official] what happened to [him] and the threat of being killed". And that "such occurrences were not uncommon in Indian politics". The applicant said that he was advised to leave. He was asked who advised him. He said the president advised him. The delegate said he had not taken that advice because he stayed at the same address. The applicant said his party was in power so he thought he would be safe.
36. He was asked why he thought the police would not protect him if he reported the harassment that took place at the beginning of this year. He said the police always favour the party that is in power.
37. The delegate mentioned that in his statement he stated that there were attempts to kill him on a number of occasions yet he only referred to one during the interview. He said that [Person A] was intending to kill him.
38. The delegate stated that the applicant was well educated and asked why he could not relocate within India. He said it was impossible to move anywhere in India because the Congress party is in power in many places. He said they can find him anywhere.
39. The delegate mentioned to the applicant that from what she had been told it seemed that [Person A] is a local criminal who would not have the power to track down the applicant if he relocated. The applicant stated that [Person A] is a friend of the Minister and he can do anything to the applicant. He said [Person A] lived close to his house which made it easier. He was asked why [Person A] would want to kill him two years after the property incident. He said it was because of the property deal and he is a criminal. He said people from the applicant's community sought legal advice from the applicant because of [Person A]'s criminal activities. The delegate noted that the applicant continued to live and work in the same area two years after the property incident. She said that if [Person A] wished to harm

the applicant during that period he had ample opportunity to do so. The applicant said he did not do anything at that time because the applicant's party was the ruling party and [Person A] thought that the police would catch him.

40. The applicant was asked if he wished to add anything further in relation to his protection claims. He said he wanted to submit some documents regarding the property deal. He said his life is at risk and he cannot stay in India. The applicant said his wife went to the police station to prove that [Person A] is a criminal. The delegate asked how his wife managed to obtain the record relating to [Person A]. He said the police provided a copy to his wife because he is a criminal and he had harassed the applicant and the applicant wanted to prove that.

Tribunal hearing ([in] December 2009)

41. The applicant attended the Tribunal. The applicant provided his passport to the Tribunal and a copy has been placed on the Tribunal file. The applicant handed to the Tribunal an undated letter purportedly from the President of the BJP at [Town 3] who stated that the applicant was appointed to a BJP Party Working Committee in 2002. The writer also stated that the applicant had "done very good work" in BJP and its Working Committee and because of his excellent work he was appointed [to a position] in the BJP for [Town 3] in 2003". The document can be found at folio 44 of the Tribunal file. I mentioned to the applicant that it referred to his appointment as [Position 1A] and asked if that was correct. He stated that was not correct and the reference to [President 1A] was a mistake. He said he was a legal advisor. His wife sent the document by fax to him. He said all documents from India which he used for his application were sent from the same fax number in [Town 3] where his wife lives.
42. I told the applicant that I had read all the documents and that I had listened to his Departmental interview.
43. The applicant said he was born in [year deleted: s431(2)] and married in 1997. His youngest child was born on [date deleted: s431(2)] at his wife's parents' place which is close to [Town 3]. He said it is about 35km from his home in [Town 3]. He said he last saw his family in July 2009 and had not seen his youngest child. I asked where he was when the child was born. He said he was in [town deleted: s.431(2)] preparing to come to Australia. The applicant stated he was working there for a company called '[Company 1]' and he started that job in January 2009 when he left [Town 3]. He said it was [in] January 2009 when he left. He said he worked there until [date deleted: s431(2)] June 2009. He said people found out his address in [town deleted: s.431(2)].
44. When he travelled to [Town 4] in January 2009 his wife and children stayed with his parents. His wife and his children went to visit him once or twice. I asked when he last saw his wife. He said he thought it was May when he saw her and the children. The applicant's parents are alive and live in [Town 3]. His wife, children and younger brother live with his parents. I asked how long his wife stayed with her parents around the time of the birth of the youngest child. He said she stayed for about one month after the baby was born.
45. I asked when he last saw his parents. He said it was in March 2009 when he went to his home one night. I asked if there was any specific reason why he went there. He said he just wanted to visit them. He said his father is now retired. He owns a farm and hires workers to help him with the farm. His brother works for an insurance company. He has an older brother who lives elsewhere and his only sister lives in the same village.

46. The applicant finished High School in 1988. He graduated in Commerce in 1991. He then studied Law in [City 2] and obtained his Law degree in 1996. He said he studied Criminal Law, Hindu Law, Muslim Law and the Criminal and Civil Procedure Codes. He said he found a position training in private practice and he worked with a senior advocate and learned all about advocacy. He was training for three years. In 1999 he obtained a job at '[company 1]'. He said he worked part-time in that job prior to 1999 and then became full-time in 1999 at their [City 2] office. I asked why he stopped practising law. He said he just wanted to do the other job. He said there was not a lot of legal work and he was given a management position at the printing company. He said he was responsible for five staff. He stayed in that job until 2001. He had been living in [City 2] until that time. He then moved back to [Town 3]
47. He joined the BJP in [City 2] in 1993. He joined the BJP in [Town 3] in 2002. In about July or August 2001 he started in private legal practice at the Magistrate's Court at [Town 3]. He also had an office at his home. He did not employ any staff. He said he dealt mainly with civil matters, for example property, land acquisition and other things. He said he dealt with property settlements and disputes regarding land and leases. He said his practice was mainly in the civil jurisdiction. He said he engaged in a little criminal law, for example bail and other matters. He said he had about 4-5 criminal clients in a year. He said they were not very serious offences and sometimes involved assault.
48. In 2003 he became more involved with the BJP. He said he became more active. He said the Party was successful in the election in 2004 and he continued working with them after the election. He was not paid for any of the work he did for the BJP. I asked what type of legal advice he provided. He said if any actions were taken against the BJP he would attend court. He said he was on a panel of lawyers who acted for the BJP. He said he was happy to do this work and he did it for the people in the community and he hoped it would to a good position in the future.

I referred to the applicant's claim that [Person A] wanted to kill the applicant. I referred the applicant to a document he had provided to the Department (folios 51 and 52 Departmental file) which set out the cases registered against [Person A] by the police in [Town 3]. The applicant said that his wife sent that document to him. I asked how she managed to get the document. The applicant stated that she went to the local police station and they gave it to her. I asked the applicant if she had been asked by the police why she wanted the document. He said he did not know. He said that her brother had gone to the police station with her. I asked if the document listed all the cases against [Person A]. He said it did. I noted that there were 25 matters listed on the document and they related to charges against [Person A]. I noted that one of the headings in the document said "Date of Submitted Charge Sheet and JF number" and asked the applicant if he could tell me what JF stood for. He said he would make some enquiries and would let the Tribunal know. (The Tribunal has not received any further correspondence from the applicant.)

49. The applicant stated that [Person A] has three different lawyers. I noted that the applicant had also provided (folio 50) a document which highlighted the number 45 and named [Person A] on the Voters List. The applicant stated that was correct. He said the list proves that [Person A] lives in the applicant's area [Town 3].
50. The applicant stated that his troubles with [Person A] started a long time ago in 2003. He told the Tribunal that prior to 2006 he had not been assaulted by [Person A] or by anybody

else. He stated that [Person A] bought two properties in [Town 3] in 2006. I asked how the applicant found out about that. He said he saw details at the court house. He said he could see it on the property registration list and he had heard two lawyers talking about the properties. He said the properties consisted of land and houses. The properties had belonged to one owner, not a BJP member. I asked why the applicant was interested in these properties. He said all the land and houses belonged to people from his caste. He said they all had lease agreements. I asked why he wanted to become involved. He said he wanted to help the people in his community and he thought the new owner might demolish the houses which would mean that the tenants would be evicted.

51. I asked how he prevented [Person A] becoming the new owner. He said he complained to the Subdivisional Magistrate. I asked when the land was bought. He said it was bought [in] November and [in] December 2006. He said the person intending to buy had to provide documents to the Subdivisional Magistrate's office (SDM). He said the documents were produced on those dates to the SDM. He said he found out about the properties [in] December 2006. I asked when he lodged a complaint. He said he lodged the complaint [in] December 2006. I asked what he did. He said he complained orally to the SDM. I asked what the SDM said. He said that he told the applicant he would look into the matter. I asked when the applicant found out that his complaint had been successful. He said he had prepared a complaint and told the people involved that he would represent them. He lodged the complaint containing their signatures. I asked when he lodged the signed written complaint. He said this happened [in] December 2006.
52. I asked when the property deal was cancelled. He said that happened [in] December 2006. I asked how he found out about that. He said because he worked at the District Office he became aware of it. I asked when [Person A] approached him. He said it was on the same day he found out that it was cancelled and that it was the applicant who was responsible for the complaint. The applicant said [Person A] phoned him [in] January 2007 and assaulted him [in] January 2007. I asked the applicant what happened. He said he was at the market. He saw a vehicle which contained [Person A]. It was about 4pm. It happened close to the clock tower. [Person A] got out of the car. He was holding a hockey stick and he attacked the applicant with it. People gathered and they saved the applicant and then [Person A] left. He said the people in the crowd were unknown to the applicant. I asked how that could be if they lived in the same village. He said he knows them by their faces but they did not know his name. I expressed surprise, given his evidence that he was a lawyer who worked and appeared at the local court. I asked the applicant if he had suffered any injuries. He said his leg and arm was injured. He said he went to the doctor but it was not serious. He stated that [Person A] did not attack him again. He said he had heard that [Person A] was looking for him to harm him. I asked who told him that. He said his friends heard that he was asking about him.
53. I mentioned to the applicant that he had continued to live at the same place and to work at the same place. He said he went to court when [Person A] went to jail. I asked when he went to jail. He said it was some time in 2006. He said that [Person A] had been released on parole when he attacked the applicant. I asked when [Person A] had been imprisoned. The applicant did not know. He said he was in prison for three years but he did not know when. I asked when he was released. He said it was in December 2006. The applicant said he did not know when he was in jail. I asked how he would know when it was safe to go to court if he did not know when [Person A] was in jail. The applicant said that if [Person A] went to [Town 3] the applicant would know as everyone in the village knows [Person A] and they

would tell the applicant. The applicant said he spent three years in prison and he came out frequently. I asked if he meant that [Person A] was in and out of jail. He said that was correct. I asked the applicant how much time [Person A] had spent in jail from the period December 2006 until the applicant came to Australia in 2009. The applicant said that [Person A] finished three years in jail and he thought that happened in 2009. I asked when in 2009. He said that when the election took place in December 2008 [Person A] was out of jail.

54. I explained section s.424AA to the applicant. I mentioned to the applicant that during his interview with the delegate he had stated that the assault took place [in] December 2006. The applicant stated that it was [in] January 2007 and that perhaps he was mistaken. He said it may have been a slip of the tongue.
55. I mentioned to the applicant that during his interview with the delegate he had stated that the marketplace was crowded when he was assaulted. The applicant stated that the witnesses were not prepared to say anything to the police because they were afraid of [Person A]. I mentioned to the applicant that he told the Tribunal that the people at the market did not know the applicant. The applicant stated that they did not know him by name but when the police asked them about the incident they denied seeing anything. I asked when the police spoke to these people. The applicant said he went to report the matter and they did not write down the complaint. I asked why they did not do so. He said they told him they would like to go to the location of the incident and ask people some questions. The applicant said the police went to the marketplace. He said people told him about it. He said a friend of his was there when the police were asking people for information. He said he did not know when they went there.
56. I mentioned to the applicant that in his statement attached to his Protection visa application he stated that [Person A] had made an attempt to kill him on a "number of occasions". The applicant stated that there was only attempt.
57. I referred to the applicant's statement where he said that after the election loss he knew what was coming and he was helpless about it. I asked if he spoke to the police about his fears after the election loss in 2008. He said he wanted to speak to them but because the Party lost the election he thought it was useless to go to the police. I asked what he thought would happen to him. He said he was sure that [Person A], because his Party was in power, would try to kill him. I asked why [Person A] would want to kill him. He said he was very angry because of the failed property deal. I mentioned to the applicant that it would have been quite easy for [Person A] to locate the applicant. The applicant stated that he moved from [Town 3] after the election. He said he moved to [Town 4] in January 2009. He said he was at the same address in [Town 4] I mentioned that he had stated in his statement that he was changing his address. He stated he was changing his address in [Town 3]. He stated that from 2006 until January 2009 he had moved 3-4 times.
58. I mentioned to the applicant that it was his evidence that [Person A] had been angry with him since December 2006 and that [Person A] was a hard core criminal. I mentioned that I found it difficult to believe that the applicant would be able to avoid such a person. The applicant said it was easy because the applicant's Party was in power and when [Person A] came out of jail the Party supported the applicant. I mentioned to the applicant that it was his evidence that [Person A] had found him when the applicant's Party was in power. The applicant said he did but [Person A] was afraid of the police because the Party was in power.

59. I asked the applicant why he delayed leaving India if he was in fear of serious harm. He said after the election he became more scared. I asked why he waited six months before leaving. He said he moved to [Town 4] and thought he was safe because he was 200km from his own town. He said [Person A] found out where he was living in [Town 4]. He said [Person A] got his phone number and address. He said [Person A] telephoned him and threatened him. He said he did not know how he got these details. I asked when [Person A] got his phone number. He said he did not know but [Person A] telephoned him once or twice in May or June 2009. I asked if that was the first time [Person A] had phoned him. He said he phoned him two or three times in May or June 2009. He said he had not phoned him before that time.
60. The applicant said that [Person A] telephoned him in January in [Town 3] and also went to the applicant's home in January 2009. He said he was not sure about the date. He said [Person A] spoke to his mother and asked about the applicant. The applicant's mother told him that she did not know where the applicant was.
61. I asked the applicant if he wished to add anything further. He said he did not. He then said [Person A] is now out of jail and he cannot return. The applicant agreed that [Person A] had not harmed any members of his family. He said he sometimes phones them.

FINDINGS AND REASONS

62. The Tribunal accepts that the applicant is a citizen of India.
63. In assessing the claims made by an applicant the Tribunal will need to make findings of fact in relation to those claims and this will more often than not involve an assessment of the credit of the applicant. When assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an Applicant has not been made out. See *Randhawa v MILGEA (1994) 52 FCR 437 at 451, per Beaumont J; Selvadurai v MIEA & Anor (1994) 34 ALD 347 at 348 per Heerey J and Kopalapillai v MIMA (1998) 86 FCR 547.*
64. In *Abebe v The Commonwealth of Australia (1999) 162 ALR 1 at 52 Gummow and Hayne JJ* observed:
- “..the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not for life.”*
65. The Tribunal must keep in mind that if the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (*See MIMA v Rajalingam (1999) 93 FCR 220*).
66. The applicant claims that he was a member of the BJP and that he gave legal advice in relation to matters concerning that Party. He claims that in 2006 he became aware that a well known criminal ([Person A]) in his town was involved in the purchase of properties. The applicant claims that the properties were tenanted by members of his community and he feared that the purchase by [Person A] would lead to the tenants being evicted. He decided to

lodge a complaint against the purchase and was successful. Because of this [Person A] became angry. There was some confusion as to when [Person A] assaulted the applicant at the marketplace. During his record of interview with the delegate he said it happened [in] December 2006 and before the Tribunal he stated that was incorrect and it happened [in] January 2007. The applicant claims that the police at the time investigated the matter by attending the scene of the incident, but did not take any further action. The applicant claims that after the Congress Party won the election in late 2008, [Person A] tried to find the applicant with the intention of killing him. The applicant claims that he moved to [Town 4] in January 2009 and remained there until he came to Australia in July 2009. The applicant claims that if he returns to India, [Person A] will continue to target him and will try to kill him. He claims that because the Congress Party is now in power the police will not offer him protection because he is associated with the BJP. The Tribunal is required to determine whether the applicant has a well founded fear and if so, whether what he fears amounts to persecution for a Convention related reason.

67. The Tribunal has taken into account the applicant's claims in his Protection visa application, his evidence during his Departmental interview and before the Tribunal in support of his claims. However, the Tribunal does not find the applicant to be credible on some key aspects of his claims as outlined below. The Tribunal is not satisfied that the applicant left India because of a fear of persecution, as described in his application and evidence before the Tribunal.
68. The Tribunal accepts that the applicant was involved with the BJP, as claimed. The Tribunal accepts that the applicant lodged a complaint, which was successful, in relation to the purchase of property by [Person A]. The Tribunal accepts that [Person A] became angry about the matter and that he assaulted the applicant on one occasion. The Tribunal is satisfied that the police investigated the matter.
69. The applicant claims that he was in fear of [Person A] until he left India in July 2009. The Tribunal notes that after the assault took place in December 2006 or January 2007, the applicant continued to live in the same place for a period of about two years. On the one hand the applicant claims that [Person A] intended to kill him and assaulted him on one occasion, but when asked by the Tribunal why he remained in the same place, he stated that [Person A] would not seek to harm him because the BJP was in power. He later told the Tribunal that [Person A] went to jail sometime in 2006 and had been released on parole when he attacked the applicant. The applicant could not tell the Tribunal when [Person A] had been imprisoned. He said he was in prison for three years and was released frequently. The applicant said that [Person A] finished three years in jail and was released in 2009. He then said that [Person A] was out of jail when the election took place in December 2008. The Tribunal is of the view that [Person A] assaulted the applicant in an angry moment on one occasion and did not seek to do so again. The Tribunal is of the view that the applicant was being untruthful when he told the Tribunal that [Person A] had been in prison for three years between 2006 and 2009. The Tribunal notes that the applicant provided a 2-page document containing 25 charges laid against [Person A] for the period [date deleted: s431(2)] August 1996 to [date deleted: s431(2)] May 2009, yet was unable to provide any details about any terms of imprisonment imposed upon him. The Tribunal does not accept that [Person A] was a threat to the applicant after the alleged assault took place or that he harassed the applicant, as claimed, after the BJP lost the election or that he intended to harm the applicant in any way. The Tribunal is supported in this finding by the applicant's delay in leaving India and is of the view that had he genuinely feared serious harm from [Person A] he would have

departed India much sooner than he did. The Tribunal is not satisfied that the applicant moved to [Town 4] because he feared [Person A]. It was the applicant's claim that [Person A] would not harm the applicant while the BJP was in power, yet he claimed that the assault at the market place occurred in January 2007 when the BJP was in power.

70. It is the applicant's claim that the police would not protect him once the BJP was no longer in power. The Tribunal does not find this evidence to be persuasive. The Tribunal is satisfied that the police have taken action against [Person A] on many occasions, as demonstrated by the document relied upon by the applicant. The Tribunal is satisfied that the police would offer protection to the applicant should he require it.
71. The Tribunal does not accept that the applicant is in fear of serious harm. The Tribunal is of the view that [Person A] assaulted the applicant on one occasion and had he wished to seriously harm the applicant, he had ample opportunity to do so in the two year period after the assault took place. The Tribunal is not satisfied that there is a real chance that [Person A] will seriously harm the applicant in the reasonably foreseeable future. The Tribunal is not satisfied that there is any credible evidence upon which it could find that the applicant stands at risk of suffering serious harm in the reasonably foreseeable future if he returns to India.
72. Accordingly, the Tribunal is not satisfied that the applicant has a well founded fear of persecution for a Convention reason.

CONCLUSIONS

73. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

74. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer's I.D. prrt44