

0909270 [2010] RRTA 112 (25 February 2010)

DECISION RECORD

RRT CASE NUMBER: 0909270

DIAC REFERENCE(S): CLF2009/102181

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Gabrielle Cullen

DATE: 25 February 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] June 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] August 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] November 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.

Information in the protection visa application

20. Information in the protection visa application indicates that the applicant is a [married man aged in his 40's] from Kochi, Kerala State, India. He claims his religion as Christian and occupation as "own business". He claims to have been educated for 12 years and attended College in Kochi from 1977 to 1979 studying Arts. He claims nil employment when asked to give details of his past employment. He claims to have lived in [location deleted: s.431(2)], Kochi, Kerala, India from September 2005.
21. He arrived in Australia [in] June 2009, travelling on an India passport issued legally [in] April 2005 and on a subclass 676 tourist visa issued [in] May 2009.
22. The applicant makes the following claims in answer to questions in his protection visa application.
23. In answer to question 41, why did you leave that country, the applicant makes the following claims:

Continuous threat from the ruling government lead by the Communist party of India Marxist CPI(M) and their local Gundas.

The police and the government authority are controlled by the CPI(M) government.

I think I will be killed by the CPI(M) Gundas because police have charged several cases in relation to me. The CPI(M) Gundas will come from another city to their directed place by the party and operated the orders

From 1988 I was against CPI(M) Gundas and [an officeholder, Mr A] and I have forced to stop the business. To survive now I am working as a cook at nearby resort.

Because of the fear to me and my family I left the country.

24. In answer to question 42, what do you fear may happen to you if you go back to that country, the applicant makes the following claims:

When I go back I will be killed by the CPI(M) Gundas because the ruling government is CPI(M) and the police and other government authorities are under control of CPI(M).

The police cases charged to CPI(M) Gundas and Gundas got imprisonment and punishment.

Now these Gundas came outside because the CPI(M) government withdrawn the criminal cases against them.

25. In answer to question 43, who do you think may harm/mistreat you if you go back, the applicant makes the following claims:

The government lead by CPI(M) had withdrawn the cases against the Gundas and the Gundas came from the jail.

So I am sure these Gundas will harm me.

26. In answer to question 44, why do you think this will happen to you if you go back, the applicant makes the following claims:

After my studies I have started a [business] in 1998 called [name and function deleted]. From my grandfather we belong to the Indian National Congress. [An officeholder, Mr A] was against my family and he filed a case in the lower court, [number] then the fight was started. He and his party announced that the [business] be stopped in future. Again [Mr A] has filed another case [number]and again failed.

When the Congress party will be in power [Mr A] and the Gundas will be underground in 1999. Again he filed a case as [number] and failed. In between he made some attack to me and I was in hospital for one month. Again he filed a case as [number] to the High Court and failed. From 2001 the Congress Government was in power till 2006 and in 2006 CPI(M) came into power.

Then [Mr A] and the Gundas making problem in 2008. I was forced to stop the [business] and due to the threat to my life I stayed in [location] and came here.

I am sure I will be killed by CPI(M) when I go back to India.

27. In answer to question 45, do you think the authorities of that country can and will protect you if you go back the applicant makes the following claims:

You can know from the media that in India most of the government people and police are unionised.

So if we belong to the ruling government we will get all the support. If not we will be tortured.

So I am sure that I and my family will be killed by the Gundas when I go back to India.

Documents submitted to the Tribunal

28. The applicant submitted the following court documents to the Tribunal:
- Front page of the judgment in the Court of the Additional Munsiff, [town and case number deleted]. Plaintiff is [Mrs A] and another party and the Defendant is the applicant. Also attached is the applicant's affidavit in the matter and relates to environmental pollution of his [business] and money owed by [name deleted: s.431(2)] to the applicant's brother, the applicant being [name deleted: s.431(2)]'s sister-in-law.
 - Judgment of the High Court of Kerala at Ernakulam between the above-named parties dated [in] April 1998, O.P. No.[number deleted: s.431(2)].

- Judgment of the High Court of Kerala between above-named parties and others, dated [in] July 1999, W.A. No.[number deleted: s.431(2)] regarding pollution and inspection of the applicant's [business].
- Cover page of judgment of the High Court of Kerala between above-named parties and others, dated[in] June of 2000, O.P. No.[number deleted: s.431(2)].
- Judgment of the High Court of Kerala between above-named parties and others, dated [in] October 2000, O.P. No. [number deleted: s.431(2)] regarding pollution and inspection of the applicant's [business].
- Judgment of the High Court of Kerala between above-named parties and others, dated [in] October 2003, O.P. No. [number deleted: s.431(2)] regarding pollution and inspection of the applicant's saw mill.

Tribunal hearing

29. The applicant appeared before the Tribunal [in] January 2010 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Malayalam and English languages.
30. The applicant indicated that his cousin's son helped him to prepare his protection visa application. He said his cousin's son read the questions and the applicant gave the answers, and his cousin's son then translated them into English. He confirmed that with regard to his claims he told his cousin's son what happened and he translated it into English and then read it back to him. The applicant said he also read a bit of English so read it himself. He confirmed the claims made in his protection visa application are true and correct.
31. He confirmed he had lived at [location deleted: s.431(2)], Kochi since his birth. He said it was his father's house, which he now owns and it includes some land He said he lived at that house until he left India.
32. He said his wife and 12 year old daughter live there and he is from the middle class. He said there is farming land attached to the house and his father also had some fields. He said these fields are owned together with his brothers and currently his brothers are working in the fields. He said when he was in India he also worked the fields and the income was generated by the rice produced.
33. He said his wife does not work but his daughter goes to a private school, called [name deleted: s.431(2)]. He said she speaks good English and his wife speaks better English than he does He said he is currently sending money to his wife for living expenses. He said he has no money but some loans because of his house renovations. He said the house renovations were started two years ago and finished one year ago. He said he is in contact with his wife and children often and that they are okay.
34. The Tribunal asked about his employment. He said after he attended college he worked for his father working in the fields. He said from 1988 he started a [business] by taking a loan from the bank and owned it until 2008. He said he could not remember the month he sold it but thought it was in the first half of 2008. He said when he meant he sold the [business], he meant he sold the machines as it was on his uncle's land. He said he employed seven people and it was near his house, about 50m away.

35. The Tribunal asked if there were any other [businesses of that type] in the area, and he said he lives on an island and there was one close by and about eight to ten [businesses] on the island of [name deleted: s.431(2)], where he lives.
36. He said neither his wife, nor his daughter nor himself have any medical issues.
37. He said after he sold the [business] he worked as a cook in a resort, called [name deleted: s.431(2)]. He said he worked there until he left India and that he had a catering business as well but that it also had difficulties.
38. He said he was involved in the Indian Congress Party. He said both his grandfather and father were in the Congress. When asked what was his involvement, he said usually all the meetings around election time were held in his house and that had happened from his grandfather's time. He said he was just a member of the Party.
39. The Tribunal asked him when the last meetings were held in his house and he said in the last election. The Tribunal asked him when the last election was and he said about three years ago, in about 2006.
40. The Tribunal asked him that when he talks about elections does he mean the Lok Sabha elections and he said yes.
41. He confirmed he was in the federal electoral district of Ernakulum. When asked who was his local district member, he said Pin Hero from Congress and that CPI(M) is in power. He said Purushothan was the CPI(M) candidate in the district.
42. He confirmed that he left India in June 2009 and went straight to Australia.
43. The Tribunal asked about his extended family in India. He said he has five sisters who live in different parts of his district. He said he has two brothers who live in Kochi, [details of their employment deleted: s.431(2)] He said his family was wealthy but he lost much money because of the court cases and the business.
44. The Tribunal asked why he fears return to India He said he had some problems with a CPI member, [Mr A] who made a case against him in his wife's name, [Mrs A].
45. The Tribunal asked him to outline in detail the specific difficulties he faced. He said from the beginning he had problems with people from the union loading and unloading the [goods]. He said it occurred when the CPI(M) was in power.
46. He said even before he started his [business] they wanted him to stop it so they made a case against him to stop it but it did not succeed. He said they then went to the next court. He said when Congress was in power he had no problems but when the CPI (M) was in power there were problems.
47. The Tribunal asked what problems and he said when they bring the loads they kept asking for more money to unload the [goods]. He said he could not continue the business because he could not bring the [goods] so they diverted it to other people's [businesses].
48. The Tribunal asked how he was then able to operate his business for 20 years from 1988 to 2008. He said in between when the Indian National Congress came to power there was no problem.

49. The Tribunal confirmed that he had a problem with unloading from 1988 until he sold his business and he said yes. He said they even continued to disturb him after he ran his catering business.
50. The Tribunal noted he had submitted document about court cases against him for pollution by [Mrs A] and others. The Tribunal noted that the documents he submitted included a final judgement made in his favour in 2003. He confirmed that was the last court case but that even though the court case had stopped they continue to threaten him.
51. He said in 2005 he was hit and hospitalised and there was a police case and hospital case but it is very hard to get the documents from the police. The Tribunal asked who hit him and he said he did not recognise the people because they came from different places and it occurred near the [business]. The Tribunal asked for details of what happened and he said he was riding his bike and they stopped his bike and hit him with an iron rod and hit his nose and head. He confirmed that he did not know who did it, but that he went to the police and hospital. He said the police had tried to investigate but the LDF – CPI(M) is ruling so there is no justice.
52. The Tribunal confirmed with him again that he did not know who it was and whether he was saying it was in 2005 and he said he could not remember. He said it was approximately 4 years ago and the Tribunal put to him that surely he would remember when he was hit and injured and he said there had been so many other complications and cases.
53. He confirmed that after the 2005 attack he was not hit again and only threatened. He confirmed that after 2003, when the final judgement of the Court occurred, there was no more court cases filed against him.
54. The applicant said that the harm he endured and described was at the hands of [Mr A] and his associates and included the following:
 - Continuous court cases until finalised in 2003 and union threats.
 - Being hit on the head by a group who he could not identify in possibly 2005.
 - Threats made against him on the phone. He said they started in 1988 until he closed the [business] and the catering business. He said they threatened they would kill him. He said he believed it was delivered by [Mr A] and his people.
 - Difficulties with running his catering business. He said they complained about the base water going through the drainage and complained to the Health Department. He said he was allowed to continue but he had to complete all the paperwork and submit modifications. He said they continuously complained and inspectors kept coming and he had to give bribes.
55. He confirmed he was able to work as a cook at the resort with no problems.
56. The Tribunal asked him who he is claiming was causing these difficulties and he said the people from CPI(M) and [Mr A]. The Tribunal asked why he is and was targeted and he said that because he and [Mr A] are neighbours and in opposing parties.

57. The Tribunal asked whether he was saying that the problems arose because he was actively involved with the Indian National Congress and [Mr A] and his associates were actively involved with the CPI(M) the problems started, he said yes.
58. The Tribunal asked whether he is claiming that the reason the harm he suffered and will suffer is because of his political belief as he is actively evolved in electioneering for the Indian National Congress and he said yes.
59. The Tribunal asked him what made him leave India and he said because they were threatening him and he wanted to live somewhere peacefully. The Tribunal asked him why he left India at that time when the claimed threats had been going on for 20 years and he said because his daughter was getting older and there was no use staying.
60. The Tribunal asked whether [Mr A] was only a member of CPI(M) or whether he had another role and he said he was [an officeholder] in the [area deleted: s.431(2)].
61. The Tribunal asked the applicant why he had not moved elsewhere in Kerala to escape the local problems with [Mr A]. The applicant said if he returns to India and goes somewhere else they will come and attack him. The Tribunal asked why he had not moved elsewhere in India and he said because the language is a problem as well as his daughter's education. The Tribunal suggested to him that independent country information indicates that there are 33 million Malayalam speakers in India, approximately 30.8 million in Kerala but significant numbers elsewhere, including approximately 700,000 in neighbouring Karnataka, 550, 000 in Tamil Nadu and 400,000 in Maharashtra and 92,000 in Delhi. The Tribunal suggested that there did not appear to be a language problem. The applicant said that they are spread everywhere. He said if he changed the place he lives his daughter's education would go.
62. The Tribunal noted that he indicated that he was paying private school fees and that he could do this elsewhere. The applicant said in no other places is there the Malayalam language.
63. The Tribunal suggested to him that independent country information indicated that there was no restriction on freedom of movement in India or moving and selling houses or schools and he agreed with this. The Tribunal suggested to him that internal relocation in India may be a viable and reasonable option as the difficulties he had described may appear to be a local problem. He said if he goes elsewhere he would have to have another house. The Tribunal indicated that this was no different than if he came to Australia. The applicant said he can earn money here and it is better than India. The Tribunal indicated to them that he had given evidence that he had been employed in India as a cook and faced no problems. He said he can live in India but he can only get money for expenses and not for his daughter's higher studies and there would be no money for her marriage.
64. The Tribunal noted that he had indicated there were eight to ten other [business] owners in the area and asked why they did not face any difficulties, and he said the nearest [business] was CPI(M). He said there were not many problems for the others and when the Tribunal asked why, he said because he and [Mr A] were in different parties.
65. The Tribunal asked him to confirm that he is claiming that problems only occurred to him when CPI(M) is in power because of his political involvement and he said yes.
66. The Tribunal noted that his evidence indicates that he is claiming that his difficulties encountered in India arose because of the political differences between him and [Mr A] and

his followers. It noted that he was claiming that he was actively involved in the Indian National Congress around the Lok Sabha elections and this involvement included having meetings at his house. He said he also did election work and he did this every election. He noted that [Mr A] did the opposite and he confirmed that he was a keen follower of the Indian National Congress and this involved promoting the local candidate for his district.

67. The Tribunal suggested to him that his claims are contrary to independent country information. It noted that he had said earlier in the hearing that the last time he was involved in electioneering was in 2006 and that the name of the local Indian National Congress candidate was Pin Hero and he won. The Tribunal noted that independent country indicates that the last Lok Sabha elections were held in 2009, and began in Kerala in April 2009 before he left India. The Tribunal noted that his local candidate was not the man he named but Professor Thomas who was also the candidate for elections held in 2006 for his district of Ernakulum, and he won over the CPI(M) candidate Sindhi Joy in the 2009 election. The Tribunal noted that Sindhu Joy was not the man he had named as the CPI(M) candidate, and the person he had named was not the 2006 CPI(M) candidate either.
68. The Tribunal noted that this information is relevant as it may lead it to find that he is not actively involved in the Indian National Congress in the manner he claims as it may find that if he did work with, was a member or had family involvement in the Indian National Congress in the manner he claims, it may expect his knowledge to be consistent with independent country information. The Tribunal noted it may lead it to find that the vendetta or difficulties, if any, faced with [Mr A] were not as a result of their political differences. It noted that it may lead the Tribunal to find that the difficulties he faced were not for a Convention reason.
69. The applicant said that the 2009 elections were for the central government not for the State government. The Tribunal noted that he had indicated that he was involved in electioneering for the Lok Sabha elections which were the ones held in April 2009, which was before he left India.
70. The Tribunal also noted it may find that he has been able to obtain effective protection in India because the final ruling from the court in 2003 was in his favour.
71. The Tribunal also noted it questioned whether the death threats were made against him as he claimed, because despite the threats continuing for 20 years he continued to live at the same house and did not try to move elsewhere. The Tribunal suggested that the reason he left India was not for the reasons he claimed. He confirmed that it was because of financial debt difficulties and he wants to provide a future for his daughter but said it was also because he feared persecution.
72. The applicant confirmed that when he was attacked the police did as much as they could but that the police gave the report to the others, meaning [Mr A] and his associates. The Tribunal noted however that he did not know who hurt him and he confirmed this, so there was little the police could do.
73. The Tribunal noted that the applicant obtained a visa to travel to Australia [in] May 2009 but did not leave India until [a date in] June 2009. It said it makes the Tribunal question whether his fear was genuine as it may expect that if he was in fear of persecution that he would leave as soon as possible when he had a passport and visa and not wait for over a month. He said it was because he had financial problems.

74. The Tribunal questioned whether a person who was renovating his house had financial problems and he said he stopped doing the work because of these problems.
75. The Tribunal asked whether he had anything more to say and he said no.

S424A letter sent to the applicant

76. [In] February 2010 the Tribunal sent the following section 424A letter to the applicant
- The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa as you are unable to show you have a well founded fear of protection for a Convention reason.

- Independent country information indicates the following

2009 Lok Sabha Elections

The city of Kochi is in the federal electoral district of Ernakulam, which in the 2009 Lok Sabha elections, held in April, was won by Prof. K.V. Thomas of the Indian National Congress by a narrow margin over Sindhu Joy of the Communist Party of India (Marxist) (<http://www.indian-elections.com/kerala/ernakulam.html> and <http://news.oneindia/feature/2009/general-election-2009-kerala-html>)

2006 State Elections

In the district of Ernakulum, in Kerala State, Professor K.V Thomas was the Indian national congress candidate and M M Lowranace was the CPI(M) candidate. ("State Election 2006 candidates for 72- Ernakulum constituency of Kerala"
<http://eci.nic.in/archive/May2006/pollupd/ac/states/s11/acnstcand72.htm> - Accessed 12 January 2010)

At the hearing held on [date] January 2010 you claimed that the difficulties you faced from CPI(M) and [Mr A] is because of your involvement in the Indian National Congress. You claimed you are a member of this party, that your father and grandfather were involved in this party, and that your house has traditionally and currently been used at election time. You claim it was last used in the 2006 elections and that you were actively involved doing election work and promoting the local candidate in the district, being Ernakulam. You indicated at hearing that this involvement included being involved in the Lok Sabha elections.

However at the hearing you indicated that in 2006 in the Ernakulum district elections Pin Hero was the Indian National Congress candidate and Purushothaman was the CPI(M) candidate. However independent country information above indicates that these were not the two names of the candidates in this election.

Further you indicated at hearing that you were involved in electioneering work for the Lok Sabha elections and the last elections occurred in 2006. However independent country information indicated above shows that the last Lok Sabha elections held in your district were in April 2009, which was before he left India in June 2009.

Relevance

These inconsistencies cast doubt on the claim that your fear is well founded and that you will be persecuted for one of the Convention reasons if you return to India and may lead to a finding that you do not meet the relevant criteria for the grant of a protection visa.

It may lead the Tribunal to find that that you were not involved in the Indian National Congress in the manner you claim, and that your dispute with [Mr A] and CPI(M) was not because of your involvement with the Indian National Congress or for any political reason.

It also indicates that you may not be credible and that evidence has been created and provided to the Department and Tribunal to obtain a protection visa. This may lead the Tribunal to find that you will not be persecuted for one of the Convention reasons if you return to India, and that you do not meet the relevant criteria for the grant of a protection visa.

S.424A reply from the applicant

77. [In] February 2010 the Tribunal received the following reply from the applicant.

I have received your letter for the invitation to comment on or respond to information. From your letter the information given by me in the hearing was wrong and ask me to give the detail. I have gone through the case and it was happened years ago, I cannot remember some of the details. Also there was stress when I was attending the Tribunal hearing.

So I humbly request the Tribunal to consider this case favourably and allow me to stay in Australia under the protection visa.

BACKGROUND INFORMATION

2009 Indian Lok Sabha Elections

78. The city of Kochi is in the federal electoral district of Ernakulam, which in the 2009 Lok Sabha elections, held in April, was won by Prof. K.V. Thomas of the Indian National Congress by a narrow margin over Sindhu Joy of the Communist Party of India (Marxist) (<http://www.indian-elections.com/kerala/ernakulam.html> and <http://news.oneindia/feature/2009/general-election-2009-kerala-html>)
79. The Indian National Congress won 13 of the 20 Lok Sabha seats in Kerala at the 2009 elections, with its electoral allies the Muslim League and Kerala Congress (Mani) winning two and one seat(s) respectively. The Communist Party of India (Marxist) won four seats.

2006 State Elections

80. In the district of Ernakulum, in Kerala State, Professor K.V Thomas was the Indian national congress candidate and M M Lowranace was the CPI(M) candidate. (“State Election 2006 candidates for 72- Ernakulum constituency of Kerala” <http://eci.nic.in/archive/May2006/pollupd/ac/states/s11/acnstcand72.htm> - Accessed 12 January 2010)

FINDINGS AND REASONS

81. On the basis of the applicant's Republic of India passport, a copy which is on file and on the applicant's evidence at hearing the Tribunal finds that the applicant is a citizen of the Republic of India and assesses his claims against that country.
82. The applicant claims he fears persecution in India because he is a member and actively involved in the Indian National Congress. He claims he is actively involved at election time, with his home currently and traditionally being the meeting place for the Indian National Congress at election time. He claims as a result of this political involvement and opinion he has suffered serious harm at the hands of [Mr A] and his family and [Mr A]'s associates. He claims [Mr A] is [an officeholder] of the CPI(M), the main party in opposition to the Indian national Congress in Kerala state. He claims he also fears persecution from the CPI(M) and the local gundas because of his political dispute with [Mr A], and that this arises when the CPI(M) is in power. He claims he is unable to obtain effective protection from the authorities as the CPI(M) are currently the ruling party in Kerala and as a result he is not protected from the CPI(M) gundas, or the police as they are under the control of the CPI(M).
83. He claims the serious harm he has suffered at the hands of [Mr A], his family and associates and CPI(M) party and gundas is long running legal action against him from 1988 until 2003 regarding the operation of his [business], action by those loading and unloading [the goods] – diverting the [goods] elsewhere leading to him closing the [business], loss of money and wealth because of the court cases and trouble from the unions, death threats from 1988 until he left India, an attack in 2005/2006 where he sustained injury to his head, and complaints regarding the operation of his catering business. He claims he fears return to India as he is not free, and will be killed. He claims the CPI(M) gundas, with the involvement of [Mr A] will kill him if he returns to India.
84. The Tribunal accepts on the basis of the court documentation submitted by the applicant, that he has been involved in a long running court action by [Mrs A] and her associates until the final court judgment in 2003. It notes that the 2003 judgment as confirmed by the applicant was in his favour and in his evidence he said that this is over.
85. It notes the applicant was unable to name who attacked him in 2005 or 2006.
86. The Tribunal has concerns whether it is true the applicant was threatened with his life for twenty years as he never moved from his home in that period or made attempts to relocate.
87. It notes the serious harm he claims regarding the catering business involved continued complaints about the drainage system, leading to its closure. It notes he was however able to find employment as a cook and encountered no problems in this employment.
88. Nevertheless, even if the Tribunal accepts the applicant's evidence of the difficulties he faced in India or will face on his return, which it doubts, the Tribunal finds for the following reasons that there is no Convention reason for the harm he fears, and that he therefore does not have a well founded fear of Convention related persecution. The Tribunal notes that in the above and below references to it doubting the difficulties he faced in India, it does not doubt and has accepted that the applicant was involved in court cases with [Mrs A] and her associates, which he finally won.

89. The applicant claims that the difficulties he has and will encounter if he returns to India arise as a result of a political dispute with his neighbour, [Mr A], who he claims is [an officeholder] of the CPI(M) who has involved CPI(M) and their gundas. As a result he claims fear from the CPI(M) as they are in government. He claims this is because he is actively involved in the Indian National Congress. He claims he is a member of the party, that his father and grandfather were involved, and that his house has traditionally and currently been used at election time. He claims it was last used in the 2006 elections and that he was actively involved doing election work and promoting the local candidate in the district, being Ernakulam. He indicated at hearing that this involvement included being involved in the Lok Sabha elections.
90. The Tribunal disputes his evidence that he is a member and actively involved in the Indian National Congress, with a family tradition of being involved in the manner he claims due to his inconsistent evidence with independent country information. While he claims he was involved in promoting the local candidate for the 2006 elections, he incorrectly named the 2006 Indian National Congress candidate for his district, Ernakulam at the 2006 elections and the CPI(M) candidate for this district at these elections. This is despite claiming his election work involves promoting the local candidate for the district at election time. The Tribunal expects that if he was a member of the Indian National Congress and involved in the manner he claims he would be able to accurately name the candidates for both the Indian National Congress and CPI(M) at the 2006 elections, in which he claims he was actively involved, when asked.
91. Independent country information indicates that in the district of Ernakulam, in Kerala State, in the 2006 State Elections Professor K.V Thomas was the Indian National Congress candidate and he defeated M M Lowranace who was the CPI(M) candidate. (“State Election 2006 candidates for 72- Ernakulam constituency of Kerala” <http://eci.nic.in/archive/May2006/pollup/ac/states/s11/acnstcand72.htm> - Accessed 12 January 2010)
92. The applicant stated in his evidence that in 2006 in the Ernakulam district elections Pin Hero was the Indian National Congress candidate and Purushothaman was the CPI(M) candidate. When the independent country information above was suggested to the applicant he claimed he was talking of the state elections not the central elections. However the Tribunal does not accept this information as the independent country information clearly indicates that Professor Thomas from the Congress party and MM Lowranace were the 2006 candidates in the state elections for the district of Ernakulam.
93. Further he indicated that he was involved in electioneering work for the Lok Sabha elections and the last elections occurred in 2006. However independent country information indicates that the last Lok Sabha elections held in his district were in April 2009, which was before he left India in June 2009. The Tribunal expects that if he was actively involved in the party as he claims he would have been aware of these elections, which were held before he left India.
94. Independent country information indicates that the city of Kochi is in the federal electoral district of Ernakulam, which in the 2009 Lok Sabha elections, held in April, was won by Prof. K.V. Thomas of the Indian National Congress by a narrow margin over Sindhu Joy of the Communist Party of India (Marxist) (<http://www.indian-elections.com/kerala/ernakulam.html>).

95. When this information together with the information above was suggested to the applicant he indicated, as noted above, that these were the central elections not the state elections. The Tribunal does not accept this explanation as he had indicated earlier in the hearing that he was involved in electioneering for the Lok Sabha elections, as part of his election involvement with the Congress Party and the country information indicates that the 2009 elections were Lok Sabha elections.
96. Further when this information together with the information above was suggested to him by a s.424A letter he replied that he did not remember as it happened years ago and he was stressed when attending the Tribunal hearing. While the Tribunal accepts that the hearing process can be stressful, as his claim is that he was actively involved in politics and campaigning for the local Congress Party candidate, the Tribunal does not accept this as a reason for his lack of knowledge. Due to his claim of actively campaigning for the Congress Party in his district, he Tribunal would expect him to remember the name of the 2006 Congress Party candidate and opposition candidate and that there was a local Lok Sabha election in 2009 in his district before he departed India.
97. As a result the Tribunal does not accept that the applicant was or is a member of the Indian National Congress, was involved with the Indian National Congress in the manner he claims, that his home was used at election time or will be if he returns to India in the reasonable foreseeable future. Therefore it does not accept he fears harm from the CPI(M) or [Mr A] because of his involvement with the Indian National Congress as he claims.
98. The applicant claims the difficulties he has encountered at the hands of CPI(M) and [Mr A] is as a result of his being involved in the Indian National Congress and his neighbour being involved in the CPI(M). As the Tribunal does not accept that the applicant was involved in the Indian National Congress in the manner he claims or will be on his return, it follows that the reason for the harm feared, or the harm he claims occurred in India is not for political reasons or belief or opinion, due to his past or future involvement with the Indian National Congress.
99. While the applicant claims [Mr A] is involved in CPI(M) and noting the Tribunal has rejected the applicant is or was involved in the Indian National Congress, the Tribunal finds that any difficulties that the applicant has faced are due to personal reasons as opposed to political reasons. Therefore even if [Mr A] is or was using his political position to effect personal harm, if any, the harm is not for reasons of [Mr A]'s political position but for personal reasons.
100. Having rejected the applicant's claim that the harm he fears, if any, is for reason of political opinion, the Tribunal has considered whether it is for reason of any of the other Convention reasons. It was the applicant's evidence that the harm he fears is as a result of his political opinion and no other evidence has been submitted by the applicant that it is for the reasons of race, religion, nationality and particular social group. The Tribunal's own consideration is that it can find no evidence that the harm feared, if any, is for the reason of race, religion and nationality.
101. With regard to particular social group, while the applicant indicated other motives for leaving India, such as financial difficulties and to provide a future for his daughter, the Tribunal does not consider these constitute a particular social group. Further it finds that none of the other motives for the dispute the applicant claims occurred, such as pollution from the [business] and drainage problems, constitute a particular social group. This is because there is no

common characteristic and they do not set the applicant apart from society. Therefore the Tribunal finds that the harm feared is for the reason of particular social group.

102. The Tribunal therefore finds that it can find no Convention reason for the harm feared, if any, including for the reason of race, religion, nationality, membership of a particular social group or political opinion.
103. The Tribunal notes that the applicant claims that the police were and are withholding protection for reasons of political opinion. However the applicant indicated at hearing that when he was attacked the police did as much as they could. Although he indicated they gave the report to [Mr A] and his associates he confirmed that as he did not know who hurt him, there was little the police could do. The Tribunal therefore finds that the police are not withholding protection and there is no harm in this regard. Further the Tribunal notes that it is the applicant's evidence that he won his court case with [Mr A]'s associates.
104. Further the Tribunal notes the applicant made vague claims in his statement that he will be killed by the CPI(M) gundas because police have charged several cases in relation to him, and they will come from another city to their directed place by the party and operate the orders. The Tribunal notes that although asked at hearing as to the difficulties he faced in India and when the difficulties he faced were confirmed with him, he did not detail these claims. Therefore the Tribunal prefers the evidence as tested at hearing, that all he fears is what he claimed at hearing, rather than the vague and confused evidence in his statement. Further the Tribunal notes that the applicant claimed at hearing that the police are against him, and gave the reports to [Mr A] and his associates whereas it appears in his statement, although vague, they were working with him by charging them on several cases.
105. The Tribunal therefore does not accept that there is a real chance of the applicant being persecuted if he returns to India on the basis of his claims considered individually and cumulatively for a Convention reason. The Tribunal is not satisfied on the evidence before it that the applicant has a well-founded fear of persecution within the meaning of the Convention as qualified by the Act.

CONCLUSIONS

106. 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

107. 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: PRMHSE