

**060926579 [2007] RRTA 36 (28 February 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060926579  
**DIMA REFERENCE(S):** CLF2006/95405  
**COUNTRY OF REFERENCE:** India  
**TRIBUNAL MEMBER:** Samuel Blay  
**DATE DECISION SIGNED:** 28 February 2007  
**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**

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of India, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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**

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.

Section 36(2)(a) of the Act provides that a criterion for a Protection (Class XA) 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 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Convention). Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

## Definition of ‘refugee’

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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**

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.

## **DIMIA File**

In a written statement that accompanied his primary application, the applicant claimed that he is an Indian Muslim. He also claimed that most Indian states are ruled by Hindu dominated parties and that Muslims' 'rights are refused and unjustified'. Given these circumstances, he joined a committee when he was young. He participated in the operations of the committee 'against Anti-Muslim activities'. The committee's influence spread throughout Tami Nadu. There were several clashes between the committee and its opponents leading to the death of several of its members. The leader of the committee was assassinated. Fearing for his safety, he left India for Country A where he found a job in City B. He claimed that he joined a Tamil organization (Organisation X), and eventually become one of the leaders of the City B branch. He also claimed that the main objective of Organisation X was to raise money to assist Muslims in India and that the social work performed by Organisation X, attracted scheduled castes groups that began to convert to Islam. This provoked radical Hinds that targeted Organisation X.

The applicant also claimed that Organisation X decided to form an alliance with a political party. This upset many members who left and formed a splinter organization called Organisation Y. The applicant left Organisation X and joined Organisation Y.

The applicant further claimed that when the Tsunami struck he 'went home to India for holiday... from City B'. He claims as a representative of the City B branch of Organisation Y, he visited some of the affected areas and assisted with the recovery effort. The assistance provoked the Hindu opponents of Organisation Y who then started to attack the members of the organization. The applicant also claimed that in appreciation of his efforts in the organization, it was organized for him to travel to two other countries to encourage Tamil Muslims to donate money to Organisation Y.

He claimed he did not see his wife and family for a number of years because he was afraid of returning to India; and even when he was eventually able to visit his family in India, he was forced to arrange for them to see him in 'some hiding places and to stay with them without happiness'.

While in City B, he was hated by members of Organisation X because he resigned from the organisation and joined Organisation Y splinter group. Organisation X 'tried to assassinate' him by trying to ran him down with a car in the streets of City B and also searched his rooms when he was staying in City B. He could not complain to the police for fear of being deported. After this

incident, he was very upset. He travelled to India for a short period to visit his family and told them about his situation, and subsequently obtained a visa to travel to Australia.

*The decision of the delegate*

After a consideration of the applicant's claims, the delegate rejected the application noting as follows:

*Although the applicant claims to have been a member and leader of various Muslim organizations, including the [committee], [Organisation X and Organisation Y], he has provided no evidence to support this claim. Similarly he has provided no evidence to support his claim of membership of any political party. Given that he has completed 12 years of schooling, has had a stable employment background and has lived abroad and traveled relatively extensively, it would be reasonable to expect someone in the applicant's situation to provide documentary evidence to support his claims. The applicant left India in an orderly fashion [weeks] after being issued his visa to Australia. In his statement, he makes clear that he traveled to Australia for the purpose of seeking protection. Notwithstanding, he has supplied no evidence in support of his claims and given no indication that he intends to lodge any supporting documentation in the future. I therefore reject that the applicant was a prominent member of any political or social organization as claimed.*

*Even if I were to accept that the applicant was involved in politics in Tamil Nadu and in [City B], I do not accept that his fears are well founded in this regard. The available information indicates that the political climate in Tamil Nadu is complex, prone to changing allegiances, and characterized by violence from all sides. There is no clear evidence to conclude that any party in particular is subject to systematic State sponsored persecution, although the information suggests that minority communities perceive that their members have often been unfairly targeted under the Terrorists and Disruptive Activities (Prevention) Act (TADA) and its successor POTA Act, and that Hindu politicians are seldom punished if they incite sectarian violence. Notwithstanding this information, there is no evidence to indicate that the applicant has ever been the subject of, or threatened with harassment of this nature, at the instigation of the State.*

*Although he claims to have been the target of attempted attacks by his political opponents in [City B], he has provided no details like dates, places, times or circumstances to lend verisimilitude to this claim. The fact that he left his wife behind in India after fleeing to [City B] suggests that his claimed political profile and consequent fear of subjective persecution may be exaggerated. The fact that his [child] was born in [year] belies his claim to have not returned to India for [a number of] years until after the tsunami.*

*Regardless of the veracity of these claims, I am not satisfied that in the applicant's particular circumstance it would be unreasonable for him to relocate within India to find meaningful protection from any perceived threat by political opponents. The applicant is reasonably well educated with a stable and continuous employment history. The Australian Department of Foreign Affairs and Trade have advised that Moslem communities are found throughout India, and that well educated, employable persons can relocate within India. I am unable to identify any information within the applicant's submissions to support a conclusion that relocation would be unreasonable in the applicant's case*

The delegate finally noted that ‘based on available country information and the lack of credible information supplied by the applicant in support of his application, there is no evidence that the applicant faces a real chance of Convention based persecution should he now return to India’.

### **Oral testimony at hearing**

The applicant appeared before the Tribunal to give evidence and present arguments.

In his oral testimony, the applicant spoke to his written statement. He claimed he would be murdered if he returned to India. He said during the Tsunami in India, his organisation rendered a lot of help to people, but at present, the government in India is against members of Organisation Y of which he is a member. He repeated claims in his written statement that opponents of Organisation Y targeted him when he was in City B. He was therefore compelled to leave City B to come to Australia. He also claimed that even though he was almost ran over with a vehicle by opponents of his organisation in City B, he was unable to report the incident to the local police because of fears that he might be deported.

The Tribunal asked him to explain why he thought he might be deported if he told the authorities about the attacks on him in City B. He claimed that if the City B authorities found out that different Indian factions were fighting, they would be deported. He also claimed that on the other hand, if he returned to India he will be murdered. In the circumstances, he sent his wife back to India and made arrangements for his travel to Australia.

The applicant claimed he is ‘affected by fear’ that is why he sent his family in India and came to Australia by himself.

That applicant told the Tribunal that he attended school up to year 12. After he left school, he became involved in a ‘social service’ organisation helping the poor. He worked with the organisation for a number of years. He stopped working for the organisation in the early 1990s. After that, he went to Country M where he was employed in a shop in a particular city. He worked there for several years and then left and went back to India and lived in Madras.

The applicant told the Tribunal that when he returned to India, he did not work. He had some money from Country M. His late father also left him some assets. So he was able survive without working.

The applicant claimed that he left India and went to City B in a particular year. The Tribunal asked him why he decided to go to City B. He said he had exhausted all his resources; he needed an income and so he went to City B. In City B, he got a job in a company. He said he left City B on a specific date.

He claimed that his wife is in India in a particular city. He claimed in India, he lived for most of his life in Tamil Nadu.

The Tribunal noted to the applicant that what he has said is not consistent with his written statement. The Tribunal noted to him that according to the information in his protection visa application form, he worked from the late 1980s until the mid 1990s for a company in Madras, and that his salary was 500ruppes.

He responded by saying that a translator had completed the protection visa application form for him and that the translator must have made a mistake. The Tribunal noted to him that that is not plausible since the information even included details of his salary. He said the translator at the time was helping another applicant, and so he must have included details concerning the other applicant in his form. The applicant insisted that what he is telling the Tribunal is the truth. The Tribunal noted to him that the details included in the form are quite specific and even included the address of the company in Madras. It is therefore implausible that the translator could have included them in error.

The Tribunal asked the applicant if he had worked for a particular company in City B. He said he had and that he stated his salary. The Tribunal noted to him that this information is consistent with the information in the application form. It is therefore unlikely that the translator could have made an error with respect to the other details in the form.

The Tribunal also noted to him that the reason he gave for leaving India to travel to City B is not consistent with the stated reason in his written statement. The Tribunal noted that he claims he left for City B because his resources were exhausted and he needed an income. This is not consistent with the claim in his written statement that he left India because he feared for his life.

The Tribunal asked the applicant if his wife had visited or stayed with him in City B. He said that the wife visited him under visitor's visa restrictions in City B and that when she became pregnant, she had to return to India as she was only entitled to stay for a short period. She had stayed for only for that specific period.



The Tribunal then asked the applicant how often he had visited India while in City B. He said he had visited India about three or four times. The Tribunal asked him if he was sure. He said he was. The Tribunal then asked him if he stayed with his wife on those visits to India. He said he did not. The Tribunal put it to him that it did not seem credible that on his return to India he did not stay with his wife and children. He said sometimes he went to Country V and asked his wife to meet with him there. He also said that he went to his village in Madras on two occasions. The Tribunal put it to him that his ability to visit his village on two occasions undermines his claim that he fears for his life if he returns to India.

The Tribunal asked the applicant if he is a practicing Muslim. He said he is. The Tribunal then asked him why he had not sworn on the Koran at the start of the proceedings. He said for him to swear on the Koran he needs to have a religious leader in the room.

The Tribunal asked him if he knew of sections of India where there are Muslim majorities. He said there are states in India where there are large concentrations of Muslims, but the Muslims there are generally scattered. The Tribunal also noted that there are large Muslim populations found in several states in India, and that Muslims are a majority in Jammu and Kashmir.

The Tribunal asked him why he did not or could not relocate to regions of India where Muslims are in the majority. He claimed could not relocate as there is discrimination against Muslims everywhere in India. He also claimed that the 'RSS' is a very influential organisation that dominates most activities and it is against Muslims. The Tribunal asked what 'RSS' stands for. He said he did not know what it stands for, but he knows that it is against Muslims.

The Tribunal then asked him if it had been his intention to seek protection in Australia when he was leaving India or City B to come to Australia. He said it was.

The Tribunal noted to him that in his written statement he had mentioned the committee and said he was a member. The Tribunal then noted that he had not mentioned the organisation in his oral testimony. He said he was worried that it might be construed as a terrorist organisation. The Tribunal then told him that this worry had not stopped him from including his membership in the organisation in his written statement.

The applicant told the Tribunal that he was a member of the Organisation X and Organisation Y. He said he raised funds for the organisations. The Tribunal put it to him that in spite of his claims that he was associated with these organisations and even raised funds for them, there is no

corroborative evidence or information that he was in fact associated with these organisations. He said he left all his membership cards in City B. He said he could bring them from City B.

The Tribunal noted to the applicant that since it had been his intention to apply for a protection visa in Australia, he could have brought the information if indeed such information exists. The Tribunal drew the applicant's attention to the queries raised in the delegate's decision record regarding his failure to provide any credible corroborative evidence. The Tribunal noted to him that he had ample opportunity to bring the information. The Tribunal also told the applicant that he is entitled to forward any additional information he may have to assist his claims to the Tribunal before the case is handed down. The Tribunal asked him if he understood that. He said he did.

### **Post Hearing Communications**

#### *Section 424A letter to the applicant*

The Tribunal wrote to the applicant inviting him to comment a number of inconsistencies his testimony to the Tribunal. The letter *inter alia* noted as follows:

(1) According to your written statement, you worked from [date] until [date] for a company called [name and address] in Madras. You also claimed that your salary was 500ruppes. This is not consistent with the statement in your oral testimony in which you claimed that after you left school in [year]:

- you got involved in social service helping with [role] and generally helping the poor.
- you worked with the organisation for about [number] years.
- you stopped working for them in [year].
- after that you went to [Country M] where you were employed in a shop called [name] in the city of [name] selling [goods] and where you worked for about [number] years.

(2) In your written statement you claimed that after the assassination of the leader of the [committee] you panicked and decided to escape to City B. This claim is inconsistent with the claim in your oral testimony in which you said in [year], you went to City B because you exhausted all your recourses from your trip to [Country M] and needed an income.

(3) In your written testimony you claimed that you did not see your wife and family for [number] years from [year]. This statement is not consistent with the claim in your oral testimony that you were able to visit India about four times

while you were in City B. It is also not consistent with your oral testimony that your wife came to visit you in City B

(4) In your oral and written statement you also claimed that you left India and you do not wish to return to the country because of your fear of persecution by Hindu extremists. These claims are not consistent with the claim in your written testimony that you returned to India in [year] for a 'holiday'. Your visit to India for a 'holiday' leads the Tribunal to conclude that you did not fear persecution in that country.

The inconsistencies undermine the veracity of your claims and the genuineness of your fear of persecution in India.

The applicant was invited to comment and explain the inconsistencies. He was also advised that 'subject to [his] comments', the inconsistencies could 'be the reason or part of the reason' for deciding that he is not entitled to a protection visa.

#### *The applicant's responses to the letter*

The applicant responded to the letter. In his response he said that he worked in the stores located in India from the late 1980s until the mid 1990s and that he was involved in social activities helping the poor. He said he was not able to answer questions posed to him properly at the hearing because he was nervous and so he could not remember the exact dates involved.

He also claimed that after the assassination of his committee leader he 'really panicked and decided to escape' from India to get away from the Hindu extremists. He said that someone arranged for him to get a visa to go to City B. He 'also had financial hardship' but the hardship did not matter to him. He said his real reason was to protect himself by escaping from the country.

The applicant further claimed that he could not visit his family for a number of years and that after a specific year he visited his family twice, not four times. On the occasions when he visited his family, he met his wife and children in a hiding place. He claimed that due to his fear he only stayed for several weeks.

#### **FINDINGS AND REASONS**

The applicant's principal claims are that he was an active member of certain Muslim political and social organisations in India and that he faces persecution from opponents of the organisations. In essence, the applicant claims to fear persecution on the grounds of his religion and his imputed

political beliefs. In support of his claims, he says that he was he was compelled to flee to Country A, he was not able to visit his family in India and he is unable to relocate to other parts of India.

#### *Membership in Muslim social and political organisations*

A central element in the applicant's claim is that he was a member of the committee and that he played a central role in the committee both in India and in City B in Country A. In spite of these claims the applicant was not able to provide the Tribunal with any corroborative evidence to support his membership in any of the organisations he claimed to belong to. The Tribunal notes that during the hearing the applicant's attention was drawn to concerns raised by the delegate that the applicant had not provided sufficient evidence to support his claims of membership in such organisations. The Tribunal further notes that even though the applicant had said that he was willing to provide such information if it was needed, and in spite of the Tribunal's point to him that he was entitled to provide any further information if he so wished up to the day of handing down of this decision, the applicant was not able to provide such corroborative information. In the absence of such information, the Tribunal is not satisfied that the applicant belonged to any such organisation as he claims. The Tribunal accordingly rejects his claims.

#### *The travel to City B*

The applicant claims that he was compelled to travel to City B following the assassination of the committee leader in his organisation. Having determined that the Tribunal is not satisfied that the applicant belonged to political and social organisations in India that were targeted by Hindu extremists, the Tribunal does not accept his claims that he fled India to City B because he was of adverse interest to such extremists groups in India.

The Tribunal's rejection of the applicant's claims is strengthened by the inconsistencies in the applicant's testimony. In his written statement, the applicant claimed that he had to leave India to City B because he feared for his life. However, in his oral testimony he said that he had travelled to City B because he needed money after he had exhausted his resources in India. When the Tribunal noted the inconsistencies in his statements to him, both in the hearing and in s.424A letter to him, the applicant was not able to offer any rational reason for the inconsistencies. All that the applicant was able to say was that he had financial hardship at the time but that was not the reason why he left to go to City B. The Tribunal is not persuaded by this explanation. The Tribunal finds it implausible that the applicant would have said that he left India to go to City B for financial reasons if indeed his real reason for leaving was that he needed to escape the

country to avoid being targeted by Hindu fundamentalists. As the Tribunal noted to the applicant in its letter to him and at the hearing, the inconsistency in his claims undermines his credibility. On the evidence, the Tribunal is accordingly not satisfied that the applicant left India to go to City B because of fears of Hindu fundamentalists. The claim is rejected accordingly.

#### *Visits to his family in India*

The Tribunal notes that in spite of his claims that he feared for his life in India the applicant was able to visit India on at least two occasions to see his family. In the Tribunal's opinion, his ability to visit his family in India undermines his claims that he feared for his life in that country. The Tribunal notes that in his response to s.424A the applicant claimed that he met his wife in 'hiding places' in India. The Tribunal does not accept this explanation. The fact that he was willing to go to India to visit his family on at least two occasions for holidays, undermines his claims that he fears returning to India because of threats to his life.

The Tribunal notes that in his response to the s424A letter, the applicant claimed that because he feared for his life, he was able to stay in India for several weeks when he visited. He therefore decided to bring his wife to City B. He further claimed that he returned to India because he 'thought things had... changed' and that his 'enemies cannot identify' him. The Tribunal is not persuaded by this explanation. In both his oral and written testimony, the applicant was not able to present any credible evidence or information that he was threatened with or subject to such harm as would amount to persecution in the sense envisaged under the Convention and s91R of the Act when he visited India on the two occasions. The Tribunal rejects the claims accordingly.

#### *Relocation within India*

Even if the Tribunal was to accept, which it does not, that the applicant was a member of certain Muslim organisations, and that he has a well founded fear of persecution because of his activities with these organisations in where he lived India, this would not assist the applicant. This is because, as the Tribunal noted to the applicant in the course of the hearing, there are large Muslim populations found in some states of India with Muslims being a majority in Jammu and Kashmir. In these states, the applicant can live in relative peace, and be safe from any forms of harassment from Hindu fundamentalists. The Tribunal notes the applicant's response at the hearing that he would face discrimination everywhere in India including areas where there are

Muslim majorities. The Tribunal does not accept this. It is not plausible that in places where Muslims are in the majority and in which the applicant can practise his religion as a devout Muslim, he would still suffer discrimination at the hands of Hindus in the minority. The Tribunal is not persuaded. The Tribunal finds that the applicant can relocate to other regions of India where Muslims are in the majority if indeed he faces persecution in his home state of Tamil Nadu or the Madras area in India.

On the evidence, the Tribunal accordingly concludes that the applicant does not have a genuine fear of persecution for a Convention reason.

### **CONCLUSIONS**

Having considered the evidence as a whole, 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) for a protection visa.

### **DECISION**

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

<p>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 <i>Migration Act 1958</i>. PRRRNM</p>
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