

DECISION RECORD

RRT CASE NUMBER: 0904298

DIAC REFERENCE(S): CLF2009/31005

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Mary Cameron

DATE: 4 March 2010

PLACE OF DECISION: Melbourne

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, applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2009. The delegate decided to refuse to grant the visa [in] May 2009 and notified the applicant of the decision and her 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] June 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] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink_findacts">222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (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. In support of the visa application the applicant provided a statement according to which she left India to come to Australia with her husband who had been granted a student visa to study in Australia. The applicant had been working as a registered nurse in India and accompanied her husband as his spouse. Her husband has a sister who lives in Australia permanently.

21. According to her statement the applicant obtained part time work as a nursing assistant at an aged care nursing home. Her husband also had part time work. In December 2008 the applicant gave her husband \$4,500 for his education fees. According to her statement the applicant’s husband’s behaviour changed after the couple arrived in Australia and he physically and mentally abused the applicant. He sexually assaulted her on a number of occasions and threatened her. He repeatedly told the applicant that he would send her back to India if she did not obey him. The applicant did not go to the police and did not make any complaints about what her husband was doing to her because she was very scared of him. However eventually she could not continue to live under these conditions and [in] January 2009 she left her husband and subsequently obtained shelter at a women’s refuge.

22. According to her statement the applicant made a complaint to the Western Australian Police Service concerning her husband sexually assaulting her. The police were investigating and although her husband had not been questioned the applicant expected that this would happen. The applicant was uncertain whether her husband would be charged with any offences. According to the applicant’s statement, after she left him, her husband kept most of her personal belongings including her passport and personal papers. He refused to give these to the applicant and she had to get the police to recover these items. The police contacted the applicant’s husband regarding the applicant’s personal property and he later went to a police station and gave the police some of her personal effects including most of her papers and her passport, but he denied having her clothes, shoes, jewellery and nursing texts which the applicant had left in his house when she left.

23. According to the applicant’s statement she fears serious harm if she returns to India. After she commenced work in Australia her wages were paid into a joint bank account in the names of the applicant and her husband. Her husband took all of the money from the account and would not allow the applicant to save any of it or use any

of it. The applicant was unhappy and arranged for her wages to be paid into another bank account in her name only. After the applicant did this her husband became angry and demanded that she continue to have her wages paid into the joint account. When the applicant refused her husband contacted his family in India and told them what the applicant had done. Her husband's family went to the home of the applicant's parents to demand that they contact the applicant to order her to pay her wages into the joint account that the applicant shared with her husband. Shortly afterwards the applicant's mother told the applicant to pay her wages into the joint account again.

24. According to the applicant's statement, when her parents first informed her that her husband's family had been to see them, the applicant contacted her father in law in India by telephone and told him how she had been mistreated by her husband. Her father in law told her that she should pay her husband's second semester fees or she should know what happens to daughters in law in Punjab dowry cases. According to her statement the applicant took her father in law to mean that she would be killed or seriously hurt by burning or poisoning. The applicant spoke to some of her colleagues at work who advised her not to pay her wages into the joint account. Because of what her husband had done to her, and acting on the advice of her colleagues the applicant refused to arrange for her wages to go into the joint account. Her husband's treatment of the applicant became even worse and he was very angry.

25. According to the applicant's statement, after the applicant left her husband he informed his family in India that the applicant had left him. He also told them that the applicant had been to the police in Australia and made a complaint against him that he had refused to return her personal property. Acting on his advice the applicant's husband's father, uncle and cousin threatened the life of the applicant and the lives of her parents who are elderly. They went to the house of the applicant's parents three times to put pressure on them and the applicant to start paying money to the applicant's husband for his education fees in Australia, even though the applicant was not living with him.

26. According to the applicant's statement, if she returns to India she will be expected to live at the house of her father in law. This is because she is married and in Sikh culture this means that she is the responsibility of her husband and his family. According to her statement the applicant cannot stay with her parents because her parents will not accept her, and as a single woman it will be impossible for her to relocate within India because of cultural attitudes. The applicant does not have a large extended family outside her home town and there is no-one who could provide her with protection.

27. Accompanying the applicant's protection visa application are documents including a copy of a letter addressed to the applicant's husband from the Western Australia Police Service listing property returned to the applicant by her husband subsequent to a complaint of theft by the applicant; a copy of the applicant's Diploma in General Nursing and Midwifery from the Punjab Nurses Registration Council; a copy of the applicant's registration documents under the Punjab Nurses [Registration Act](#); a copy of a Character Certificate in respect of the applicant issued by the [nursing school deleted: s.431(2)]; copies of the applicant's records of results for each year of her nursing qualification; a copy of a letter from [Hospital 1] in [City A] stating that the applicant worked in [Hospital 1] from [a date in] October 2005 until [a date in] April 2006 and was an excellent nurse; a copy of a letter from [Hospital 2] stating that the applicant worked in the Surgery Ward of that hospital from [a date in] January 2007 to [a date in] April 2008 and that her work and conduct were excellent, and a copy of letter from [Hospital 3] in [City B] stating that the applicant worked in that

hospital as an apprentice for three months and as a staff nurse for four months during 2006 and that her service and conduct were excellent during this period.

28. Also contained on the Departmental file is a submission from the applicant's representative enclosing a copy of the applicant's Indian passport and a copy of an Australian Federal Police Certificate – Name Check Only in respect of the applicant.

29. The delegate refused the application by a decision dated [in] May 2009

30. The applicant appeared before the Tribunal [in] August 2009 to give evidence and present arguments.

31. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.

32. The applicant confirmed that she was born on [date deleted: s.431(2)] in India and is of Indian nationality. She stated that she has only one sibling who is a younger sister. Her sister lives in Melbourne.

33. The Tribunal asked the applicant about her education. The applicant stated that she completed secondary school and then studied nursing, completing her nursing qualification in 2005. She stated that her studies had been suspended for a period of time when her parents were unwell and her brother died, but that she graduated as a qualified nurse from [school name deleted: s.431(2)] in 2005. The Tribunal asked the applicant how much professional experience she has had as a nurse, and the applicant stated that she worked as a nurse in India for three years.

34. The Tribunal noted that the applicant had provided the details of three hospitals as being her places of employment and also her residential addresses in the period from late 2005 until April 2008, and asked the applicant whether she had lived at the hospitals where she worked as a nurse. The applicant stated that she had lived and worked in hospitals since 2005 and prior to that she had lived with her parents and her sister.

35. The Tribunal asked the applicant whether she is married. She responded that she was married [in] October 2007 and is now separated from her husband. The Tribunal asked the applicant where she had lived subsequent to her marriage. The applicant stated that she had lived at her hospital. The Tribunal queried whether she had lived with her husband after their marriage. The applicant stated that she had stayed with her husband for only about twenty days in the period of five or six months after their marriage, and otherwise she continued to live at the hospital where she worked. She stated that her husband lived with his parents. She stated that she finished working [in] April 2008.

36. The Tribunal queried why the applicant had not lived with her husband after their marriage. The applicant stated that her parents had wanted her to stay with her husband and parents-in-law, but that her parents-in-law and her husband wanted her to continue to obtain work experience. The applicant explained to the Tribunal that her marriage was an arranged marriage. She stated that it was arranged only about a week before it took place. The applicant stated that she did not see her husband until the wedding day. The Tribunal asked the applicant whether she could have chosen not to marry her husband. The applicant said no; that her culture is such that a girl will have to accept what is arranged by her family.

37. The Tribunal noted that the applicant is [in her 30s], and is well educated, and queried whether, given these circumstances she could have exercised her own choice. The applicant stated that the situation is not like that, and that she had no choice. The Tribunal asked the applicant why her family had waited until she was in her thirties to arrange her marriage. The applicant repeated that she had a gap in her studies because her parents were sick and therefore she did not graduate until 2005.

38. The Tribunal asked the applicant whether she remains separated from her husband and she confirmed that this is the case and that she is presently living in a women's refuge. The Tribunal asked her how she arranged assistance from the women's shelter. The applicant stated that she had lost her ATM card for her bank account and had gone into her bank to ask for the account to be closed. She stated that she was told by the bank teller that \$2000 had been taken out of her account, and she had been very distressed and cried a lot. The applicant stated that an English speaking lady asked her why she was crying and the applicant explained what had happened to her. The applicant stated that she had, at this time, already been through many beatings and much suffering at the hands of her husband. The applicant stated that the woman asked the applicant where she was working and when the applicant told her where she worked the woman said that she should tell the staff there what was happening to her. She did so, and the nursing manager called the refuge on behalf of the applicant.

39. The Tribunal asked the applicant when the problems in her relationship with her husband developed. The applicant stated that when she was in India her parents-in-law would not allow her to stay in their home because they thought the applicant would find out about them. The applicant stated that her husband's sister is a permanent resident of Australia and when the applicant and her husband came to Australia they stayed with his sister. The applicant stated that initially she did not have a job because of her language difficulties and her husband's sister stated that she could not have food for nothing. The applicant stated that then her husband and his sister started beating and torturing her. The Tribunal asked the applicant what she meant by 'torture'. She stated that her husband would tell her that he would not feed her and yet he wanted her to work and send money home to his parents. She stated that her husband also sexually assaulted her.

40. The Tribunal asked the applicant whether her husband continued to abuse her after she secured employment. The applicant stated that it kept going on because of the issue with the joint bank account which she shared with her husband. She stated that she was not allowed to spend a single penny from the bank account and that the physical beatings continued.

41. The Tribunal asked the applicant when she had left her husband and she stated that she left [in] January 2009. The Tribunal asked her whether she has had any contact with her husband since that date and the applicant stated that she has not. The Tribunal asked the applicant whether she considered returning to India when she left her husband. The applicant stated that she did not, because his family keeps threatening the applicant's family that if the applicant returns to India they will kill them.

42. The Tribunal asked the applicant whether there are any police or court documents in respect to her husband. The applicant stated that she complained to the police but that there are no documents. The applicant's representative stated that a complaint had been made to the police, and they had taken a statement of which the representative has an undated and unsigned copy. The representative stated that the applicant's husband had been picked up and questioned by the police but he had denied everything and there was no corroborating evidence of the physical violence. The representative pointed out that there was evidence on the Departmental file of the applicant's husband returning personal property to the applicant by delivering that material to the [location deleted: s.431(2)] police. The applicant stated that her husband has still not returned all of her possessions.

43. The Tribunal noted that the applicant had indicated in her statement of claims that she had opened a personal bank account in which to deposit her salary. The

applicant stated that the distance to the ATM made it a half hour trip. She stated that the ATM was not working and she didn't know how to get the problem fixed. She asked her husband if he could assist with the problem and he said no; that the applicant was not allowed to take a cent of money from the account. The applicant stated that she had to walk between home and work. Other staff asked her why she didn't catch a bus or a train. The applicant described her situation and the staff at her workplace encouraged her to open her own bank account. An Indian girl from the applicant's workplace took the applicant to the bank on her day off and they opened a separate account for the applicant. When her husband and his sister found out about this they started to harass the applicant, and beat her more than they had before.

44. The applicant described to the Tribunal a series of events during which her ATM card was taken from her and \$2000 was withdrawn from her personal account without the authority of the applicant. The events involved the applicant's introduction to a female friend of her husband and the encouragement of the applicant's husband for the applicant to go out socially with this friend. The friend took the applicant's ATM card from her, and later claimed to have either returned it or lost it. The applicant later found out that money had been taken from her account, and she closed the account. The Tribunal queried how someone else could have obtained access to her account, and the applicant state that she did not know how it had happened. She told the Tribunal that the woman had previously been with the applicant when the applicant withdrew money from the bank and may have seen her ATM code number.

45. The applicant told the Tribunal that when she confronted the woman who had taken her ATM card, the woman told the applicant that she could have the applicant killed. The woman stated that she knew hundreds of people in [City C] and said that she had spoken to the applicant's husband and her husband had told her to feel free to go ahead and have the applicant killed. The Tribunal indicated that this reaction from the applicant's husband and his friend seemed very extreme. The applicant stated that her husband had also said that he had been in contact with the applicant's parents in India and that if the applicant returned there she would be killed.

46. The Tribunal asked the applicant whether the day when she had gone to the bank and found that her money had been withdrawn was also the day on which she left her husband. The applicant confirmed that this was the case, and that it was [in] January 2009. The Tribunal asked the applicant whether her husband has contacted her family in India since that time. The applicant stated that even before this date her husband contacted her family to put pressure on the applicant to pay his study fees. He also made threats that he would kill the applicant. The Tribunal asked the applicant whether her husband had contacted her family since the applicant left him. The applicant stated that he had done so and that he had told her parents that she had gone away with another man.

47. The Tribunal noted that the applicant had stated in her original statement of claims that her husband had contacted her parents to complain that the applicant had been to the police, but had not mentioned his accusation that she left with another man. The applicant stated that she did mention this to the police. The Tribunal asked the applicant whether her husband's parents had also contacted the applicant's parents. The applicant stated that they had, and that his parents kept visiting her parents and threatening them, and that this continues at present.

48. The Tribunal asked the applicant when her husband's family had begun to threaten her family. The applicant stated that it started a month or two after her arrival in Australia, and that they were saying that it was about money and only money. The applicant stated that her husband's parents threatened that they would kill the

applicant She stated that it was also about the applicant leaving their son. She stated that these things can go on for generations in the Punjab. The applicant stated that her parents had been threatened by her father in law, and her husband's uncle, auntie and cousin. She stated that her parents will also be at risk if the applicant returns to India. The Tribunal queried why her parents would be at any greater risk if the applicant returns to India than they are if she does not. The applicant stated that her parents are living in danger and that they are old and don't do much. The Tribunal queried whether, given that the family of the applicant's husband had not acted on any of their threats against the applicant's family, it might infer that their threats were merely empty threats. The applicant said no, the threats are not empty.

49. The Tribunal asked the applicant how her family had responded to the threats from her husband's family. The applicant stated that her parents are telling her to save her own life, because if she dies then they will die too. She stated that her parents have struggled since the applicant's brother died. The Tribunal asked the applicant how her staying in Australia will be of help to her parents. The applicant stated that her sister is already in Melbourne and that she is married and her parents in law are good. The applicant stated that her sister will help her parents.

50. The Tribunal told the applicant that it was difficult to follow the applicant's reasoning that her parents would be at greater risk from her husband's family if the applicant returned to India than if she stayed in Australia, although separated from her husband. The applicant stated that it is because the main animosity is towards her and so if she returns to India her husband's family will harm both her and her parents. The Tribunal asked the applicant to confirm that she was saying that, should she return to India her parents will be harmed by her husband's family, but if she does not return, they will not be harmed. The applicant stated that she could not say anything for sure about this, but that her family are telling her that they are being threatened by her husband's family.

51. The Tribunal asked the applicant what she fears will happen to her if she returns to India. The applicant stated that 'they' will find out that she has returned because their house is only half an hour away from the applicant's parents' house and then they will kill her. The Tribunal asked the applicant why they would kill her. The applicant stated that they would kill her because she did not support her husband financially and left him. The applicant stated that there are lots of cases in the Punjab of women who are burned or are forced to commit suicide.

52. The Tribunal asked the applicant whether she could seek protection from the police or other authorities in India from the harm that she fears. The applicant stated that the authorities don't listen to the common woman and that one can 'buy' the police over there. The Tribunal put to the applicant independent country information which indicated that, although family related violence against women remains a serious problem in Indian society there have nevertheless been significant gains in this regard in recent years through an increased willingness of the police to assist women and initiatives such as community policing. The applicant stated that this is not true; that these things are written about but don't happen in reality.

53. The Tribunal noted that the applicant is highly educated and qualified and has worked as a nurse in several different hospitals in India, and also has work experience in Australia. The Tribunal suggested that the applicant may be in a relatively good position to return to the type of work she had previously done in India when she lived and worked in hospitals, particularly in the larger Indian cities. The applicant responded that it is not safe for a woman to live alone in those places.

54. The Tribunal asked the applicant whether she has any family members in Australia other than her sister. The applicant stated that she has not. The Tribunal asked her why her sister had come to Australia and the applicant stated that she had come to study, and that she is studying hotel management. The Tribunal asked the applicant whether she was agreeable to the Tribunal hearing evidence from the applicant's sister as a witness in the review proceedings. The applicant stated that this was fine, and provided a telephone number for her sister [Ms A].

55. The Tribunal heard evidence from the applicant's sister [Ms A] by telephone. The Tribunal asked the witness whether she could tell the Tribunal what had happened to the applicant since her arrival in Australia. The witness stated that since the applicant had arrived in Australia her husband and his sister have been misbehaving. The Tribunal asked her in what way they had been misbehaving and the witness stated that in the beginning they were 'hassling' the applicant about money. The Tribunal asked the witness whether she knew what had happened after that. The witness stated that they started to mentally torture the applicant who became depressed. She stated that they would not allow the applicant to talk to her family very often. The witness stated that the applicant's husband was slapping and beating the applicant because he wanted her to be responsible for giving him money, even though she had already paid him a sum of money.

56. The Tribunal asked the witness whether the marriage between the applicant and her husband had been a marriage of the applicant's choosing. The witness stated that it had not, and that the applicant's husband had not been known to the applicant at all before she married him. The Tribunal asked the witness about her own marriage and the witness stated that her marriage had also been an arranged marriage but that it is a happy one.

57. The Tribunal asked the witness whether, when she was still residing in India, the family of the applicant's husband had threatened her family in way. The witness stated that the family of her sister's husband threatened them a lot. She stated that one day when the witness was at home the family of the applicant's husband came to the house and stated in front of the witness that, should the applicant return there, they would kill her.

58. The Tribunal asked the witness whether the applicant would be able to relocate in India given her qualifications and work experience. The witness stated that it is not easy to find a job and that one doesn't 'get much' as a nurse. She stated that the applicant is too old for government jobs. She stated that it is very difficult for a single woman to live in the big cities like Delhi and Mumbai. The Tribunal asked the witness why it is difficult for single women to live in these places. The witness stated that there is not enough safety and the applicant would be exposed to misbehaviour in such places where there are incidents of rape and murder. She stated that the applicant has no relatives outside the Punjab and would not be safe.

59. The Tribunal suggested to the witness that independent country information indicated that the applicant would be able to avail herself of state protection in India from the type of criminal harm which the witness described. The witness stated that police stations in India are full of these sorts of cases and that nothing much is done. She stated that the government does not care either. The witness stated that the family strongly requested that the Australian government provide protection to the applicant.

60. The Tribunal invited submissions from the applicant's representative. The representative stated that while the applicant does have family members in India other than her parents, they are estranged. He stated that she does not have any practical solutions for living outside the Punjab. The representative noted that the Tribunal had

not specifically asked the applicant whether she could live in a hospital in India, and suggested that the Tribunal do so. The Tribunal put to the applicant that she had lived and worked in hospitals in India for several before she came to Australia, and queried why she could not do so again should she return to that country. The applicant stated that before she came to Australia it was different. She questioned how she could stay in a hospital, stating that sometimes she would have to go home. She stated that if she tried to remarry there would be allegations and insults and so it would not be easy for her.

61. The applicant's representative requested that time be allowed for him to provide written post-hearing submissions by [a date in] September 2009. The Tribunal agreed, and the applicant's representative provided a written submission dated [in] September 2009.

62. According to the submission of the applicant's representative, the applicant contends that she is a member of a particular social group being an Indian woman who has suffered domestic and sexual violence and against whom her husband's family has made a claim in the nature of a dowry claim. The submission incorporates detailed country information in respect to woman as a particular social group in India and in respect to gender based violence in India, particularly dowry and marriage related violence against women.

63. According to the submission of the applicant's representative, the applicant's evidence is that she was from a rural area in the Punjab. According to the representative's submission the applicant had stated that it would be very difficult to relocate in order to reduce the risk of serious harm to her. She had been working as a nurse for several years away from her home town before she married and had lived in hostels close to the hospitals in which she had worked. According to the representative's submission the applicant had, in her evidence, stated that it would take her a significant period to obtain employment outside her home town if she returned to India because jobs were scarce and the job market was highly competitive. Although educated she had no work experience other than as a nurse.

64. According to the submissions of the applicant's representative the applicant stated that although she had an extended family she had no effective relationship with them and would not be able to stay with them as an interim measure until she obtained work. She had one sister who was in Australia. Her only brother died in 1999. According to the representative's submission the applicant had said that her parents were elderly and could not effectively protect her – her father was in his late seventies. According to the representative's submission, the applicant's evidence was that she did not have extensive savings and did not have the financial resources to relocate. In addition the applicant said that she had serious concerns for her physical safety as a single woman living on her own even if she could obtain accommodation elsewhere. The submission provides detailed country information regarding the practical difficulties for a woman relocating to a new area within India. It makes reference to the UK Home Office Operational Guidance Note on India (July 2006) in respect to internal relocation for single women in India, but submits that limited assistance is to be gained from the restrictive approach inherent in that Guidance Note given the different conditions prevailing in Australia.

65. The written submission of the applicant's representative concludes that the applicant contends that;

- I. She has been the victim of domestic and sexual violence in Australia at the hands of her husband and as a result separated from him and made a complaint to the police in Australia;

- II. Her husband's family have threatened her life through her family in India and directly in a telephone conversation she had with her father in law;
- III. The threats made against her have been made in the context of financial claims against her in the nature of a dowry claim associated with failure to contribute financially to her husband's education in Australia;
- IV. In Indian society women in her situation are a particular social group;
- V. She has a well founded fear of suffering serious harm (section 91R [Migration Act 1958](#)) if she returns to India;
- VI. The principal state agencies in India tolerate or are indifferent to the threat of serious harm to the applicant, or are unwilling or unable to afford protection to her. The applicant further contends that the country information indicates that there is no differentiation between women who are still living with their husbands and those who are separated;
- VII. It is not reasonably practicable for her to relocate to reduce the risk of serious harm to her.

Country Information

Honour Killings in the Punjab

66. The US Department of State in its 2006 report on human rights practices in India states that honour killings continued to be a problem in the Punjab, and that police in Delhi arrested 4 men and a father suspected of ordering an honour killing of his daughter for "living separately from her husband" (US Department of State 2006, Country Reports on Human Rights Practices – India, 8 March).

67. According to a report prepared by the National Commission on the Status of Women from the International Campaign Against Honour Killing website, around 1,707 honour killings were reported in Punjab from 1997 to 2003, making the province the leader with regards to gender related violence (<http://www.stophonourkillings.com/?name=News&file=article&sid=1935>).

68. The continuing prevalence of honour killings in parts of India was discussed by Indian women activists in January 2004 in the following article *Honour killings on the rise in India: Women's group Rahul Verma* (OneWorld.net):

Indian women activists have called for an urgent change in the country's laws to counter the uncontrolled rise of "honour killings" in India, saying they comprise ten percent of all killings in the northern Indian states of Haryana and Punjab.

Honour killings -- where men and women are killed by their kin or members of their caste -- are also rampant in the western part of Uttar Pradesh.

"This violence is committed in the name of saving the "honour" of the community, caste or family," says a leading Indian women's group, the All India Democratic Women's Association (AIDWA) in a resolution passed in the Indian capital, New Delhi.

At a conference held by AIDWA, Sunday, victims of violence narrated tales of killings, rape and humiliation. Most of these honour killings were ordered by so-called caste panchayats, or informal courts comprising members of a particular caste, which decide all matters concerning them.

"A caste panchayat is a self-proclaimed body consisting of village elders or the elite," explains AIDWA general secretary Brinda Karat. "Women are excluded from the body," she says.

The caste panchayats sit in judgement on matters of marital or domestic discord or on issues relating to land. Often, villagers give precedence to the judgement of a caste panchayat rather

than that delivered by the legal panchayat -- a constitutional body of men and women elected by villagers to decide local issues.

While most such crimes go unrecorded, AIDWA warns that honour killings are on the rise in India. In Muzaffarnagar, the worst affected district of Uttar Pradesh, 13 cases of honour killings were reported in the first nine months of 2003, up from ten in 2002.

Some 35 couples were also declared missing during this period.

Most honour killings revolve around run-away marriages or relationships between two people from different castes. There were several instances of a groom or bride being killed by irate family members for marrying someone from a so-called lower caste.

A prime example is that of Geeta Rani of Hoshiarpur of Punjab, whose husband, Jasveer, was killed by a group of people from his village last month. Rani and Jasveer both were from different castes, with Jasveer's killers belonging to Rani's caste.

"They cut off his hands and legs and then killed him for "daring" to marry one of "their" women," recounts Rani.

In another instance, a woman from Uttar Pradesh who belonged to a caste of barbers -- considered by traditional Hindu society as one of the lower castes -- was repeatedly raped and finally killed by a group of higher caste Yadav men.

Her crime? Her son had married a girl from the socially and economically more prosperous Yadav caste.

AIDWA says forms of violence differ, ranging from public lynchings and murders to rape. In some cases, people's faces were blackened or heads shaved off. Some were forced to eat excreta or drink urine, while others faced social boycott.

In its resolution AIDWA says that, "Central to such violence is the subordinate position of women and girls in all castes and communities. Women are viewed as the property of the family, the caste and the community. A woman's chastity is the "honour" of the community."

AIDWA has called for strict measures to stem the rise of honour killings, including a ban on all decisions of caste panchayats that violate the Indian Constitution, which has abolished castes and regards men and women as equal.

It has also called for changing the law to allow courts to intervene in all crimes where violence is committed in the name of "honour."

69. More recently the following report *Couple killed in Punjab Honour Killing*, accessed from thaindian.com, suggests that honour killings continue to occur in the Punjab.

Chandigarh, June 15 (IANS) A young couple was hacked to death by the girl's brother at their home in a village near Banur town in Punjab. The cold-blooded murder was committed by Sarabjit Singh to avenge the honour of his family as his sister had married against the family's wishes to the boy from an upper caste.

While the boy, Suresh Kumar, died on the spot, his wife Sunwinder succumbed to her injuries at the Post Graduate Institute of Medical Education and Research (PGIMER) here.

Sarabjit attacked the couple with an axe while they were sleeping. He was arrested.

The couple were married February this year in the Punjab and Haryana High Court here. The girl's family, which is from the Dalit community, was against her marriage to the upper caste boy of the same village, Gajju Khera, 25 km from here.

The girl's family has been absconding after the killings, police officials said. They added that teams have been dispatched to various places to trace the family

70. The extent of crime perpetrated against women in the Punjab remains high. A news report of October 2006 detailing statistics relating to crimes against women in Punjab stated that "women in the state continue to live under terror":

Twenty one women are murdered and four are attempted to murder every month in Punjab. About 28 women are raped and two face attempt to rape every month. At an average 27 women are kidnapped every month and about 10 women commit suicide. About 22 cases of molestation of women are registered every month.

This is a glimpse of law and order situation in Punjab while the women in state continue to live under terror.

During last five years, at an average 2300 cases of crime against women were registered. Lowest crime rate was registered in 2005 when 2282 cases were registered. During 2006 till month of August only 1756 cases of crime against women have been registered.

If figures tell the tale of women's plight, it is shocking to know that during last five years

(2002-2006 till August) have seen an increase in rape cases with 1591 women raped and 143 faced an attempt to rape.

About 200 women have been murdered in the state in first eight months of current year. The figures were 271 murders of women in 2002, 239 in 2003, 240 in 2004, 256 in 2005 and 191 in 2006.

The dowry deaths shows the fate of women in Punjabi society. According to figures 165 women were killed for dowry in 2002, 104 in 2003, 105 in 2004, 96 in 2005 and 85 in first eight months of 2006.

The dowry harassment cases in Punjab have been going unabated. Till August this year, 534 dowry cases have been registered. In five years 3946 dowry harassment cases were registered which means 70 cases every month.

1231 of molestation of women were registered in Punjab in five years of Congress rule. 475 cases of eve teasing (nine every month) have been registered ('Crime against women in Punjab goes on unabated' 2006, Punjab Newline Network website, 25 October <http://www.punjabnewline.com/content/view/1761/46/>).

71. A UK Home Office Operational Guidance Note on India dated 17 April 2008, in a section on women who fear domestic violence in India, includes the following information:

3.10.1 Applicants may state that they face domestic violence at the hands of their husbands or other family members.

3.10.2 Treatment. India ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 9 July 1993. Although this contains a number of constitutional safeguards guaranteeing equal rights for women, there is evidence of huge gaps between constitutional guarantees and the daily realities of women's lives. It was reported in 2006 that the forms of gender-based violence prevalent in India include domestic violence, dowry-linked violence, sexual assault, sexual harassment and sex-selective abortion, violence against dalit women, and violence through the medium of the law on grounds of sexual orientation. 'Bride-burning' was reported to be a common and serious problem across

all religious, class, and caste boundaries.⁷³ It was reported that in 2007 the law provided extensive powers to magistrates to issue protection orders to deal with dowry-related harassment and murder. Madhya Pradesh, Kerala, Bihar, and several other states had a chief dowry prevention officer, although it was unclear how effective these officers were. Madhya Pradesh also required that all government servants seeking to marry produce a sworn affidavit by the bride, the groom, and his father that no dowry exchanged hands.

3.10.3 According to a 2004 National Commission for Women Survey, 60 to 80 percent of women were abused in some way by their spouses, 42 percent were beaten physically, and 22 percent were expelled from their homes for at least a day. The women's group Majlis has said that many women are forced to remain in abusive relationships because of social and parental pressure and to protect their children. A survey conducted during 2005 by the International Institute for Population Studies states that 56 percent of women believed wife beating was justified in certain circumstances.

72. With some relevance to the facts of the review application, considerable information is available about the situation of single women in the Punjab, particularly those deserted by overseas based Indian husbands. The typical situation involves male non-resident Indians (NRIs) returning to the Punjab for a short period during which time an arranged marriage is undertaken. The husband then returns to their home country – usually the United States, Canada, Britain, or Australia – never or rarely contacting the bride again and in some cases requesting a divorce ('Where have our husbands gone?' 2004, *The Asian Pacific Post*, 21 October. (<http://www.asianpacificpost.com/portal2/402881910674ebab010674f4f02015e1.do.html> – Accessed 13 February 2007)

73. In such cases, the abandoned women live with relatives, become "unwanted dependents on their in-laws and parents", or:

Activists say that a large proportion of the abandoned wives end up as a statistic in India where a woman is molested every 26 minutes, raped every 34 minutes, sexually harassed every 42 minutes and kidnapped every 43 minutes.

Those who do not accept their fate and fight back take on the risk of becoming part of another deadly number in India--every six hours a young married women is burnt alive, beaten to death, or driven to commit suicide ('Where have our husbands gone?' 2004, *The Asian Pacific Post*, 21 October <http://www.asianpacificpost.com/portal2/402881910674ebab010674f4f02015e1.do.html> – Accessed 13 February 2007.

Other cases included in this category of single women do involve overseas marriages which breakdown due to familial abuse. However, little information is provided on the situation of these women once they return to India:

The National Commission for Women (NCW) in New Delhi recently identified desertions of women by NRIs as one of the most serious gender issues in Punjab. It proposed a draft convention on custody of children and distribution of property from such failed marriages.

"The necessity for the convention arises from the fact that NRI marriages are becoming more and more common. **In Punjab, there is an NRI marriage in every third or fourth house,**" according to NCW Chairperson Poornima Advani. The NCW estimates the number of women

deserted by NRIs in Punjab alone at between 10,000 to 15,000 and recently recommended establishing a special cell for problems related to NRI marriages in the Ministry of External Affairs and the Ministry of Overseas Indian Affairs, and some Indian embassies have added welfare officers to assist **Indian women caught up in bad marriages overseas.**

... When things don't work out in a cross-country marriage, the woman from India is especially vulnerable. She is in a new country, alone and dependent on her husband's family, without any support system to fall back on.

Marriage to an IT professional brought Roshini from New Delhi to New York. She was pursuing a degree in college, and her new husband had told her she could continue her studies in the U.S. "But when I came here, he suddenly changed," recalls Roshini, whose name has been altered to protect her identity.

"He started abusing me by name calling, pushing me around and not even letting me talk to my parents in India. He basically isolated me from everyone."

This man whom she was just getting to know was so violent that he could be sitting next to her and slap her for no reason, and even hit her with a slipper and threatened her with a hammer. One morning, as she slept, he came and kicked her on the back: "I was scared for my life and that's when I called the police. I got an order of protection and then I contacted Sakhi."

... Nor is it just village women in this situation: well-educated, urban women are also finding themselves trapped. The Indian media have widely reported on women who after spending a few idyllic months with their new grooms in India, have never seen them again. **They've been abused by in-laws and have had to face dowry demands. In many cases, their in-laws have thrown them out and the men have remarried abroad.**

... According to a report by Indo-Asian News Service, the parents of Gurmeet Singh and Balwinder Singh, who are based in Chicago, advertised in Indian matrimonial columns seeking brides for their two NRI sons. They forgot to mention one small, inconvenient detail – the older son Gurmeet was already married! He had married Chandigarh resident Jasdeep Kaur on January 18, 1998. The two even had a child.

In order to facilitate her migration to the U.S., Jasdeep alleges, the family arranged a fake court marriage with Balwinder, the younger brother who was a green card holder. **While in the U.S. she was abused and tortured by her husband and his family, with dowry demands of Rs. 1 million. She returned to India in March 2001.** After seeing the advertisement for brides for the two brothers in the newspapers, she petitioned the courts there and the two brothers have been restrained from marrying by the court. Her mother Baljit Kaur said they went to court so that other girls would not get cheated like their daughter (Melwani, L. 2005, 'Dishonor And Abandon – The word is out in India: Marry an NRI at your own peril', *Little India* website, 2 May, <http://www.littleindia.com/news/134/ARTICLE/1475/2005-02-05.html> – Accessed 13 February 2006.

74. A later August 2006 article details the case of domestic abuse in an overseas marriage. The only information provided on the situation of the women on return to

India is that “many [are] unwilling to speak out, fearing the shame and stigma associated with being a divorced or separated woman in traditional Indian society”:

[A] 22-year-old student from the north Indian city of Chandigarh thought she was heading for a prosperous new life in the West with a British-born Indian doctor after he chose her from scores of women who replied to his advert seeking a bride.

But after leaving her family and homeland to live in the UK, Sonal found her new husband was a fraud. **“He was mentally sick and wasn’t a doctor and didn’t have a job. His family tricked me and now my life is finished,” she said.**

Women’s groups say every year hundreds of starry-eyed girls seeking a better life in the West are duped into wedlock by men of Indian origin living in the diaspora -- in countries like the United States, Britain, Canada and **Australia** -- mostly for money.

... Very often the women go abroad after the wedding only to find themselves abandoned with no one turn to, no money, no ability to speak the local language and no knowledge of the norms and customs of the alien country.

Other women tell tales of being battered or kept prisoner in the home and treated like domestic workers. Some even find their new husband is already married to someone else.

There are also cases of “holiday brides” -- women abandoned in India within days or weeks of marriage with the husband promising to return once visa arrangements have been made for his wife, but never actually doing so.

There are no accurate numbers on how many cheat marriages take place, but some reports say India’s northern state of Punjab, which has a large community overseas, has so far registered 15,000 cases alone. Other states like Gujarat and Kerala have also seen cases.

75. But activists say the number of deceived brides is under-reported with many unwilling to speak out, fearing the shame and stigma associated with being a divorced or separated woman in traditional Indian society (Bhalla, N. 2006, ‘Indian brides seek protection from abusive grooms’, *The Scotsman* website, 15 August http://news.scotsman.com/latest_international.cfm?id=1188452006 – Accessed 14 February 2007.

State Protection in the Punjab

76. The US Department of State report on human rights practices in India for 2007 indicates that:

The law sets criminal penalties for rape, including spousal rape, but the government did not enforce the law effectively. Although the government prosecuted rape cases during the year, only 10 percent were adjudicated fully by the courts, and police typically failed to arrest rapists, perpetuating a climate of impunity. Rape and other violent attacks against women continued to be a serious problem. While official statistics confirmed a dramatic increase in reported crimes against women, this may have reflected a growing sense of security in reporting such crimes. The 2005-2006 National Family Health Survey (NFHS) reported that only one in four abused women had ever sought help to end the violence they experienced and

only two percent of abused women had ever sought help from the police. According to the NCRB, two rapes took place every hour nationwide, and 19 of 20 victims knew their attackers. NGOs asserted that rape by police, including custodial rape, was common. The 2005-2006 NFHS reported that one-third of women ages 15 to 49 had experienced physical violence and approximately one in ten had been a victim of sexual violence.

In May 2005 parliament amended the Code of Criminal Procedure to stipulate mandatory DNA tests in all rape cases. In an effort to protect women from sexual assault by police, the bill also prohibits the arrest of women after sunset and before sunrise except in “exceptional circumstances” (US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – India*, March, Section 5).

77. According to the UK Home Office operational guidance note on India (2008 – above);

3.10.4 Sufficiency of protection. Numerous laws exist to protect women’s rights, including the Equal Remuneration Act of 1976, the Prevention of Immoral [Traffic Act](#) of 1956, the Sati Prevention Act of 1987, and the Dowry Prohibition Act of 1961. However, the government often was unable to enforce these laws, especially in rural areas where traditions were deeply rooted. As noted in Amnesty International’s report in May 2001 (The battle against fear and discrimination): “Attempts by women to seek justice through the criminal justice system are regularly forestalled...Unless supported by male relatives or a strong social group, women victims of crime are at a severe disadvantage within the criminal justice system” However, the Indian government has advised state governments to undertake a number of measures for the prevention of crime against women. This includes the registration of First Instance Reports (FIRs) in all cases of crime against women, the prominent exhibition of help-line numbers of the crime against women cells at public places, the setting up of women police cells in the police stations and exclusive women police stations where necessary, and adequate training of police personnel in special laws who deal with crime against women. Other steps the government reportedly took include providing telephone help lines, creating short-stay homes, counselling, occupational training, medical aid and rehabilitation.

3.10.5 The Protection of Women from Domestic Violence Act, passed in October 2006, recognizes all forms of abuse against women in the home, including physical, sexual, verbal, emotional, and/or economic abuse. Domestic violence includes actual abuse or the threat of abuse. The law recognizes the right of women to reside in a shared household with her spouse or partner even while the dispute continues, although women can be provided with alternative accommodations, to be paid for by the spouse or partner. The law also provides women with the right to police assistance, legal aid, shelter, and access to medical care. The new law bans harassment by way of dowry demands and empowers magistrates to issue protection orders where needed. Under the new Act, spousal rape is also criminalized. Punishment ranges from jail terms of up to one year and/or a fine of approximately \$450 (19,800 rupees). As of November the Act had been ratified by four of 28 state governments: Andhra Pradesh, Tamil Nadu, Uttar Pradesh, and Orissa. Citizens registered 8,000 nationwide criminal cases under the Act since it was brought into force.

3.10.6 Those experiencing domestic violence at the hands of their husbands or other family members can therefore reasonably seek protection from the Indian authorities. However, the provision of this assistance may be inadequate to ensure that every individual woman who needs assistance and protection is able to access it. Additionally, some women’s ability to

access this help and assistance may be limited by such factors as their location, lack of literacy and lack of awareness of their rights in what remains a patriarchal society.

78. Some evidence of the ability and willingness of police to help protect single women who may be at risk of an honour killing is perhaps offered by the actions of the Punjab police with regard to their investigation of the murder of Surjit Athwal in 1998. In a 2004 *BBC News* article on the case, the brother of Surjit Athwal, Jagdeesh Singh stated that:

The Punjab police proved to be completely uncooperative, completely unprofessional and completely undetailed in its attention to Surjit's case. **Their attention to her case was a grudging disinterest, a pure paper exercise, no serious investigative follow-up of Surjit's disappearance** ('Honour killings' 2004, *BBC News*, 8 September <http://news.bbc.co.uk/2/hi/programmes/newsnight/3638014.stm>)

79. The same *BBC News* article also gives a contrasting opinion on the Punjab police by British detective superintendent Jim Blasir, who was in charge of the investigation:

My experience in working with Punjab police is I found the officers very professional, but historically, there have been some abuses in Punjab, some abuses of human rights. I think that there does need to be good links. I think that if this Surjit Athwal case was to happen today, you would get a very different response. That's the first thing I would say because we're going back ten years when our relationships weren't as good, and I think sometimes lots of the good results in homicide investigations are where we have good evidence collection at the scene and there's good initial investigation, and I think that if a case similar to Surjit Athwal was to happen tomorrow in Punjab, the results would be very different ('Honour killings' 2004, *BBC News*, 8 September <http://news.bbc.co.uk/2/hi/programmes/newsnight/3638014.stm> – Accessed 13 February 2007).

FINDINGS AND REASONS

80. The applicant travelled to Australia on a valid Indian passport and states that she is a national of India. She has provided substantial documentary and oral evidence of her background in India. The Tribunal finds that she is a national of India and therefore for the purposes of the Convention the Tribunal has assessed her claims against India as her country of nationality.

81. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings on the claims the applicant has made. This may involve an assessment of the applicant's credibility. In 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. That said, the Tribunal is not required to accept uncritically any or all allegations made by the 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. Moreover the

Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvaduri v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547. If the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make a finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true.

82. It has been submitted explicitly or impliedly, that the applicant is a member of the particular social groups comprised of Indian women, separated or divorced Indian women, and as “an Indian woman who has suffered domestic and sexual violence and against whom her husband's family has made a claim in the nature of a dowry claim.”

83. The leading recent Australian authority on the particular social group question is *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25; (2004) 217 CLR 387 (“*Applicant S*”). In their majority joint judgment, Gleeson CJ, Gummow and Kirby JJ. set out at paragraph [36] the correct approach to the question of whether a group falls within the scope of the term *particular social group* for the purposes of the Convention:

Therefore, the determination of whether a group falls within the definition of “particular social group” in Art 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a “social group” and not a “particular social group”. As this Court has repeatedly emphasised, identifying accurately the “particular social group” alleged is vital for the accurate application of the applicable law to the case in hand.

84. In the same case Justice McHugh summarized the issue similarly;

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.

85. In *MIMA v Khawar* (2002) 210 CLR 1, the High Court recognized that women in a given society could constitute a particular social group for the purposes of the Convention. In that case Gleeson CJ found that it was open to the Tribunal to determine that “women in Pakistan” constituted a particular social group.

86. Gender based groups have been considered in a number of cases, particularly in the context of claims of domestic violence. Australian courts have accepted that “single women in India”, “married women in Tanzania”, “young Somali women”, and “women or divorced women who had converted to Christianity in Nepal” may constitute particular social groups for the purposes of the Convention. In contrast, in *Lek v MILGEA (No.2)* Wilcox J held that “young single women” in China did not constitute a particular social group. In *Jayawardene v MIMA*, Goldberg J doubted that a group such as “single women” or “single women without protection in Sri Lanka” constituted a particular social group for the purposes of the Convention. The Court in *MIMA v Kobayashi & Anor* held that the evidence before the Tribunal provided no basis for finding that “women in Japan” or “unwed mothers in Japan” were persecuted

groups. In *Applicant S469 of 2002 v MIMIA Bennett J* found that it was open on the evidence before the Tribunal to find that females in Thailand did not constitute a particular social group for the purposes of the Convention.

87. The applicant's representative has submitted that the applicant is a member of a particular social group for reason that she is "an Indian woman who has suffered domestic and sexual violence and against whom her husband's family has made a claim in the nature of a dowry claim" The Tribunal does not accept this submission for reason that the purported particular social group is not an identifiable group of people set apart from other members of society and united by a common characteristic or other quality ("*Applicant S*" per McHugh, J). In that case Justice McHugh stressed the necessity of the group being cognisable within the society in the following statement:

A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term "a particular social group" appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a "well-founded fear of being persecuted for reasons of ... membership of a particular social group" A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase "persecuted for reasons of ... membership" implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals. (*Applicant S*, per McHugh, J, at 64)

88. The High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in society. In *Khawar* for example, McHugh and Gummow JJ stated:

The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group. (at 28)

89. The particular social group posited by the applicant appears not to reflect the operation of cultural, social religious and legal factors so much as to be a description of the applicant's particular individual circumstances. The Tribunal finds that the particular social group posited by the applicant by virtue of her identity as "an Indian woman who has suffered from domestic and sexual violence and against whom her husband's family has made a claim in the nature of a dowry claim" is not an identifiable group having regard to the relevance of legal, social, cultural and religious factors in the consideration of this issue.

90. However, the Tribunal is obliged to consider not only the claims that the applicant has expressly made but also the claims that arise implicitly from the material

before the Tribunal (*Ramirez v MIMA* [\[2000\] FCA 1000](#); [\(2000\) 176 ALR 514](#)). It is apparent from the independent country information before the Tribunal that Indian women are differentially treated on the basis of their gender. It is also apparent from that information that Indian women who are separated or divorced can be seen to constitute a particular social group. The Tribunal accepts that Indian women and separated or divorced Indian woman constitute particular social groups within the meaning of the Convention and that the applicant is a member of these groups. The Tribunal has also considered the applicant's explicit claims in respect to her membership of a particular social group of Indian women who are the subject of dowry related claims. On the basis of the material before it, and separately from any consideration of the applicant's individual experiences of domestic and sexual violence, the Tribunal finds that Indian women whose husband's families have made claims in the nature of dowry claims constitute a particular social group in India, and that the applicant is a member of this group.

91. Having accepted that the applicant is a member of particular social groups of Indian women, separated or divorced Indian women and Indian women whose husband's families have made claims in the nature of dowry claims the Tribunal must consider whether her membership of one or more of these particular social groups is the essential and significant reason or reasons for the serious harm feared by the applicant: s91R(1)(a)

92. The applicant has provided detailed evidence that she has been subject to physical, sexual and psychological violence by her estranged husband. That evidence is supported by the evidence of [Ms A] The applicant has given evidence that she left her husband after he arranged the theft of money from her bank account [in] January 2009, and that she has had no contact with him since that time. The Tribunal accepts the applicant's evidence in respect to these matters.

93. The Tribunal accepts the applicant's claim that she has been the victim of domestic and sexual violence in Australia at the hands of her husband, and that she has separated from her husband and made a complaint to the police in Australia. The Tribunal further accepts that the applicant's husband's family members have made threats against the applicant's life, and that these threats have been made in the context of financial claims against her in the nature of a dowry claim associated with her failure to contribute financially to her husband's education in Australia. The Tribunal accepts that the harm which the applicant fears from her estranged husband and his family amounts to serious harm within the meaning of the Convention.

94. Given the Tribunal's findings above, it accepts that the applicant has been subjected to serious harm from her husband, and that she faces a real chance of suffering serious harm at the hands of her husband or his family members if she returns to her home town in the Punjab. The Tribunal finds on the evidence before it that the violence that the applicant fears should she return to India arises for the reason that she has defied her husband's family by separating from her husband, in an act that may be considered unacceptable in Indian tradition. However the Tribunal finds that a Convention ground (being the applicant's membership of a particular social group of Indian women or separated or divorced Indian women or Indian women whose husband's families have made claims in the nature of dowry claims, or any other Convention ground) is not the essential and significant reason for the harm which the applicant fears. Rather the harm that she fears is from non-State actors, being her husband and his family, because of her actions in separating from her abusive husband, and failing to finance his education.

95. However, women suffering violence in such situations as the applicant may nevertheless, depending on the circumstances, come within the scope of the Convention: *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1. A majority of the High Court in *Khawar* held that the Convention test may be satisfied by the selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. The applicant has contended, and it appears from the evidence, that she will not be afforded protection by the Indian authorities from harm at the hands of her husband's family for the essential and significant reason of her membership of particular social groups including 'Indian women'.

96. Importantly, s.91R(1)(c) of the Act refers to systematic and discriminatory conduct. Mere inaction will not suffice. However discriminatory inaction will not amount to mere inaction. This is also the position under the Convention as interpreted by Australian Courts

97. Although the independent country information set out above indicates that significant steps have been taken in India to improve the protection of women from violence, there is also evidence that there is a certain unwillingness of the authorities in the Punjab to enforce existing laws and to utilise other mechanisms designed to afford state protection to women.

98. The Tribunal notes that while the applicant would be at risk of harm from non-state actors, being her husband and his family, the Tribunal is not satisfied that the applicant will be able to afford herself adequate state protection from the harm that she fears if she returns to the Punjab. In forming this view the Tribunal has considered the country information set out above which indicates that honour killings continued to be a problem in the Punjab, and that the extent of crime perpetrated against women in the Punjab remains high with women in the state continuing to live under terror. The country information indicates that although the Indian government has enacted numerous laws to protect the rights of women, there are significant problems in enforcing these laws, especially in rural areas where traditions are deeply rooted. The country information set out above indicates that in the north of India and particularly in the Punjab it is difficult for the Indian government to provide effective protection to woman because of the deeply ingrained nature of traditional customs and practices and the resistance of local authorities to the effective enforcement of laws.

99. On the evidence before it the Tribunal finds that the applicant would not be afforded effective protection from the harm that she fears by the Indian authorities in the Punjab. The Tribunal further finds that this lack of state protection amounts to a selective and discriminatory withholding of state protection for a Convention reason from serious harm that is not Convention related. The Tribunal finds accordingly, and with reference to *Khawar*, that the applicant comes within the scope of the Convention.

100. The Tribunal has considered whether it would be reasonable for the applicant to relocate to another part of India to another region of the country away from the Punjab where, objectively, there is no appreciable risk of the persecution which the applicant fears at the hands of her husband and his family. (*SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18; *SZFDV v MIAC* [2007] HCA 41; (2007) 237 ALR 660)

101. The applicant has submitted that it would not be reasonable for her to relocate for reasons including her limited financial resources, her lack of close ties with her extended family and because of the difficulties facing single women living away from their families in India.

102. The Tribunal has taken into account the applicant's background and her evidence and relevant country information related to the relocation of women in India.

103. In July 2004 the UK Home Office undertook a fact finding mission to India to look at the situation and treatment of women. The mission sought the opinions of around a dozen experts on the question of relocation for women in India, including those who are single or divorced. Relevant to this review application is the following;

The representative at the NCW [National Commission for Women] said that internal relocation is not easy for women all over India. Even if a woman is independent she can still face violence. In small cities it is very difficult for women to set up homes independently if she has a family. It is not easy for single women to survive and the problem of literacy also plays a part.

According to Dr Basu at AIWC in Delhi, it is still difficult for women to live on their own in India however not so much in urban areas though. Security is not there. Some women manage to live on their own in apartments but this is an urban phenomenon. In addition it would be very difficult for single unmarried women living outside of a hostel because it would be very difficult to rent due to the expense and landlords do not let apartments to women. The situation is changing but the general view is that women should be married and not working, or staying as a paying guest with a family.

Jagori representatives echoed this view when they said that it is very difficult for women to move and relocate because in northern India they do not have access to information and women's illiteracy rates are still high in rural areas. It is difficult for lone women to move to rural and urban areas. By law the woman is the custodian of her children until the age of 7 but the father remains the guardian, sometimes the children are given the option of where they want to go. The first option for a woman is to return to her parent's home and the parental advice is to return to the husband's home and endure the situation because of the cultural aspect.

... According to Dr Mohini Giri at the Guild of Service it would be very difficult for a single woman to relocate as society goes by natural law with everything in pairs and it would be even harder with children. ...She suggested that even the more educated would find it hard so by comparison it may be easier for a single woman to relocate. A single woman wanting to rent an apartment would be viewed with hesitation so she would have to stay in a hostel without her children. Most women prefer to relocate to natal areas where parents or siblings live. In recent years in urban affluent areas, parents are more protective and the mindset has changed over the last decade or so but this is not the case amongst the urban lower middle classes. Women are educated in the affluent classes so can get work, however violence against women is huge particularly with regard to communal riots.

Kamal Singh at the British Council stated that mobility is an issue and that the situation was very grim with safe housing being hard to find even for those in the higher income bracket. Women from both high and low income brackets moving on their own in search of a safe home, are viewed with suspicion. She thought it may be easier in urban areas as accommodation for younger women to live alone did exist but along with tight restrictions, in the form of paying guest accommodation.

...According to representatives from the AP Women's Network and Oxfam it is not possible for women to live on their own because society clings on to age old customs. They stated that it would also be a major problem for women to relocate, including middle class women.

As noted by a senior lecturer from Osmania University in Hyderabad, there are more occurrences of girls living independently where they get jobs in Call Centres where cars are sent for women working at night. In Hyderabad, by and large people have accepted this situation and there are a lot of girls living on their own. Whenever change is necessary people are changing without a fuss. She also stated that there is stigma attached to a married woman returning to her parents so within the constraints she may try to signal to her family that she is under pressure.

...According to a representative from Sanchetana in Ahmedabad, even for educated women it is very difficult for them to live separately. On the subject of inter-faith marriages we were told that this did not happen between Hindus and Muslims so much anymore. Re-marriage for Muslims is possible but not for Hindus. Widows are alienated and isolated in their social life and are forced to live in poverty. For divorced women it is not easy to set up on their own. The delegation were told that there are not many divorced Hindu women but that you do find remarried Muslim women and single women (UK Home Office, 2004, *Report of the fact finding mission to India – Women in India*, UK Home Office website, 11-24 July, chapter 9 http://www.homeoffice.gov.uk/rds/pdfs06/india_ffm0704_250106.doc – Accessed 13 February 2007

104. Two experts in the report refer specifically to the state of Punjab in stating their opinion on the possibility of relocation:

According to a representative at the Institute for Development and Communication in Punjab single unit migration takes place but only from white collar high profile workers, relocation does not take place amongst the working classes. Dr Dagar at the Institute reported that in some areas such as Maharashtra and Gujarat it has changed for the better for women in terms of better access to education. In terms of mobility, globalisation has enabled women to get night jobs in call centres, in Bombay it is always easy to get a job. She commented that the awareness is there but not the sensitivity. She said that social mobility even in the upper income groups is very limited and happens more within the family circle. Social structures are very important and when a girl goes to university she will stay with family. Women see home as a protection and this view will always prevail.

105. The UK Home Office operational guidance note on India dated 17 April 2008 includes information on internal relocation for single women and divorcees in a section on women who fear domestic violence in India. It is stated in the operational guidance note that:

3.10.7 Internal relocation.

The law provides for freedom of movement and the government generally respects this in practice, however, in certain border areas the government requires special permits. The situation as regards internal relocation for single women, divorcees with or without children, and widows may differ from the situation for men as it may be difficult for women on their own to find secure accommodation. Although rents are high and landlords are often unwilling to rent to single women there are hostels particularly in urban areas where a large number of

call centres provide employment. The situation for women with children is likely to be more difficult as children may not be accepted in hostels. Illiterate women from rural areas are likely to find it particularly difficult to obtain accommodation as a lone woman. For some women in India relocation will not be unduly harsh but this is only likely to be the case where the individual is single, without children to support and is educated enough to be able to support herself. Some single women may also be able to relocate to live with extended family or friends in other parts of the country. However, where these circumstances do not apply internal relocation is likely to be unduly harsh (UK Home Office 2008, Operational Guidance Note: India, 17 April, Paragraph 3.10.7)

106. According to a response from the Department of Foreign Affairs and Trade in respect to a Departmental query regarding the ability of a single mother from the Punjab to relocate within India (DFAT Responses 19/8/09);

The ability of a woman ... to relocate within India or Punjab would be dependent on her individual circumstances, including her education levels, availability of monetary resources, and her support networks across the country. These would all be important in terms of finding gainful employment and supporting herself and the child. In general, we note that the major metropolises (Delhi, Mumbai, Kolkatta) are generally more liberal in attitude.

107. The Tribunal has considered whether, in all of the circumstances the applicant is reasonably able to relocate within India to a region where, objectively, there is no appreciable risk of the occurrence of the persecution.

108. In *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437, Black CJ observed that the focus of the Convention is not upon the protection that the country of nationality might be able to provide in particular regions, but upon a more general notion of protection by the whole of the country. At 441, he considered that the reason for this was that:

If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.

109. In *Randhawa*, Black CJ held that given the humanitarian aims of the Convention, the question to be asked is not merely whether an applicant could relocate to another area, but whether he or she could “reasonably be expected to do so”. His Honour stated (at 442):

... a person’s fear of persecution in relation to that country [of nationality] will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person.

Justice Beaumont agreed that relocation must be a reasonable option, stating (at 451):

... that is to say, if relocation is, in the particular circumstances, an unreasonable option, it should not be taken into account as an answer to a claim of persecution.

110. If it is not reasonable for a person who has a well founded fear in part of a country to relocate to another part, then the person’s fear of persecution in relation to the country as a whole is well founded (*Randhawa*, per Black CJ at 443). Conversely,

if it is reasonable for the applicant to relocate to another part of the country then that applicant's fear is not well-founded.

111. What is reasonable will depend on the circumstances in the individual case. It may often be necessary to have regard to a broad range of issues in determining whether an applicant has genuine access to meaningful protection in their country of origin.

112. The Tribunal has carefully considered the situation for the applicant in India both now and in the foreseeable future. The Tribunal finds that the applicant could safely live in India by relocating to another area within India for the reasons outlined below.

113. The Tribunal has considered the evidence of the applicant and the witness at hearing that it would not be safe for the applicant to live as a single woman in India; that it would be difficult for her to obtain employment away from her home town and because nursing is a highly competitive and scare job market; and because she has limited savings or financial resources. However the Tribunal gives significant weight to the applicant's circumstances in India in the recent past during which she was able to secure consecutive periods of employment in three different hospitals, leaving each employer with excellent references, as well as to the fact that she has been employed in Australia. These factors indicate that applicant has not had difficulty in finding employment in different locations in India in the past. The Tribunal also gives significant weight to the fact that the applicant has lived away from her family home at the hospitals where she worked for a number of years before her marriage when she was a single woman, and also subsequent to her marriage in 2008.

114. The Tribunal finds that the applicant is [in her 30's] and is estranged from her husband. Given that the applicant is of a mature age and has in the past lived separately from her family, it would not be unreasonable for her to live away from her family home in the future. The Tribunal notes in relation to this point that if the applicant were to remain in Australia she would also be living away from her family, other than her sister who is temporarily resident in Australia at the time of this decision.

115. The Tribunal has noted country information in respect to the difficulties faced by single women in India, including the observation of the UK Home Office in July 2004 (set out above) that it is still difficult for woman to live on their own in India, and that the ability of women to access help and assistance is affected by factors including location, literacy level, and whether or not they have children. However the Tribunal is satisfied that the applicant has the skills and experience to be able to be economically viable in another area of India such as Mumbai or Delhi or another large city of India, where attitudes are generally more liberal, and to relocate successfully.

116. The applicant holds a Diploma in General Nursing and Midwifery, and was a registered nurse with the Punjab Nurses Registration Council prior to leaving India. The applicant has worked in the past in India, including work as a Staff Nurse at [Hospital 1] between October 2005 and April 2006; as an apprentice and then as a Staff Nurse at [Hospital 3] May 2006 and December 2006; and as a Staff Nurse in the Surgery Ward at [Hospital 2] between January 2007 and April 2008. Significantly, and according to her own evidence, the applicant also lived at, or attached to, the hospitals where she was employed throughout her years of employment. She continued to live at [Hospital 2] after she married her husband in early 2008 and until her departure for Australia. The applicant has excellent employment references from the hospitals in which she worked in India. The applicant has been employed in an aged care nursing home in Australia, and has drawn a salary from that employment. The applicant is

highly educated and language is no barrier to relocation. According to her evidence the applicant speaks English, Punjabi and Hindi.

117. The applicant does not have any children, and she has been working in Australia. Although she may not have significant financial resources, the Tribunal considers that the applicant will have saved some money while working in Australia, and has the qualifications and experience to enable her to readily find employment, and associated accommodation, as she has in the past as a nursing professional in India.

118. As the Tribunal has found that the harm feared by the applicant is from non-State actors, being her husband and his family, the Tribunal finds that such difficulties are confined to the area where she previously lived and she can avoid those difficulties by living elsewhere. On the information she has provided regarding her background and circumstances, the Tribunal is satisfied that relocation for the applicant is reasonable and that she can avoid the harm she fears by relocating within India. The Tribunal therefore finds that it would be reasonable for the applicant to relocate to a region in India away from her home town and village. Accordingly the Tribunal finds that the applicant would be able to safely relocate to one of these areas upon her return to India and that it would be reasonable for her to do so in the circumstances.

119. As the Tribunal has found that the applicant would be reasonably able to relocate to another area of India, the Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution in relation to India as a whole.

CONCLUSIONS

120. 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

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