

DECISION RECORD

RRT CASE NUMBER: 1005461

DIAC REFERENCE: CLF2010/22983

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Megan Deane

DATE: 8 December 2010

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 (the delegate) to refuse to grant the applicant a Protection (Class XA) visa under [s.65](#) of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, arrived in Australia on [date deleted under [s.431\(2\)](#) under the *Migration Act 1958* as this information would identify the applicant] December 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2010. The delegate decided to refuse to grant the visa [in] June 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] July 2010 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.

CLAIMS AND EVIDENCE

6. The Tribunal has before it the Department's file relating to the applicant.
7. The applicant was represented in relation to the review by his registered migration agent.
8. The applicant lodged an application for a protection visa [in] February 2010. In the application, the applicant stated that he was Indian and Christian. The applicant gave his address in India in Mumbai and stated that prior to departing India he had been self-employed.

9. The applicant stated in the application that he had left India due to threats from the families of his three sisters and from his wife's ex-husband and that he could be killed by the people who were threatening him. The authorities could not and would not protect him because they were corrupt and would be bribed by the people who were threatening him.

10. The applicant's previous representative provided a written submission with the application which set out the basis of the applicant's claims:

[The applicant] instructs me as follows:

He was born in India in [year]. He is the only male child of his parents. He has three sisters and his father is now deceased. His mother is a housewife and is illiterate.

At the age of [age] he began working in his father's business, [Business A], as his father was paralysed and therefore the family depended on [the applicant] to earn income. He worked hard and earned enough income to pay for the weddings and dowries of his sisters.

Following the death of his father, [the applicant], as the only son, inherited the business as well as certain property and money. After this, his sisters' husbands began to harass him, saying that he should use this income to support them, and sign over the property to them.

[The applicant] was not willing to do this, because he had worked for many years to maintain the business and make it profitable, so that he believed that he had earned the right to the assets which his father had left to him. Furthermore, he needed a way of supporting himself, and had no educational qualifications or any other way of earning income. Therefore he refused to comply with the demands of his brothers-in-law. They became very angry at this, and began to threaten him with violence. Matters became worse after he married on [date] October 2009, because his brothers-in-law then realized that he was intending to start a family and use his assets to support his wife and family. The threats continued, and became more serious, and on the evening of [date] December 2009 he was attacked by one of his brothers-in-law with an iron bar, and seriously injured. He had to go to hospital as a result of this attack, and he still bears scars.

[The applicant]'s marriage caused a further problem inasmuch as his wife [Ms A] had previously been married to a certain [Mr A], whom she divorced on [date] August 2009, [Mr A], who remains in India, holds [the applicant] responsible for the breakdown of his marriage, and has also threatened [the applicant] with violence for this reason.

[Ms A] had come to Australia on a student visa in January 2008, and now holds a Bridging Visa in consequence of an application for a subclass 485 visa. [The applicant] therefore decided to apply for a visitor visa in order to escape India and to spend time with his wife. He arrived in Australia on [date] December 2009 and is living with [Ms A] in Melbourne. After arriving in Australia, [the applicant] sought spiritual help for the psychological distress he was suffering, and found this through the Church of Jesus Christ of LatterDay Saints. He and [Ms A] were baptized as Christians on [date] January 2010. Although [the applicant]'s conversion was genuine and not done in order to strengthen his claims to refugee status (see enclosed letter from [Mr B]), he believes that his conversion to Christianity will further anger his brothers-in-law, and he also points to evidence of persecution of Christians in India (see enclosed documents).

[The applicant] believes that if he returns to India, he will be tracked down wherever he goes by his brothers-in-law, who will hire criminals to kill him. He states that the police in India are extremely corrupt and will easily be bribed by his brothers-in-law, and for this reason there is no possibility of relying on them to provide him with protection.

The relevant grounds of the Refugees Convention in the present case are

- (i) Membership of a particular social group (namely, elder sons or only sons, who traditionally, in India, bear responsibility for providing for other family members);
- (ii) Religion (Christianity).

11. The representative provided further documents with the application which included:
- A medical certificate from [date] December 2009 which indicates that the applicant had been assaulted by his brother in law at 10:30 pm on [date] December 2009;
 - The applicant's marriage certificate;
 - The applicant's wife's ([Ms A]'s) divorce certificate;
 - A letter from [Mr B], [location], the Church of Jesus Christ of Latter-Day Saints which read:

Re: [The Applicant] & [Ms A]

It has been brought to my attention that [the applicant and Ms A] are applying for visa extensions or for some form of permanent residency in Australia. One reason for this relates to their recent conversion to Christianity, and the personal danger they would face upon returning to India from family and the more extreme elements of their former Hindu faith. For the purposes of their application I can confirm that both [the applicant and Ms A] are baptised & confirmed members of the Church of Jesus Christ of Latter-Day Saints and therefore would be considered Christian. They attend my Ward [similar to a parish] and are active in their participation.

- Internet articles regarding attacks against Christians in 2008 in Orissa, in 2006 in Madhya Pradesh and in 2005 and 2006 in Maharashtra;
- Internet articles regarding protests by Christians in New Delhi in 2007;
- A page from HinduUnity.Org naming Sonia Gandhi as a Traitor to India and Hindus with pro-Christian/Muslim agendas and the Pope as one of the biggest enemies of Hinduism;
- A programme from the Baptism of the applicant and his wife [in] January 2010.

Interview with the delegate

12. The applicant and his wife ([Ms A]) attended an interview with the delegate [in] May 2010.

13. According to the recording of the interview, the applicant stated that he had been Hindu in India before he had converted to Christianity in Australia. The applicant confirmed that he had three sisters in India who were all married. In India he had a business in chemical trading and real estate.

14. Circumstances in India had become hopeless. He had been drinking a lot before he became a Christian. One day he met with missionaries who asked if he was having a party at home. He said no because he was stressed. He was invited to Church and saw that everyone was respected and loved in Brotherhood. He was attracted to them he saw there was a God and there was love in the world. He did not have any involvement with Christianity before he came to Australia. The missionaries took him in and showed him the truth of God.

15. He was from a strict Hindu family and if his family found out he was Christian they would kill him. Before, they were planning to kill him, but the family were activist Hindus and now he and his wife would definitely be killed.

16. The delegate asked what was causing the stress. The applicant stated that he had worked hard for his family but he discovered that his family was using him for the money. When he got married in September 2009 they threw him out. His family told them to move to Amritsar (the city that [Ms A] came from). [Ms A] returned to Australia in October.

17. The delegate asked what had happened to the applicant's business now that he was in Australia. The applicant stated that his brother in law had taken over the business now. He still had an apartment purchased in joint names with his sister but she was now holding that asset.

18. The applicant stated that his brother in law had beaten him over the head with an iron bar when he was asleep in December 2009. He was living with his family at the time but after the attack, he ran away. The brother-in-law was still living with the applicant's mother. [Ms A] had told the applicant to come to Australia. He took his business documents to an agent and borrowed money from friends and travelled to Australia. [In] December he was staying with friends and in hotels.

19. The applicant stated that his brothers in law would kill him or hire people to kill him if he returned to India. His family knew that he had converted to Christianity because he had told them over the telephone.

20. The applicant stated that he went to church every Sunday and provided copies of baptism certificates. The applicant stated that he could not relocate within India because he had converted from Hinduism. Hindu activists would find him anywhere. His brothers would give his photograph to them and they would publish his photograph in the newspaper and they would find him anywhere.

21. The applicant stated that [Ms A]'s husband was also pursuing them. They were divorced and her husband had remarried but he did not want [Ms A] to leave him. He had traced her to Mumbai. [Ms A] stated that her mother had already been attacked. The police were taking bribes from him. He wanted to keep both wives.

22. [Ms A] stated that the Hindu groups were so strong, particularly in Maharashtra, and the politicians and authorities could not stand against them.

23. The applicant provided a USB stick with clips of attacks on Christians and an article in relation to attacks on Christians in Orissa which the Tribunal has viewed.

24. [In] June 2010 the delegate decided to refuse the protection visa application.

Application to the Tribunal

25. The applicant lodged an application for review of the delegate's decision [in] July 2010. The Tribunal invited the applicant to attend a hearing which was scheduled [in] September 2010. The applicant's new representative advised that she had recently taken on the case and requested a postponement. The hearing was postponed to [date deleted: [s.431\(2\)](#)] September 2010.

26. Prior to the hearing, the representative provided further submissions which set out the applicant's background:

The Review Applicant was born in Mumbai, India on [date] as the only son of his parents. The Review Applicant has three older sisters. His mother and sisters still live in the family home Mumbai, and his father is deceased.

When the Review Applicant was [age], his father suffered from a psychological condition, which made him unpredictable, unreliable and sometimes debilitated; and he was therefore unable to continue to run the family business, [Business A], which had been owned by the Applicant's father's family for generations. The Review Applicant was therefore required to discard his secondary school studies, and began running the family business in order to provide an income for his family in the absence of his father. The Review Applicant was required to take on this role in accordance with Indian social, cultural and legal customs which require the eldest son within the family unit to assume responsibility for the financial and emotional support of other family members. Due to his father's unstable mental state, the Applicant was required to salvage the business from debt and other ineffective business

practices which, due to his illness, his father had accumulated.

In 1998, the Applicant's father suffered [medical condition]. He then became physically and mentally incapacitated, and was put in intensive care in hospital. The Review Applicant's father passed away in August 2000 after spending the last 6 months of his life in intensive care. During this time, the Review Applicant was responsible for continuing to run the business as well as visit his father in hospital to deliver medications and other necessities to him.

The Applicant ran the family business and acted as the sole provider to the family unit for 11 years from 1992 to 2003. During this time, he was required to work very long hours, and not only support the living and household expenses of the family, but also earn enough income to finance the dowries and weddings of his three older sisters.

Following the death of his father in 2000, the Review Applicant began to suffer further harassment at the hands of his brothers in law and sisters, who were very insistent that he should not only use his income to support them and their families, but also transfer to them the business and property left to the Review Applicant by his father. The business and property were left to the Review Applicant by his father as the sole male heir in the family, and in line with the Hindu legal principle of 'Karthā', which is the traditional Hindu principle that the most senior male in the family (being the Review Applicant after the death of his father) has the sole legal right to manage the business, and has unquestioned authority in relation to all company decisions. (<http://www.articleinput.com/e/a/title/Legal-requirements-for-family-businesses-in-India/>)

The Review Applicant is married to [Ms A], an Indian citizen who is currently on a Bridging Visa A associated with a 485 Visa. [Ms A], had previously been married to [Mr A]. This marriage ended in divorce, and in fact [Ms A] separated from [Mr A] shortly after arriving in Australia. He travelled with her [as] a student visa dependent. She notified DIAC of their separation shortly thereafter. My understanding is this marriage was not a happy one, and [Mr A] has also remarried. [Ms A]'s has overcome much adversity in her life, including the death of her sister (who was burnt to death by her sister's husband), to successfully complete her studies in Australia. It would be fair to say, that the Review Applicant's family did not welcome her to the family, particularly because she had been previously married who was also Sikh.

Applicant's Visa History

The Review Applicant arrived in Australia on [date] December 2009 as the holder of a Subclass 676 Visitor Visa, which was granted in New Delhi on [date] December 2009. After arriving in Australia in December 2009, the Review Applicant and his wife converted to the Christian faith. More information in relation to their conversion is detailed below.

The Review Applicant lodged a Protection Visa Application on [date] February 2010. This application was refused on [date] June 2010 on the basis that while the decision maker felt that the Review Applicant did have a well founded fear of persecution, this persecution was not for one of the reasons set out in the Convention, and therefore the Review Applicant was not a person to whom Australia owes protection under the Convention.

On [date] July 2010 the Applicant lodged an appeal to the Refugee Review Tribunal ('RRT'). The Review Applicant's wife has lodged a 485 visa application on the basis of her own qualifications and skills, and although disclosed in her application, the Review Applicant was not able to be actually included on her application. Indeed, the Review Applicant travelled to Australia and lodged the protection visa application owing to his genuine fear of returning to India and suffering further persecution.

...

Applicant's claims of persecution on Convention Grounds

The Applicant is unable or owing to such fear unwilling, to return to India on the basis that he

has a well founded fear of being persecuted as a result of:

- His religious beliefs; and
 - His membership of a particular social group, being eldest male children in Indian families.
- [The representative outlined the psychological state of the applicant and requested that it be taken into account at the hearing]

Review Applicant's membership of a social group as the eldest male in a traditional Indian family

...

The Review Applicant noted the following points to the decision maker in relation to his role in his family as the eldest son:

- His sisters and brothers started pressuring him to turn over the business to them
- His brother in law attacked him with an iron bar and tried to kill him, at which point he fled the family home
- He and his wife were initially welcomed into the family home, but were then beaten and driven out by his brothers in law

...

Eldest Male Children in India as a Particular Social Group

The Review Applicant, as the only (and therefore eldest) male child in his family unit, is a member of the particular social group of eldest male children in India; and it is his membership of this social group which has caused him harm in India, and continues to place him at risk of harm if he were to return.

The Procedures Advice Manual (PAMS) in relation to the interpretation of [s 91S](#) of the Act, notes that whilst the fear of persecution must be for a convention related reason, the facts and circumstances of the individual circumstances of the applicant in question are paramount. In addition, the UNHCR guidelines in relation to assessing membership of a social group in determining refugee status note that this ground should be assessed in line with the object and the purpose of the Convention; and therefore, social group cannot be defined exclusively by the fact that it is targeted by persecution. (UNHCR Membership of Social Group page 2). Therefore, the fact that not all eldest male children in India have suffered the same persecution of the Review Applicant does not prevent him from having a well founded fear of harm based on his membership of this social group.

As a social group, there are united common elements which distinguish eldest male children in India from other groups in society. This social group operates within the social context of Indian families, and especially within the Hindu culture in which the Review Applicant was raised. These characteristics are therefore not based on a shared fear of persecution, and instead have their roots in the very foundations of the legal, social and economic framework of Indian society. I therefore submit that eldest male children in India are a particular social group under the test by the High Court in *Applicant S v MIMA* [\[2004\] HCA 25 \(Applicant S case\)](#)

The test summarised by McHugh J in Applicant S case summarised the issue as follows:

" 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. "

Clearly, based on the test outlined above in Applicant S case eldest male children in India is an identifiable group with a social presence in India, which sets them apart from other members of society given the role they play within the family unit and the expectations placed on them to look after their families and in relation to inheritance and community expectations. I note that numerous Tribunal decisions have found that particular social groups can exist which reflect the social and cultural beliefs and traditions of the society in question. For

example, in 1001105 [2010] RRTA 514, the Tribunal found that it was possible that a social group existed in Ghana which consisted of 'people who refuse to take on the role of king' (1001105[2010] RRTA 514 (24 June 2010) at 45), as this reflected the importance of the role of king within the particular society, and the social expectations of people who are in this position.

Social and legal aspects of the role of eldest sons in India

Indian society (and particularly in Hindu society, to which the Review Applicant's family belongs) is centred around the concept of a large, interdependent family unit; and the hierarchical structures within the family unit are reflected in the broader society. The caste system which existed in India has resonated within contemporary Indian society, and hierarchical structures are crucial to the way society functions, as well as the family unit. The family unit is seen as the centre of life in Hindu society, and all business relationships, social relationships and cultural identity is formed from the place of the family within society and the corresponding roles which family members perform.

The status of eldest males in Indian families, and their specific responsibilities to the family in this role has a solid legal foundation. As noted above, the Hindu principle of Kartha enshrines this role, stipulating that eldest sons are eligible to determine all important business decisions in relation to a family business once they are of a certain age, and this cements their place in the family hierarchy. Males of the family have traditionally controlled key family resources, as under Hindu law women did not inherit real estate or other family property, and were therefore reliant on their kin for support. (<http://asiasociety.org/countries-history/traditions/indian-society-and-ways-living>) Although other contemporary laws have superseded this traditional law and women are certainly eligible to inherit property, the basis of this law, being that males are responsible for these family resources, is still an innate and immutable feature of traditional Hindu culture.

The Review Applicant's family is a strictly devout Hindu family, and abide by these traditional social and cultural practices. Family businesses are therefore usually run by the father of the family and the eldest male child, who are considered the heads of the family and are expected to run the business (<http://www.articleinput.com/e/a/title/Legal-requirements-for-family-businesses-in-India/>).

Indian families have a traditional joint family structure, under which several generations of the male line live under the one roof, with their wives moving into the joint family home to assist with caring for the parents of the male and other family members. This family structure is traditionally Hindu, which is the specific religious and cultural background of the Review Applicant.

These inherent rights, responsibilities and pressures therefore unite all eldest males in India onto whom responsibilities are forced by the incapacity of the male head of the family, and therefore these males are a cognisable group within society (*Applicant A & Anor v MIEA & Anor* [1997] HCA 4) owing to the social, cultural and legal importance of their role within the family.

Based on these legal rights and obligations, there is therefore an inherent social perception and expectation that the eldest son in an Indian family will assist in providing for his family. These social norms and expectations have continued despite urbanisation, secularisation and developing economic principles, and are therefore a pervasive force in Hindu society (Hietzman, J and Worden RL 'India – A Country Study, Washington – GPO for the Library of Congress, 1995 as at <http://countrystudies.us/india/83.htm>)

Eldest sons are expected to bring their family to live in the family home once they marry, and they continue to own the property. In the Review Applicant's situation, the incapacity of his father in running the business and the household meant that this task fell to the Review Applicant by virtue of his status as the eldest male child. As demonstrated very clearly in

relation to the Review Applicant's situation specifically, these responsibilities therefore inform the social condition and family relationships of eldest males in India, as it becomes their specific role within the family and within society to provide for all members of the family, regardless of their own condition or aspirations.

Therefore, despite the fact that eldest male sons in India are also entitled to certain rights as a result of their status, it is the corresponding obligations which lead to discrimination and persecution being perpetrated against them, and in particular against the Review Applicant in this case.

The obligations which meant the Review Applicant was required to leave school and run the family business at [age] therefore apply generally to all eldest male children in India, as is the expectation that the Review Applicant will financially support his family and provide for his mother and three sisters to facilitate the fulfilment of their social roles. In the case of his sisters, this involved financing their weddings and providing their dowries. The family structure (and the role of the eldest child in the family in such circumstances) therefore underpins social, cultural and business principles in Hindu society.

...

Inability of the State to protect the Review Applicant as a member of a particular social group

The fact that the Review Applicant has a well-founded fear of persecution from his family based on his status as the eldest son in the family (in his specific circumstances) is recognised as a source of persecution, given that private groups are recognised under the Convention (UNHCR Membership guidelines page 5). The authorities in Mumbai, and in India generally, are unable to offer effective protection to the Review Applicant in India for a Convention reason.

Having established that the Review Applicant belongs to this specific social group, I note that the decision maker did not question the fact that the Review Applicant had a well founded fear of persecution based on his membership of this particular social group. I submit that he has clearly suffered serious harm as a result of his membership of this social group, and his status as the eldest male in the family with the responsibility to provide financial support to the rest of his family is a significant part of the reason for the serious harm that he has suffered at the hands of his family, and is likely to continue to suffer.

Harm suffered in the past

The Review Applicant has certainly suffered serious harm as the result of his place as the eldest male child of his family. It is directly as a result of his membership of this social group that he has suffered such severe harm at the hands of his family members, as it is on this basis that he has inherited the business and ensuing responsibilities, as well as his responsibilities to the welfare of his mother, sisters and their families. It is these characteristics that led the Review Applicant's responsibilities and his persecution by his family and extended family members.

The ongoing physical and emotional harassment of and violence towards the Review Applicant is extraordinary, and has clearly significantly contributed to his current psychological condition. As detailed in the report from [Dr A], the Review Applicant has advised her independently of the DIAC and the Tribunal of instances of serious harm and violence he has suffered at the hands of his family members, and because of his role as the financial provider for his family. I therefore request that the clear effect of this harassment and violence is taken into account.

Since the marriage of his sisters, the Review Applicant has suffered this treatment predominantly at the hands of his brothers in law and other extended family members. The basis of their attacks on him (which have spanned more than 10 years to date) is the fact that the Review Applicant has the responsibility for running the family business and providing for

the family, and this prevents the brothers in law from deriving more financial benefit from the business than the Review Applicant provides to them. The Review Applicant has been physically assaulted by his brothers in law countless times, including while he has been sleeping. In addition, his brothers in law have also organised to have him attacked by people they have hired specifically for this purpose. The Applicant was stabbed by an unknown person on his way to work one day, and still carries the scars from this attack.

After the Review Applicant's marriage to his wife in 2008, the couple were initially welcomed back to the family home; however, the Review Applicant and his wife were subsequently attacked (both verbally and physically) by his brothers in law, and their luggage was thrown out of the house. It was at this point that the Review Applicant fled his family home, and he and his wife lived out of hotels and with some friends until his wife had to return to Australia. The Review Applicant has therefore suffered significant persecution at the hands of his family; and this persecution, although perpetrated by a private group (being his family unit and other individuals organised by the family unit) is nevertheless because of the fact that he is the eldest son in his family with the corresponding rights and responsibilities detailed above.

Given the severity of the systematic and severe assault that the Review Applicant has been subjected to over a number of years, the Review Applicant advises that he genuinely believes that if he were to return to India he would be tracked down and murdered by his family.

Protection by Authorities for a Convention reason

The authorities are unable to protect the Review Applicant, as the pervasive nature of the social norms which distinguish eldest Indian males from society mean that the authorities are also likely to be of the view that his responsibilities to his family need to be met. In addition, the Review Applicant has not found protection from authorities from ill-treatment in the past, and it is therefore likely that further harassment would be met with the same lack of response. In addition, the Review Applicant's brothers in law are all members of the Bajrang Dal, which is an extremist Hindu group which operates across the country. As a group, the Bajrang Dal stand for upholding extremely traditional Hindu laws and traditions, and have been identified by a number of international human rights organisations as the key perpetrators of religious intolerance and violence in this area.

The Review Applicant is therefore at extreme risk of further persecution in India based on the beliefs and associations of his brothers in law. The perception that the Review Applicant has fled to Australia and abandoned all responsibilities to his family will have extreme repercussions amongst his family and this extremist group.

The continued instances of violence perpetrated by such extremist organisations are clearly not able to be controlled by the state. The obvious vendetta and extremist views held against him by his extended family members exacerbate the threat of harm to the Review Applicant specifically, and increase the likelihood that he will continue to suffer persecution based on his role as the eldest male in the family.

Although not explicitly a relevant consideration in determining whether a wellfounded fear of persecution for a Convention ground exists, I submit that the Review Applicant's fragile state of mind is taken into account in considering whether he has a well-founded fear of persecution based on his membership of the social group. The suicidal tendencies of the Review Applicant are clearly a matter of grave concern for his physical and mental health, and it is very likely that if he were forced to return to India the fear he has for the actions of his family will exacerbate his mental condition.

Relocation

This is addressed in detail below.

2. Persecution on the basis of the Review Applicant's Christian religious beliefs

The decision maker was satisfied that the Review Applicant converted to Christianity upon

arriving in Australia, and there is therefore no issue of fact as to the Review Applicant's conversion and religious beliefs. The Review Applicant has been baptised as a Christian with the Church of Latter Day Saints, and attends worship every Sunday in [location], which is a 1.5 hour drive from the couple's home in [Location A], Victoria. The veracity of the Review Applicant's Christian views are therefore not a question of fact, and the decision maker accepted that his conversion is genuine.

Similarly, the decision maker also accepted that the harm feared by the Review Applicant is serious harm and systematic and discriminatory conduct for the purposes of [s 91 R\(1\) and \(2\)](#) of the [Migration Act 1958](#).

The issue for consideration is therefore whether the Review Applicant's fear that he will suffer persecution in India as a Christian is well founded.

...

Separate issues of well-founded fear and relocation

In coming to the conclusion that the Review Applicant does not have a well-founded fear of persecution based on his religious beliefs, I submit that the decision maker has considered irrelevant factors on this exact point, namely those in relation to relocation. Although relocation is a consideration to take into account in determining whether the applicant is a person to whom Australia owes protection under the Convention, the decision maker erred in finding that the fact the Review Applicant could relocate to another state in India was determinative of the issue of whether he has a well-founded fear of persecution.

The decision maker should have made explicit considerations in his decision as to whether there is a well-founded fear of persecution of Christians, as well as converts to Christianity, in India.

Failure of the decision maker to appropriately consider whether the Review Applicant has a well-founded fear of persecution on the basis of his religious beliefs

The Review Applicant submitted with his application a number of articles in relation to the documented instances of persecution against Christians in India; however, these articles do not appear to have been accorded any weight by the decision maker, who has simply quote the International Report on Religious Freedoms in making his determination. Similarly, it is unclear from the decision record as to whether the decision maker accepted that Christians do suffer persecution in India as a group, as he did not appear to consider this point at all. The decision maker appears to therefore have made his determination based on the relocation issue rather than assessing whether the Review Applicant has a well-founded fear of persecution based on his conversion to Christianity and his religious beliefs.

As the articles were submitted with the application, the decision maker should have had regard to this information under the requirements of the [Migration Act](#) (1958) and line with general procedural fairness principles. The articles submitted by the Review Applicant cover in detail instances of violence towards Christians for the period 2001 to date, demonstrating the consistent violence that has occurred towards Christians as well as anti-Christian sentiment which exists from extremist Hindu organisations.

Conversion of the Review Applicant in Australia

The decision maker (based on his discussion in the interview with the Review Applicant and the decision record) appears to be satisfied that the conversion undertaken by the Review Applicant and his wife to Christianity is genuine, and did not raise any issues in relation to the fact that the Review Applicant converted to Christianity after arriving in Australia.

Despite the silence of the decision maker on this issue, I wish to reiterate the circumstances in which the Review Applicant came to be converted to Christianity, which demonstrate the genuine nature of his conversion and why he chose to convert upon arriving in Australia.

As noted above, the Review Applicant came to Australia in December 2009 as the holder of a visitor visa. Having fled the violent situation with his family in India, the Review Applicant

was very depressed, and began to use alcohol as a means of coping with his mental anguish. The report from [Dr A] details the serious mental condition of the Review Applicant at this time. The Review Applicant was approached by a representative of the Church of Latter Day Saints, and found comfort in their approach and their teachings which led him to ultimately convert to Christianity.

The conversion of the Review Applicant and his wife is therefore genuine, especially considering his fragile mental state and his disillusionment with the traditional Hindu practices of his family, particularly the extremist views of his brother in law who have subjected him to systematic physical and mental abuse for over 6 years.

Persecution of Christians in Maharashtra

Although the decision maker did not make any specific findings in relation to the issue of whether Christians are persecuted in India, the decision record indicates that he had regard to the US Department of State 2009 report in International Religious Freedom ('the Report'), which is the most current report in relation to this issue.

As noted in the decision record, the Report notes that Christians in India do face physical mistreatment, harassment and other forms of serious harm, particularly in states where the Bharatiya Janata Party (BJP) forms part of the state government.

The decision maker therefore appears to accept that Christians do suffer persecution in the majority of Indian states. In fact, the Report states that there were numerous reports of violence against Christians in Maharashtra (International Report on Religious Freedoms), the state which the Review Applicant is from. The Review Applicant's state is therefore the site for significant violence against Christians. In addition to this report, the persecution suffered by Christians in India has been very well documented by a number of Christian groups, as well as other independent sources. I refer you to the excerpt noted by the decision maker in the decision record for a list of instances of violence which have occurred against Christians in India as provided by the Report, as well as the articles provided by the Review Applicant in support of his visa application.

A Human Rights Watch report on attacks against Christians in India published in 1999 describes three major Hindu organisations which are "most responsible for violence against Christians", which demonstrates the tension which exists between strict (and extremist) Hindu organisations and Christians living in India. These organisations are the Rashtriya Swayamsevak Sangh (RSS), the Vishwa Hindu Parishad (VHP), and the Bajrang Dal (BD). Shiv Sena has also been implicated in the activities carried out by these groups, particularly in Maharashtra. A former RSS member is quoted in the report as likening the RSS to the ruling political party, the Bharatiya Janata Party (BJP): "There is no difference between the BJP and RSS. BJP is the body. RSS is the soul, and the Bajrang Dal is the hands for beating." (Human Rights Watch 1999, *India Politics by Other means: Attacks Against Christians in India*, October, Vol 11, No 6 (C), Section III.)

The RSS was founded in the city of Nagpur in 1925 by Keshav Baliram Hedgewar with the mission of creating a Hindu state. Since its foundation, it has propagated a militant form of Hindu nationalism as the sole basis for national identity in India. Western thought and civilization are perceived as enemies of Hindu culture. Religions such as Islam and Christianity are depicted as alien to India, as they are the religions of foreign invaders-the Mughals and the British.

The Bajrang Dal is the militant youth wing of the VHP, and after being formed in 1984 has operated as an independent movement, although it is affiliated with the RSS. With its loose organizational structure, it initially operated under different names in different states; and therefore the Bajrang Dal faction that the Review Applicant's brothers in law are involved in in Mumbai is part of this broader movement. Its activists are believed to be involved in many acts of violence carried out by Hindutva organizations, including the recent spate of attacks

against the Christian community in India. (Human Rights Watch 1999, *India Politics by Other means: Attacks Against Christians in India*, October, Vol 11, No 6 (C), Section III.)

Founded by Bal Thackeray on June 19, 1966, the Shiv Sena is a Hindu party based in Maharashtra, the state in which the Review Applicant lives. The Shiv Sena became a major force in Indian politics during the 1980s, and is a close ally of the BJP and is part of the ruling central government coalition. An alliance of the Shiv Sena and the BJP, with the Sena as the dominant partner, has also been in power in the state government of Maharashtra since 1995. (Human Rights Watch 1999, *India Politics by Other means: Attacks Against Christians in India*, October, Vol 11, No 6 (C), Section III.) Leaders of both parties were implicated in the demolition of the Babri Masjid in Ayodhya and the ensuing violence in Bombay, the state capital.

The US Department of State Human Rights Report on India for 2008-2009 (being the most recent report available) notes that there continued to be significant instances of violence against Christians and other religious minorities in India. This report stated that there were 943 recorded cases of communal violence in 2008, in which 167 persons were killed and 2,354 were injured. These attacks occurred against several different communities, including Christian, Hindu, and Muslim. In 2008 Hindu-Christian communal riots resulted in the deaths of 44 persons and injuries to 82. (<http://www.state.gov/g/drl/rls/hrrpt/2009/sca/13087.htm>)

As the result of such instances, several human rights and religious freedom NGOs continued to express concern about sporadic anti-Christian violence in some states governed by the BJP and claimed some attackers had affiliations with the Hindu extremist group Rashtriya Swayamsevak Sangh. Hindu organizations frequently alleged that Christian missionaries forced or lured Hindus, particularly those of lower castes, to convert to Christianity. Such allegations fomented anti-Christian violence.

(<http://www.state.gov/g/drl/rls/hrrpt/2009/sca/13087.htm>) There is therefore concern from religious freedom organisations as to the continued presence of extremist organisations who are affiliated with the BJP, which clearly has an anti-Christian and anti-conversion agenda. The most recent Human Rights Watch World Report issued in January 2010 further confirms that there are continuing concerns for Christians living in India. Following the infamous and serious attacks on Christians in Orissa in 2008, mob attacks on churches and other Christian institutions, apparently instigated by Hindu extremist groups, have continued to occur in several states; and the authorities in India have therefore had 'little success in containing Hindu extremists'. (Human Rights Watch World Report 2009

<http://www.hrw.org/en/node/87394>)

There is therefore compelling evidence from a number of respected sources which states that the situation for Christians in India is still unsafe, and that persecution on the grounds of religion still occurs with little success of state intervention. As a Christian in India, the Review Applicant's fear of persecution is therefore well founded based on the continuing issues faced by Christians in this area. The Review Applicant's fear is also well founded based on the fact that he is from Maharashtra state, which has been listed as a state in which anti-Christian Hindu extremist groups are established.

Importance of the Review Applicant's specific situation in this context

The ideologies and impact of the Bajrang Dal on inflaming the tension between Hindu and Christians is therefore very significant; and the fact that the Review Applicant's brothers in law (who are clearly disposed towards violence and harming the Review Applicant for the reasons detailed above) are members of this group put him at an extreme risk of persecution on the basis of his conversion to Christianity. The Review Applicant's family are also generally very devout Hindus, and observe their religious and cultural beliefs very seriously. In addition to being from Maharashtra state, where violence against Christians has and continues to occur and anti-Christian sentiment has a voice in the Bajrang Dal, the extremist

Hindu beliefs of the Review Applicant's family (and extended family) put him at a great risk of persecution for his conversion to Christianity.

The Review Applicant's brothers in law are all extremist Hindus, and members of the Bajrangdal, which as noted above is one of the key sources of anti-Christian sentiment and violence present in India today. Therefore, not only is the Review Applicant facing persecution by his family in relation to his place within the family, his conversion to Christianity leaves him at a very high risk of persecution from his family and extended family members, owing to their extremist position and their connections within such violent groups.

Relocation as an option for the Review Applicant

I note that a relevant consideration in considering whether the Review Applicant is a refugee to whom Australia owes protection obligations under the Convention is whether the Review Applicant could return to his country of origin, but relocate himself to try and avoid further harm and persecution against him on both grounds claimed above.

The Review Applicant would almost certainly be exposed to a risk of being persecuted or other serious harm upon relocation, given the ongoing and very serious nature of his persecution by his extended family members. As detailed above, the Review Applicant's family members have hired people in the past to attack and track down the Review Applicant for the sole purpose of harming him, and therefore it is very likely that his family members will be willing and able to track down the Review Applicant.

The Review Applicant has advised that individuals are able to be located in India with reasonable ease through the use of contacts and bribes to locate people and obtain their contact details. The Review Applicant believes that his extended family members and the extremist groups they are affiliated with will be able to track him down through publishing his photograph in Hindu newspapers and by bribing acquaintances, friends and other people who know him to provide them with his contact information if he is forced to return to India. The strength of these networks therefore means that the Review Applicant will continue to have a well-founded fear of harm; and therefore for the Review Applicant relocating to a different area of India may not be more than a safe haven from his area of origin as required by the UNHCR guidelines.

The decision maker noted that it would be reasonable for the Review Applicant to move to a different area of India, particularly states which have a large majority of Christians. However, I submit that it would not be reasonable for the Review Applicant to relocate, and that he would not be able to lead a 'relatively normal life without facing undue hardship'. As noted above, the social structure of India is such that family ties provide a mechanism through which to secure accommodation, work and other necessary social benefits to ensure survival. Having been estranged from both their families, the Review Applicant and his wife would be returning to India with nothing but their fear of persecution on the basis of the Review Applicant's membership of a social group and their mutual religious beliefs. Therefore, the Review Applicant's existence in India would not be a meaningful alternative, especially in light of his very fragile mental state. The reality of the Review Applicant's situation is that relocating to another part of India will not only mean that he will suffer persecution on the Convention grounds addressed above, but also his fear will be exacerbated by his mental illness, and could lead to potentially tragic results.

I therefore submit that it is unreasonable for the Review Applicant to simply relocate to a different area of India based on the Review Applicant's specific mental state, and the past persecution he has suffered. In addition, given the estrangement that he has from his family it is highly unlikely that he will have access to the right connections and channels through which to obtain employment or other financial support. The Review Applicant is a very vulnerable individual owing to his history of persecution and his mental disorder, and there is a very strong possibility that the burden of returning to India and his fear will simply mean

that he is unable to provide for himself and his wife.

The decision maker found the Review Applicant to be resourceful and able to make a life for himself without undue hardship; however, I submit that the current severity of the Review Applicant's mental illness would render him unable to maintain any form of employment. In addition, the Review Applicant's experience in business has stemmed entirely from his contacts, connections and knowledge of business in Mumbai specifically, as he has had no formal education or training outside of practical knowledge. He would therefore not have the necessary qualifications or skills to compete in a different marketplace, which would severely limit his employment opportunities outside of Mumbai and where he suffered under persecution.

The UNHCR guidelines for relocation explicitly state that the specific circumstances of each case should be taken into account in determining whether the applicant in question can return to any part of their country of origin; and I submit that in light of the above, it is highly unlikely that relocation will mean that the Review Applicant will be safe from persecution from his family and extremist Hindu organisations. In addition, his current psychological state and his fear of returning to India also mean that relocation will not provide a meaningful alternative for the Review Applicant, who will live his life in constant fear of being tracked down by his family and their associates. Furthermore the decision of *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40 (30 August 2007) held that when considering the aspect of relocation the decision maker should consider whether it is reasonable or practicable to relocate to another part of the country depending on upon the particular circumstances of the Applicant and the impact upon the person of relocation. The attributes of the Applicant and his particular circumstances are such that makes relocation impossible and would by no means be safe for him to do so.

3. Review Applicant's mental illness as a ground for persecution if forced to return to India

If the Tribunal is of a view that the Review Applicant's well-founded fear of harm is not based on the Convention reasons listed above, I submit that the Tribunal take into account the Review Applicant's mental illness as a reason he may be the subject of persecution in India. It was not disputed by the decision maker that the Review Applicant has a wellfounded fear of harm from his family in India; and therefore I submit that he will suffer further persecution and harm as a result of his severe depression and posttraumatic stress disorder (PTSD). The Review Applicant's wife has lodged a 485 visa application in Australia, and is therefore not able to be granted bridging visas to travel back to India for more than 3 months at a time. The Review Applicant has no other connections in India that he wishes to contact (owing to the fact that he is concerned his family members and other Hindu extremists will track him down), and he will therefore be returning to a country with no connections and no means of obtaining support for his condition.

27. The representative provided supporting documents:
 - A certified copy of the applicant's Certificate of Ordination from the Aaronic Priesthood Ordination, confirming his baptism, and
 - A copy of interview notes for the applicant's interview with DIAC in relation to his protection visa claims.
28. The representative also provided a report from [Dr A], PhD MAPS, Counselling Co-ordinator with the [agency deleted: [s.431\(2\)](#)] dated [in] August 2010 which set out:

...

[The applicant], was referred by Red Cross to us for counselling in March 2010, as they were concerned for his mental health. An intake was completed by a member of my counselling team in March 2010, who was also quite concerned about his mental health. So I have been

having regular counselling sessions with him since [date] April 2010. Also, when I was on leave for family reasons in May 2010, a couple of other members of my counselling team had to care for [the applicant] and when he deteriorated, they had to involve the CATT, who needed to visit him and his wife daily where they were living, for a while when he was suicidal.

So mostly myself, but also other members of my counselling team, have had regular contact with [the applicant], at least weekly over nearly five months, with sessions from half an hour to one and a half hours each time. Also, due to concern for his mental state, other members of other [agency] teams, including health, casework and employment, have spent much extra time with [the applicant] to offer appropriate supports to him.

Background

[The applicant] and his wife [Ms A], describe being rejected by their respective extremist Hindu families when they decided to get married, even though they did not have any money to pay for a dowry, plus other complications. Since, their families refused to support them, they found themselves homeless and drifting with no support from their own Hindu communities. Meanwhile, a Mormon missionary, offered them some support and a caring community who looked after them. So they converted to Christianity, which then caused their family to become threatening in their behaviours. [The applicant] reports being attacked and beaten by his brothers-in-law in India, making him very fearful of returning.

So [the applicant] and his wife, are extremely fearful of returning to India. They believe they will be targeted by the family wherever they go in India. And they believe that their conspicuous faces and names will be easily tracked down no matter where they go in India. They have documentation of reports of extreme actions including torture and death, towards non-conformists to extreme Hinduism, and especially towards those who convert to another religion. Also, they have had personal death threats from family members. So he appears to have a well grounded fear of persecution if he was returned to his country of India

Psychological Assessment

[The applicant] is often extremely distressed about how he and his wife have been treated in the past by family, and even more distressed about the possibility of returning to India, where he believes he and his wife will certainly be killed.

[The applicant] has become very emotionally disturbed, and show many symptoms of Post-Traumatic Stress Disorder including:

- Restless and disturbed sleep with nightmares
- Flashbacks and night terrors due to past persecution
- Has had suicidal thoughts and ideation, and often feels life is hopeless
- Extremely anxious with constant fears of more persecution in the future
- Becomes distressed and restless when talking about his situation
- Becomes very distressed thinking about corruption and persecution in India
- Can obsessively watch horrific *You Tube* scenes of persecution in India
- Can become agitated and angry with others about his situation
- Socially isolated with avoidance of mixing with others
- Has difficulty talking with others at times
- Can become very quiet, difficult to engage and almost catatonic
- Has used excessive amounts of alcohol to block out intrusive thoughts in the past
- Often quite child-like and needing constant reassurance from his wife & others
- Has trouble concentrating on what is happening around him
- Has had hair loss due to stress
- Has times of not being able to eat due to extreme anxiety

[The applicant]'s condition has deteriorated over the months he has been trying to seek asylum here in Australia. However, he has had times when he has tried his best to give something back to others, by using his gourmet cooking skills to prepared delicious food for his wife and also for others, when he has volunteered in our community kitchen. Also, he has sometimes been able to do physical work with one of our staff for a day, when asked to help. However, he is often too stressed to do any much at all.

Thankfully, [the applicant] does have some support from his wife. However, she has now become extremely distressed herself (including some suicidal ideation), and has a very painful work injury affecting her back and leg. Meanwhile, they both have some support from the Mormon Church community, who have tried to give some emotional and minimal financial support at times.

However, I am still extremely concerned for the mental health of my client [the applicant], as he is still often in a fragile state, and so is his wife. They both have seen and experienced too much persecution (including his wife's sister being burnt to death), and both have well-grounded fears for their own safety and a genuine fear of persecution if they were returned to their home country of India.

Meanwhile, if they were granted permission to stay in our country, I believe they would be able to become respectful citizens who could contribute to our society, especially with their great culinary skills!

29. [In] September 2010 the Tribunal received a fax from the representative which noted that the applicant had a collection of You-Tube videos showing evidence of persecution to Christians and requesting that the Tribunal also refer to the previous articles submitted with the DIAC files in relation to the persecution of Christians. The representative submitted that the applicant's wife [Ms A] and the applicant, and [Ms A]'s mother had been threatened by [Ms A]'s ex-husband. The applicant was currently taking [medication deleted: [s.431\(2\)](#)]. He had been under the care of [doctor deleted: [s.431\(2\)](#)] who first saw him after he was admitted to the [hospital deleted: [s.431\(2\)](#)] with suicidality. He had been continuing with his medication and had been advised by [doctor deleted: [s.431\(2\)](#)] to find a GP in [Location A] to keep up his ongoing care. The applicant was concerned that if required to return to India, his family and-or authorities would use his photo and put it out in the various media to find him.

The Tribunal's hearing

30. The applicant attended a hearing [in] September 2010. [Ms A] also attended the hearing and gave evidence. The applicant was represented at the hearing by a registered migration agent. The applicant was assisted by an interpreter in the Hindi language.

31. In response to the Tribunal's questions, the applicant stated that he arrived in Australia [in] December 2009. He and [Ms A] were married in October 2009. They met in August 2008 in Bombay. They met on the street when she was crying. The applicant outlined the circumstances in which they met. The applicant stated that [Ms A] was formerly Hindu. She then married a Sikh but they were now both Christian.

32. In relation to his family in India, the applicant stated that his mother, his three sisters and their husbands remained in India. His father died in August 2000. His father did not leave a will.

33. His mother lived in the family home in India with his sister [name deleted: [s.431\(2\)](#)] and her husband. His sister [name deleted: [s.431\(2\)](#)] was living in [location deleted: [s.431\(2\)](#)] Mumbai and his other sister [name deleted: [s.431\(2\)](#)] was living in

[location deleted: [s.431\(2\)](#)], Mumbai. Sometimes they would come to stay for one week, sometimes they would return to their in-laws' house.

34. The family home ([address deleted: [s.431\(2\)](#)]) had been purchased in 1992. It was in all the family's names; his mother, the applicant and all the sisters.

35. In India, he had been living in different places, hiding, sometimes in hotels and lodges sometimes in religious hostels. He went into hiding when he and his wife were married [in] September 2009. Three days after the marriage, he and [Ms A] returned home and his sisters and brothers in law started beating him. The family put their suitcases out and pushed them out of the house. The family set some gangsters after them. They went to Amritsar to hide at [Ms A]'s mother's place for shelter but could not stay there because [Ms A]'s ex-husband created trouble and sent men there. They left and came to Delhi to stay with a relative who did not help. Then they returned to Mumbai and stayed with a friend. They arranged money so that [Ms A] could return to Australia and complete her studies. She returned to Australia in October. He hid in different places then returned to Mumbai. He returned to the house after 15 days after [Ms A]'s departure and stayed for two weeks to try to make peace but when he was asleep they tried to hit him with an iron bar. He returned to the house to pick up some documents when there was no one in the house. He took the documents then went to a travel agent and submitted his passport to book a ticket.

36. The applicant did not own any other property in India. The applicant stated that his father had property but the family forced the applicant to sign a blank form. He did not know what they did with it. The Tribunal noted that the applicant had provided papers for a farmhouse in [location] which was owned with [name deleted: [s.431\(2\)](#)] which was purchased in February 2009. The applicant stated that he did not know if it was still in his name. He had purchased the property with his sister as an investor. She told him that she had an allotment letter and she needed money to buy the house. They had agreed that he would keep his name on the title.

37. The applicant stated that his business in India had been in chemical trading and real estate. He had previously been involved in multiple businesses but the family used to take the money from his bag and pockets. He started in the business when his father was alive but did not run it. After some time his father's business (a country liquor bar) was not going well and stopped operating in 2002. He gave the money from the business to his family and he said he would pay them more little by little.

38. He did not know if [company deleted: [s.431\(2\)](#)] or any of the family businesses were still operating. He had no information, and was totally cut off.

39. The Tribunal noted the occupations which the applicant had listed in his protection visa application. The applicant stated that he had been running [Business A] because his father gave him the authority to run the business however his siblings forced him to shut down the business and give them the money. They wanted more money for their businesses. [Business B] was his own business. He was an employee at [Employer 1] and at [Employer 2]. He had a job at [Employer 3]. He had been operating [business deleted: [s.431\(2\)](#)] as a business for 4 or 5 years.

40. The Tribunal noted that this appeared to indicate that the applicant was not solely involved with running the family business. The applicant agreed.

41. The applicant stated that the visitor visa application had been completed by an agent. The applicant gave him the relevant information. He did not know what conditions were attached to the application.

42. He had applied to visit Australia twice before. He had wanted to come to Australia previously to visit [Ms A] but had not stated this reason in the visitor visa application because she was not divorced at the time.

43. The applicant stated that he left India because his family would find him wherever he goes. They wanted to find him so that he would not claim on the property in the future. He had also changed his religion and that would give them another chance. They needed an excuse to beat him and his conversion would give it to them. Before they were hiring people but now they can kill him for religious reasons.

44. The applicant stated that in 2003, when his sister was married and he was going to work, he was attacked with a knife used for slaughtering the goats. He was cut on the hand. They had hired someone who he did not know. After his marriage [Ms A] overheard their conversation that they had tried before and now they would try again.

45. He had gone to the police on the previous occasion, who said to bring the person who did it to them. They did some paperwork and told him they would look for his assailant but they did not look. He went back and they said that they did not know. They said there was no complaint. He believed that they had taken a bribe from the person who had tried to kill him to tear out the page which contained the complaint.

46. The applicant stated that he had the right to claim the property in future because it was his parents' property and according to the Hindu culture, the son is the owner of the property. The Tribunal asked why the property would be in joint names if it were his by right. The applicant stated that when they bought the property, the sisters were not married. After they were married the applicant wanted to remove their names from the property but they did not agree. If they were on the title, they were the owners and he had not disputed their ownership; but they should not beat him up. No one should be killed for the sake of property.

47. The applicant stated that the reason for the harassment was that he was removing their names from the title. If he stayed in the house, he would be the owner of the house because in the Hindu religion after the sister's marriage their names are struck off the property. The Tribunal noted that this was not the legal consequence of their marriage. The applicant agreed that it was not legal but it happened with mutual understanding. If the sisters did not agree, the case went to the court and he did not know if they would succeed.

48. The Tribunal noted that the applicant had provided a copy of a hospital report which stated that he was assaulted by his brother-in-law with a rod. The Tribunal asked if he had reported the attack to the police. The applicant stated that the attack had occurred in December 2009. He went back to get his belongings but he was sleeping in the night when his brother in law came and attacked him. He hit the applicant's hand. The applicant ran away. He went to the hospital and asked for the police but there was no one on duty and so he caught a train to a Sikh temple in Delhi.

49. He went to the police station and they said it was a family matter and he should go to court. But without money they would not even write a report.

50. The Tribunal asked what the applicant thought would happen to him if he returns to India. The applicant stated that people would take money to kill someone, even the police. First of all they would find him, they could give his photo to the newspapers. Then they would find an excuse to kill him. The Tribunal asked, if his relatives had already taken over the business and the assets, why they would now seek to harm him further. The applicant stated that his family still would be scared that he might appeal to the courts at any stage. The Tribunal noted that it appeared disproportionate to seek to have him killed to prevent him going to court. The applicant stated that they had to kill him so that he could not produce an heir for the property.

51. The Tribunal asked if he would go to the police if his life was in danger. The applicant stated that he could not go to the police because he did not have money.

52. The Tribunal asked if it would be reasonable for the applicant to relocate away from Mumbai to avoid his relatives. The applicant did not know how long he could hide. The Tribunal noted that India was a large place and wondered how easy it would be to find the applicant. The applicant stated that if there was a reward in the newspaper, they would find him and bring him home. He had also changed religion and no one would accept him. He was considered to be a low caste person. The Tribunal noted that there were millions of Christians in India. The applicant stated that most were born Christian and had not converted.

53. The applicant explained the background to his conversion. He stated that he had been drinking a lot when he came to Australia. He came out of the bottle shop and met two people who asked if he was having a party. He told them he was upset. They said that they wanted to talk to him in his home. He said that he could not talk to them without his wife. Then they took him to the church. They were not concerned with their money but they gave him and his wife a lot of respect. Before he went to the Hindu priests and did not get anything, they were making food and stealing his money and the Christians showed him a good path. Otherwise he was becoming a non-believer. They made him a human being. He stopped drinking and they showed him a path.

54. The Tribunal asked the applicant what it meant to be a Christian. He said that they spoke sense and they showed the way that God told them. He thought people needed religion and needed someone to show the way. Previously he had not known anything explaining the Bible. He and [Ms A] were baptised [in] January 2010 after attending church for one or two weeks before that. The Tribunal noted that this appeared to be a short time in which to convert. The applicant stated that a moment was sufficient to recognise a wise thing. He had not considered the ramifications of converting before he was baptised.

55. He had not considered how his family would react because everything was finished with the family. The Tribunal noted that he had been in Australia on a visitor visa. The applicant stated that he did not want to go back.

56. The applicant stated that he did not convert in order to strengthen his claims for a protection visa. He would continue to practise Christianity if he returned to India, even if he had to die.

57. The Tribunal asked what the applicant's ordination certificate entailed. The applicant stated that they had the power from God to give blessings to anyone. He was not yet a missionary, he was still practising.

58. The Tribunal noted that the applicant had stated that he had converted and no one would accept him. The applicant stated that the Hindu religion was important to his family. His eldest brother-in-law was a member of the Hindu VHP (World Hindu Organisation and Bajaram Dajat). One brother in law was a member and looked after the other brothers-in-law.

59. The applicant stated that he had not completely known about this before he left India. A friend had told him, but he did not know that the friend was also giving information about him to his family. He rang him after the baptism when he was preparing to go back to India. If people thought he made a mistake by changing religion he would make it again. If speaking truth is a sin he will speak the truth. The religion he believed in before tells lies; they ask for money and worship on little matters and frighten people. The priest was always asking for money. His new church

did not believe in those things and if someone was in trouble, they came in the middle of the night to help. They knew humanity.

60. The Tribunal asked what had happened with [Ms A]'s husband. The applicant stated that after the marriage they went to Amritsar. Someone conveyed a message that her husband wanted to meet. They met outside [location deleted: [s.431\(2\)](#),] along with 12 people with guns and said that he had to leave her or they would kill her. He wanted to kill him so that [Ms A] would be his second wife.

61. The Tribunal noted that the applicant had not mentioned 12 men with guns before and it appeared to be an important detail. The applicant stated that he did not want to involve his wife. The Tribunal noted that they had stated that [Ms A] was also afraid. The applicant stated that he had been told that they needed proof but he did not have any. The Tribunal noted that he also did not appear to have told his current representative that there were 12 men with guns. The applicant stated that he wanted to wait until he was talking to the decision maker.

62. The Tribunal asked how [Ms A]'s husband would find the applicant if he returned to India. The applicant stated that he could give [Ms A]'s photograph to someone. His boss also had friends in Australia.

63. The applicant provided photographs which he had kept in his bible of himself with other members of his church and letters to him from other members of the church.

64. [Ms A] also gave evidence. She stated that on the second or third day after they were married, while the applicant was in a deep sleep she overheard his brother in law who was drunk talking to his wife. He said that they had tried to kill the applicant many times and now that he was married, they would try to kill him again. The next day she told the applicant what his brother-in-law was planning and the applicant said he knew. He said he could not do anything against his brothers-in-law. They would stay and see what would happen and how his mother responded. Then all the sisters suggested that they go for a honeymoon. When they came back as soon as they came back they were beaten and kicked out of the house. They stayed with a friend for a few days to sort it out. They didn't have any money, just two suitcases. They went to a hotel then next day caught a train to Delhi then came back to Bombay. They arranged for her to return to Australia.

65. The Tribunal noted that at the interview with the delegate, [Ms A] had said something about politicians in Maharashtra not stopping Hindu fundamentalists, but the context was unclear. [Ms A] stated that in Mumbai, Shi Sena, Bajaram Dal and VJP Hindu extremists formed the main political parties. Both of the elder brothers-in-law were members of these organisations. They had tried to kill the applicant before and she did not doubt that they could kill him one way or another

66. In India the ruling party make their own rules. As the Hindu extremists in Mumbai were in power, they gave Christians a hard time. There were previously attacks on Muslims and the police did not take any action apart from what the politicians told them to do.

67. The Tribunal asked about [Ms A]'s claim to fear reprisals from her ex-husband. [Ms A] stated that she was threatened by her ex-husband's parents but there was still no justice.

68. She was married in 2006 and her husband had a criminal record. They were always fighting. His family forced her to come to Australia on a student visa although she already had good qualifications in India. He had a relationship with another woman with a [age deleted: [s.431\(2\)](#)] boy. She fought with him. She told her parents what had happened then her mother went to see her parents-in-law and they said they

did not know about it. Her parents-in-law did not telephone her. She wanted to separate from him. Her parents were already suffering because of her elder sister. She returned to India in August. Her parents discussed divorce with her parents-in-law. As soon as she returned, he made threatening calls to her. The police told her to change her number. She separated her visa and he stayed until July 2009.

69. Meanwhile her mother in law sent the police to harass her parents and the community started to ask questions. Her father became ill. In May 2009 she took her father to the hospital and her mother-in-law found out that she was in India. She went there to kill her but she left and she was already at the Delhi airport.

70. Her mother was beaten and spent one month in the hospital. When she found out, she applied for divorce in Australia. She was shocked by the attack on her mother and the police did not take a report.

71. The Tribunal asked why the family would seek to harm her now they were divorced. [Ms A] stated that they were afraid that she would ask for all the money she had spent on the marriage and they wanted revenge for the divorce. She had to bribe the registry of births deaths and marriages to get wedding photos to lodge a first information report against her mother-in-law. Her ex-husband could pay anyone to kill her.

72. The Tribunal asked how the applicant was involved in this situation. [Ms A] stated that first met him in Mumbai in 2008. [Ms A] stated that she was crying and the applicant helped her in Amritsar. When they found out that the applicant was helping her they sent 20 or 30 people to the market with guns. The Tribunal asked if [Ms A]'s ex-husband had ever met the applicant. [Ms A] stated she was no sure they might have met on the way to the police station or in the public place where they were with 20 or 30 people with guns.

73. The Tribunal put to the applicant that he had two previous unsuccessful visa applications and that his current visitor visa had a no further stay (8503) condition which might indicate that he needed to apply for a protection visa if he were to stay longer. The applicant stated that he had not thought about that, he just had to apply because he could not go back.

74. The Tribunal noted that the property appeared to be owned in joint names which might indicate that the applicant had not inherited all of the family's property. The applicant stated it was in all names. The Tribunal noted that this might undermine his claims that he inherited everything if the property were owned in joint names. The applicant replied that it was traditional that whoever looks after the property inherited it. The family had tried to usurp everything and so they had pushed him out. According to the cultural principles, the boy was the owner of all the properties. He was the only son. The siblings had taken everything forcefully by taking his signature. It was a property matter. They were trying one way or the other to kill him.

75. The Tribunal noted that their household also did not seem to be consistent with the representative's submissions that the line of male generations live in the same household and that in his house, the daughter's husbands appear to have moved into the home. The applicant stated that this was correct.

76. The Tribunal put to the applicant that the applicant's claims might appear to be a family dispute where he is claiming to be entitled to the assets and the daughters are demanding their share. The Tribunal noted that the applicant had stated that he was already fleeing from his brothers-in-law and he was subject to the no further stay condition, then he converted to Christianity. The applicant stated that he converted to Christianity because he did receive from the Church the affection he did not receive from his family. He arrived on a visitors visa and was ready to go back but decided to

save his own life. The Tribunal noted that this might indicate that his conversion was for the sole purpose of strengthening his claims for a protection visa. The applicant stated that this was not the case.

77. The Tribunal noted that the applicant did not appear to be claiming in his initial application that his brothers-in-law were Hindu extremists. The applicant stated that all his claims were in the representative's submissions. The Tribunal noted that the applicant had stated that one brother-in-law was a fundamentalist, but [Ms A] had said two. The applicant stated that if one becomes a member, the others were drawn in, they all get together. When the old people sit together the priests sit together they are all talking about the active members and they say that one brother should be active in those activities.

78. The Tribunal put to the applicant according to the most recent US Department of State, International Religious Freedom report, the Indian Constitution provides for freedom of religion and the national government generally respected religious freedom in practice. The vast majority of Indians of all religious groups live in peaceful co-existence however there were some organised communal attacks against minority religious groups. The country's democratic system, open society, independent legal institutions, vibrant civil society and freewheeling press all provided mechanisms to address violations of religious freedom when they occur.

79. The applicant stated that when there were riots, all the grievances came out. He had also read that all religions were living together but Sonia Gandhi had been targeted because she was Christian.

80. [Ms A] stated that there were so many religions but the two main religions were Hindu and Sikh. She had been a witness to the massacre at the Golden Temple at Amritsar in 1984 and was still scarred.

81. The Tribunal put to the applicant that, although there were attacks and violence against Christians in parts of India, according to the 2001 government census, of the 1.1 billion population 2.3 per cent were Christian so there were millions of Christians throughout the country. The information suggests there is freedom to practice religion in India and Christians often held large prayer meetings without violence or protests. The Tribunal noted that the AICC documented 73 attacks on Christians, excluding attacks in Karnataka and Orissa, and given that there are millions of Christians in the country, the Tribunal put to the applicant that this information did not suggest that all Christians faced a real chance of persecution in India, considering the numbers of Christians in India.

82. The applicant stated that Christians born as Christians could continue to practice, no one bothered them. However, if a Hindu converted it was a sin. If they sacrificed a newly born baby to please their god, they could kill a man.

83. The Tribunal noted that there were many religions living together in India and there was some friction, but on the whole there appeared to be a fairly peaceful co-existence of religion. The applicant stated that Sonia Gandhi had been threatened for being a Christian. The Tribunal noted that the website of the Hindu extremist group had named her among so many others that it did appear to be extreme. [Ms A] stated that Muslims and Christians were minorities in India and she had been present at Golden Temple in Amritsar in 1984.

84. The Tribunal noted that there were inconsistencies between the applicant's evidence and [Ms A]'s evidence, particularly in relation to the events in Amritsar. The applicant stated that he had difficulties with his memory and concentration due to his medication, but he had told the truth.

85. The Tribunal noted that it would be necessary to consider the applicant's credibility. The Tribunal would also have to consider what was the essential and significant reason for the harm feared; whether there was a real chance of persecution in the reasonably foreseeable future and whether the harm feared was for reasons of one of the grounds which is set out in the Convention.

86. The Tribunal and the representative discussed the particular social group "eldest male children in India", as set out in the findings and reasons section below.

87. The representative submitted that the applicant had been disclosed in [Ms A]'s subclass 485 application but was prevented by being a spouse without holding a student visa himself. He could still apply offshore for a subclass 485 visa and the protection visa was not a last resort option to live in Australia.

88. In response to the Tribunal's concerns that the applicant's claims had been amplified through the protection visa process, the representative stated that more detail had been added because they had sat down with the applicant for an extended time. He was not given that opportunity by his first agent and his interview with the delegate was short. The representative submitted that the applicant had not been well and the hearing had been long. He was becoming incoherent with his answers at the end of the hearing.

89. The representative requested further time in which to provide a supplementary submission, allowing for the applicant to travel home to [Location A] and then return to Melbourne, and allowing for school holidays. Further time was granted.

Submissions following the hearing

90. Following the hearing, the representative provided further submissions. The representative's submissions in relation to the hearing are discussed in the findings and reasons section below.

Particular social group

91. The representative made further submissions in relation to the particular social group of eldest males in traditional Indian families to be defined as a particular social group for the purposes of the Convention, and submitted that the broadness of the category did not prevent it from being classed as an identifiable social group for the purposes of the Convention. The representative submitted:

... The existence of eldest sons in traditional Hindu families as a social group on Convention grounds is therefore based on the powerful legal, social and cultural role which eldest sons in families have inhabited over time. Although the legal and political landscape in India has altered since the abolition of the caste system and other more rigours implementation of traditional Hindu law, the legacy of this law has left social expectations of eldest sons which translate to very powerful obligations and duties which must be met. ...

I further submit that, similar, the specific situation with the review applicant's family does not prevent the review applicant from claiming membership of the particular social group of eldest sons in a traditional Hindu family. As noted in the PAMS, it is well established that a particular family is capable of constituting a particular social group in and of itself; and therefore, although this is not the social group of which the review applicant is claiming to be a member, the ability of a family group to constitute a particular social group of itself

recognises the importance of the family unit in particular cultures, and the importance and impact that membership of a family can have in relation to a well-founded fear of persecution.

92. The representative also provided further submissions in relation to the obligations of eldest sons to provide financially for their family.

93. In relation to the structure of the review applicant's traditional Hindu family, the representative submitted:

I note that the Tribunal indicated at hearing that the fact the review applicant's youngest sister lives at home with their mother does not appear to accord with the traditional structure of the review applicant's family (and his role within the family). Firstly, I submit that the living arrangements of the review applicant's sister, are not of themselves, relevant to considering the social and cultural power of the responsibilities inherent to the review applicant as the eldest male in the family, as this unique role and his membership of this social group has clear characteristics apart from other members of his family and from society as a whole; and it is these characteristics which the Tribunal is required to assess.

The review applicant has advised that his youngest sister has chosen to live at home with her mother due to a number of factors. Firstly, his youngest sister and her husband have taken over the management of the lease of the premises held by the family as detailed above; and given the property is now in the name of the review applicant's mother, they require her permission and consultation in order to effectively manage the commercial premises for her in the absence of the review applicant. The review applicant's youngest sister and her husband live with his mother with the full permission of her husband's family, and as such, there is no specific impediment to this where both families are amenable to the situation. The review applicant's elder sister have both moved out of home in accordance with traditional Hindu living arrangements, and return to visit their mother regularly for 1-2 week visits accompanied by their husbands.

The traditional nature of the hierarchy of the review applicant's family is apparent through his responsibilities as duties as detailed above, and therefore, the fact that his sister lives at home rather than with her husband's family does not of itself undermine the review applicant's membership of the social group of eldest males in a traditional Hindu family.

94. In relation to the family home being in the joint names of the review applicant and his other family members, the representative submitted:

By way of clarification, the review applicant has advised that the family home, to the best of his knowledge, was held in the names of all members of his family (ie his mother and 3 sisters) following the purchase of the house in 1991. The review applicant's father purchased this house and placed it in the names of all members of the family in order to provide for them. The review applicant is not sure of the current status of the title of the house, given that he has not spoken to his family since he has been in Australia due to the highly volatile nature of the situation with his family.

As discussed at hearing, the review applicant did take steps to attempt to take his elder sisters' names from the title of the family home, since they were no longer living in the house; however, these plans fell through given the violence that he had suffered at the hands of his brothers in law, as well as the psychological abuse of his sisters. The review applicant therefore did not go through with this transfer as a means of self-preservation and owing to

his fear of persecution from his family. The review applicant could have legally affected this change by registering it with the court.

In any event however, I submit that the status of ownership of the family home is not central to the review applicant's claims to be a member of a cognisable social group. The traditional hierarchical structure of his family adhered to by himself and the other members of his family is clear, and therefore, while modernisation has meant that the women in his family are entitled to own property, his obligations and financial responsibilities which set him apart from his mother and sisters are owing to the fact he is the eldest son in the family and financially responsible for them. In addition, it is on the basis of the fact that he was responsible for providing financially for the family that he suffered persecution, rather than for the fact that he owned the family home. I therefore submit that the broader picture of the assets held by the family are relevant; however, of itself, the ownership of the family home is not determinative to the review applicant's claims, which are based in the social and cultural expectation that he provide financially for his family.

95. The representative noted that the review applicant was not aware of the current situation of the assets of the family due to the fact that his family forcefully obtained his signature prior to him departing for Australia and he suspected that the document he had signed had been used to attempt to remove his interests from the family home and assets following his marriage to his wife.

96. In relation to his marriage, the review applicant believed that the violence towards him from his family had escalated following his marriage and that it was as a result of the other members of his family persecuting him in his role as eldest male and financial provider. The representative also made further submissions in relation to the sale of [Business A] and the absence of a will.

97. In relation to the nexus between the claimed particular social group and the harm feared, the representative submitted:

The review applicant believes that in being in the social group above claimed he will suffer persecution on the basis that should he be made to return to India he will suffer abuse from his family and his brother-in-laws as well as avail no protection from the relevant authorities as he will be expected to continue to serve his family, and work for them. Furthermore, the fact that he fled from this situation leads him open to severe punishment and abuse.

98. The representative clarified the evidence given in relation to events in Amritsar, submitting that there were two incidents, one in which the applicant was threatened by [Ms A]'s ex-husband and 12 men (which he did not tell [Ms A] about) and another when they were met by the ex-husband and 30 men. The representative submitted:

Although not directly relevant to the claims for protection made by the review applicant, I wish to clarify this evidence, particularly given the length of the hearing and the stress which the review applicant was under owing to his medical condition. The situation with his wife's ex-husband is not directly relevant to his claims for protection under the Convention grounds; however the capacity for corruption within the Indian police system as detailed by the review applicant and his wife in relation to this issue indicates the difficulty of holding perpetrators of violence accountable for their actions, including the review applicant's family members and others whom have been involved in the harm suffered by him.

Religion

99. The representative submitted:

Although there have been few recent reports of violence between Christians and Hindus in India, the review applicant has advised that the undercurrent of tension which exists between these two religions is constant and mostly unseen. The review applicant recalls travelling through certain provinces in the Maharashtra province, and not being permitted to pass certain borders or points until he underwent a bodily and bag search to allow the armed men patrolling the area to tell whether he was of the Hindu faith or not. In the experience of the review applicant, religion is a tension which exists in his community and in the broader community, and he advises that it is on this basis that he fears for his life if he were to return to India.

100. The representative made submissions in relation to the International Religious Freedom Report for 2010 which states that India is on the USCIRF Watchlist on the grounds that there is a continuing concern for the freedom of religious expression within India, and continued:

The continued influence of Hindu extremist organisations is clearly an area of concern for religious freedom in India, and accords with the review applicant's account of an atmosphere of continuing tension despite the fact that specific instances of violence have not been reported. As noted above, the Report makes very clear that the failure of the Indian government to provide justice to Christians and other religious minorities targeted by violence and discrimination creates 'a climate of impunity, which affects the day to day lives of Christians living in India and ensures there is a continual threat of violence and discrimination.

101. The representative submitted that the applicant's fear of persecution on the basis of his Christian beliefs is exacerbated by the involvement of his brothers in law in the Mumbai branch of the Hindu extremist organisation, the Bajrang-Dal which the representative submitted placed the review applicant at an even higher risk of harm than other Christians living in India based on the warnings issued by the USCIRF;

The review applicant wishes to clarify that although all his brothers in law are involved in various activities of the Bajrang-Dal in Mumbai, his eldest brother in law is an active, official member of this organisation. His other brothers in law also participate in these activities, and go with the eldest brother in law to speak about religion and attend other activities that are organised. All his brothers in law come from strict Hindu families, and therefore these beliefs continue to be very important to them.

The review applicant became aware of the involvement of his brothers in law in this organisation whilst in Australia after speaking to a friend who advised him of their involvement. Although the review applicant knew of the strong Hindu beliefs of his brothers in law, he was not aware of the extent of their involvement within the Hindu community until his arrival in Australia. The review applicant has therefore advised that he was not actually aware of the extremist beliefs of his brothers in law until his conversion to Christianity in Australia.

...

The membership of the review applicant's eldest brother in law in this organisation adds to the review applicant's well-founded fear of further persecution based on his conversion to Christianity. In addition to the animosity which already exists towards the review applicant as the result of his status as the eldest male in the family, he is therefore at further risk of harm owing to his religious beliefs. This is particularly evident given that his brothers in law, who are already pre-disposed to violence toward him, are members of a religious extremist organisation. In the specific situation of the review applicant, he therefore has a well-founded fear that he will be persecuted for his religious beliefs on the basis that he has converted to Christianity, and has relatives who are involved in this organisation.

... The Bajrang Dal is a very high profile organisation in India, and has branches and members

in many Indian states. The review applicant therefore believes that his brother in law, given his membership of the organisation, will be able to locate him even in the event that he relocates to another state or city in India. The violence and harm that he has suffered at the hands of his brothers in law strongly suggests that it would be very possible for them to track him down and use this as a further ground on which to persecute him. The review applicant believes that he will now be targeted by the Hindu community to which he belonged in Mumbai, owing to the influence of his brothers in law and his family, as the result of his conversion to Christianity.

The review applicant converted to Christianity in Australia as the result of extenuating circumstances which demonstrate the genuineness of his conversion. As detailed by the review applicant at hearing, his mental state upon arriving in Australia was very unstable, and he turned to alcohol as a way of coping with his depression and anxiety owing to the harm he has suffered. The review applicant was approached by representatives of his church, and chose to join the Church after further consultation with them. ...

102. The representative submitted that the applicant's safety would not be assisted by relocation due to his mental instability, his family's ability to track him down and his fear of being targeted by extremist organisations across India on the basis of his Christian beliefs and by the Bajrang Dal at the behest of his brothers in law.

INDEPENDENT EVIDENCE

Principals of Kartha and the Hindu United Family (HUF)

103. An article on http://www.worldlingo.com/ma/enwiki/en/Hindu_joint_family discussed the principal of Kartha in the context of the Hindu United Family:

HUF as a partner in a partnership firm

HUF is a joint family consists of all persons lineally descended from a common ancestor. Hence, HUF is a group of members of the same family.

The "father", or the "senior member" of the family called "Karta", ordinarily manages the property belonging to Joint Family. Hence, the status of HUF cannot be termed as person.

...Powers of Karta or manager regarding joint Family Property

In *Ramdayal and others v. Bhanwarlal and others*, AIR 1973 Raj. 173, the Rajasthan High Court held that regarding the transfer of joint family property by the manager, the principles of law are well settled and are as follows:

The Manager of a joint Hindu Family has the power to alienate (transfer) for value the joint family property so as bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate. That the payment of debts incurred for family business or other necessary purpose constitute a legal necessity.

That the burden of proving legal necessity to support alienation is upon the alinee.

That the alinee can succeed not only on proof of legal necessity but also on proof that the alinee made reasonable inquires and was satisfied as to the existence of the legal necessity.

It is sufficient it to say here that the Karta or the manager can create a charge against the joint family property, only if the loan for which the charge is created, is taken for a purpose necessary or beneficial to the family. The burden of proving legal necessity lies on the banker and the banker has not only to prove the legal necessity but also to prove that it made reasonable inquiries and was satisfied as to the existence of the legal necessity.

Karta is the senior most male member of the family 2. Only the Karta has the right to manage the property and business of the HUF. 3. Karta can enter into contract on behalf of the HUF and bind all the members to the extent of their share in the property/business 4. If the

coparceners so desire, all the coparceners and Karcha may authorize any one or more adult coparceners to manage the business. Such a person (s) is/are known as “Manager(s)”

... Whether a Hindu Undivided Family (HUF) can become a partner in a partnership firm?

Under the Indian Partnership Act, partnership is defined under Section 4 as “a relationship between persons who have agreed to share profits of a business carried on by all or any of them acting for all.” Now the question is whether a HUF can be treated as a person under the law. Unlike a company, a HUF has no separate existence from its members. A Company as a separate entity can enforce its rights, whereas, a HUF, has to be necessarily represented by a Kartha or an adult member for enforcing any of its rights. A HUF cannot be treated as a person.

Reprisals against Hindus who convert to Christianity in Mumbai

104. There is evidence of reprisals against Hindus who convert to Christianity in India both by authorities and the public. There was no mention of any reprisals occurring in Mumbai according to the sources consulted. A 2008 US DOS report claimed that the issue of conversion had resulted in “assaults and/or arrests of Christians”. A 2009 UK Home Office report describes a “culture of opposition to conversions from Hinduism” as well as against the religious activities of minorities. This opposition is reflected in state-level anti-conversion laws. These laws are present in the states of Orissa, Madhya Pradesh, Chhattisgarh, Himachal Pradesh, Arunachal Pradesh, Gujarat and Rajasthan. The laws are argued to have caused the “vilification” of the Christian community. (UK Home Office 2009, Country of Origin Information Report – India, May, p64). The US DOS reported that “numerous” Christians had been arrested under these laws for allegedly “engaging in conversions by force, allurements, or fraud”. (US Department of State 2008, *International Religious Freedom Report – India*, September, Section 3).

105. The US DOS, UK Home Office and Christian Solidarity Worldwide reported anti-Christian communal violence breaking out in Orissa in 2008 which saw 40 people killed and 134 injured, mainly Christians. Over 4,000 Christian homes and 50 churches were destroyed. Religion was said to be only one reason for the violence, with other factors including ethnic, political and economic playing a role. (Christian Solidarity Worldwide (undated), ‘India - Orissa’, <http://www.csw.org.uk/urgentactionindiaorissa.htm> Accessed 3 September). Despite these instances of violence it was reported that Christians often held large public prayer meetings without retribution. These included in Mumbai with Joyce Meyer Ministries holding meetings for thousands of worshippers in 2008.

106. ‘Uncensored’, a pro-Hindu blog linked to the Hindutva News website, discusses Hindu spiritual leader Narendra Maharaj’s re-conversion of 100,000 Christian converts back to Hinduism. This included the mass re-conversion of 1,800 Christians to Hinduism in Mumbai. Maharaj’s attitude reflects those extremist Hindu views against conversion to Christianity:

About his drive, Maharaj said it was deplorable that Hindus had to be reconverted to Hinduism. He said he was not opposed to anybody practising any other religion, but the missionaries were “luring and misleading” the ordinary Hindus to convert them. “An anti-conversion law is needed.....Nobody should be converted, whatsoever be his religion.”

107. The website goes on to warn Christian missionaries that Hindus “won’t take things lying down”. (Ameyap 2008, ‘1,800 Christian tribals convert to Hinduism in

Mumbai', Uncensored website, 7 May <http://ameyap.wordpress.com/2008/05/07/1800-christian-tribals-convert-to-hinduism-in-mumbai/> Accessed 3 September). Mumbai is also home to the Hindu extremist group 'Shiv Sena' whose leader Bal Thackeray's condemnation of Italians (in the context of Congress Party leader Sonia Gandhi being of Italian descent) was aimed at all Christians. (PakistanPal 2010, 'Pune bombed: More Shiv Sena terror in Maharashtra', <http://pakistanpal.wordpress.com/2010/02/16/pune-bombed-more-shiv-sena-terror-in-maharashtra/> Accessed 3 September).

Police protection for converts to Christianity

108. There is evidence to suggest that in some instances, police protection was unavailable to Christians, including converts.

109. Several sources reported that following attacks on Christians and their churches, perpetrators had not been held to account by authorities. Christian Solidarity Worldwide (CSW) reported in 2007 that impunity for perpetrators of religiously-motivated violence was a "chronic problem". (Christian Solidarity Worldwide 2007, 'Briefing – India: Face Finding Mission', July <http://csw.org.uk/documents/visit/pdf/CSWReportIndiaFebruary07.pdf> Accessed 3 September). The US DOS added that laws against religious violence were not enforced rigorously or effectively, particularly by state governments. It was believed that this inaction by authorities would be viewed by perpetrators as a signal that they could commit violence with impunity. (US Department of State 2010, *International Religious Freedom Report for 2009 – India*, October, Section 2). CSW reported the incident of an attack on a church in Punjab in 2006 where police had failed to intervene, despite a High Court order. It was alleged that police subsequently passed on a false report to their superiors, and refused to file a First Information Report. The All India Christian Council reported in 2006 the story of a Christian pastor who had been prevented from worshiping in his home by a group of men from the Hindu-nationalist Rashtriya Swayamsevak Sangh (RSS) organisation. When the pastor attempted to file a report with the police he was allegedly prevented from doing so and instead was reprimanded for carrying out Christian activities. (All India Christian Council 2006, 'Hindu extremists stop Christian worship gathering in Punjab', All India Christian Council website, 5 May <http://indianchristians.in/news/content/view/912/45/> - Accessed 3 September 2010). The *Panthic Weekly* even reported on an Inspector of Police being transferred out of a station because he intervened against attacks on Christians. (Mann, Simranjit Singh 2007, 'Christians and Muslims under attack in Punjab', *The Panthic Weekly*, 21 November <http://www.panthic.org/news/125/ARTICLE/3693/2007-11-21.html#> - Accessed 3 September 2010). As a result of inaction by police it was reported in the *Christian Science Monitor* that young Christians were considering forming groups in order to defend themselves. (Ridge, M. 2008, 'Anti-Christian attacks flare in India: Some see a government hand in the fanatical Hindu anger against a minority and its converts', *The Christian Science Monitor*, 3 September 2010). In addition to inaction to protect Christians there were also reports of police themselves attacking Christians. (UK Home Office 2009, Country of Origin Information Report – India, May, p64). In spite of this there were reports, including from Christian websites, of instances where police had played roles in protecting Christians and preventing unrest. (All India Christian Council 2007, 'Hindutva Forces Convert Church into Gurudwara in Punjab: Sikh leaders come to the rescue of Christians', All India Christian Council website, 10

April <http://indianchristians.in/news/content/view/1279/42/> - Accessed 3 September 2009).

110. Reports of alleged false arrest of Christians suggest a level of hostility towards the community by authorities which may further limit their ability to receive police protection. In some instances, Christian victims of attacks, particularly in Chhattisgarh, Karnataka, and Madhya Pradesh, were themselves arrested by police instead of their attackers. The All India Christian Council alleged cases of Christians being falsely accused and arrested on charges like burning Sikh holy scriptures. (All India Christian Council 2008, 'New attacks in Orissa, Karnataka, Punjab, and Kerala', All India Christian Council website, 21 September <http://indianchristians.in/news/content/view/2406/45/> - Accessed 3 September 2010). A pastor in Punjab was also allegedly arrested for celebrating Christmas and speaking about Christ. ('INDIA: Indian Christians suffer persecution on Christmas day' 2006, *AisaNews.it*, 28 December <http://www.asianews.it/index.php?l=en&art=8103#> - Accessed 3 September 2010). Another incident described police taking Christians into custody, ostensibly to protect them from Hindu extremists, but instead beat them while in jail. (Lal, Vijayesh 2005, 'INDIA: Police beat Christians in Punjab State, India, *Compass Direct*).

Mormons in India

111. Country information suggests Mormons are, for the most part, able to practice their religion in India. Several articles, including two from Mormon websites, discuss Mormons in India and make no mention of any impediments or restraints by authorities or society on their ability to practice. A Global Post article focusing on New Delhi has Mormons speaking freely about their conversion and practice. (Fatah, S. 2009 'The Mormons in India', *Global Post*, 24 July <http://www.globalpost.com/dispatch/india/090715/the-mormons-india> Accessed 3 September). An article from the LDS Church News website discusses the growth of the church in New Delhi and speaks of young Indian Mormons undertaking Church activities without restraint. The article contains pictures of Indian church members with their families – suggesting they do not feel there is any danger in being publicly exposed. The article displays pictures of Mormon missionaries on the streets openly attempting to spread their message, seemingly without fear of reprisal. (Terry, M. 2009 'The Mormons in India', *Church News*, 5 September <http://www.ldschurchnews.com/articles/57849/Church-in-New-Delhi-moving-forward.html#> Accessed 3 September). High ranking Mormon Church officials have made public their visits to India where they met with local Church officials. (D.H. 2009 'The Mormons in India', *Mormon World*, 25 August <http://www.mormonworld.org/mormon-asia/sister-beck-visits-mormons-in-india/> Accessed 3 September). An LDS website article states that Mormons have taught in Indian schools and Mormon churches have assisted in aiding schools. There is again, no mention of any impediment to this cooperation. (Newsroom 2009, 'Mormon Couple Teach in India', 29 May 2007 <http://lds.org/ldsnewsroom/eng/news-releases-stories/mormon-couple-teach-in-india> Accessed 3 September). The ability of Mormons to practice their religion in New Delhi and other parts of India suggests that the same is true for a large cosmopolitan city like Mumbai.

112. More broadly, India is described as a secular country with no official religion and a National Government that respects religious freedom. The US Department of State (US DOS) reports in 2010 that "[t]he Constitution provides for freedom of

religion, and the National Government generally respected this right in practice” The Indian Constitution protects the right of individuals to choose or change their religion and practice the religion of their choosing. Having been a home to all of the world’s major religions for over 1000 years, India’s religious groups have historically shared a relatively peaceful coexistence. This coexistence has continued, in parts due to the country’s democratic system, open society, independent legal institutions, vibrant civil society, and free press. There were however reported instances of organised communal attacks on religious minorities, though none reported targeting Mormons in particular. (US Department of State 2010, *International Religious Freedom Report for 2009 – India*, October, Section 2).

113. Despite the National Government’s rejection of communalism, there were reports of less tolerant approaches from some state and local Governments which may affect Mormons’ ability to practice freely. This was through their enacting of ‘anti-conversion’ legislation and the arrest of people engaged in religious activities. NGOs argue that anti-conversion laws not only infringe upon an individual’s right to convert, but favour Hinduism over minority religions, and represent a significant challenge to secularism. Certain state and local Governments were also accused of being influenced by ‘Hindutva’ or pro-Hindu ideology and failing to “efficiently or effectively prosecut[e] those who attacked religious minorities”.

114. Most Mormons are concentrated in the South, where a large proportion of India’s Christians live. The southern cities of Chennai, Hyderabad, Bangalore, Coimbatore and Vishakhapatnam have the majority of Mormon Church membership for India with slightly over 5,300 members. (Kewish, C. W. and Kewish C. A. 2009 ‘Growth of Mormon Church in India expands two districts into five’, *Church News*, 28 November <http://www.ldschurchnews.com/articles/58262/Growth-of-Mormon-Church-in-India-expands-two-districts-into-five.html#> Accessed 3 September). Even here however, their numbers cannot be described as ‘large’. There are only around 7,500 Mormons throughout India, according to the *Global Post* and the Latter Day Saints (LDS or Mormon) Church. (Fatah, S. 2009 ‘The Mormons in India’, *Global Post*, 24 July <http://www.globalpost.com/dispatch/india/090715/the-mormons-india> Accessed 3 September). These are spread across 28 branches. Christians overall only make up a small percentage of India’s population - 2.3 percent. (US Department of State 2010, *International Religious Freedom Report for 2009 – India*, October, Section 2).

RELEVANT LAW

115. 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.

116. 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).

117. 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’

118. 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.

119. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] 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) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

120. 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.

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

122. 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.

123. 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.

124. 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.

125. 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.

126. 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.

127. 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.

128. The meaning of the expression ‘for reasons of ... membership of a particular social group’ was considered by the High Court in *Applicant A*’s case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... 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". ...

129. Whether a supposed group is a ‘particular social group’ in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person’s membership of the particular social group.

FINDINGS AND REASONS

The applicant’s ability to participate effectively in the hearing before the Tribunal

130. The representative stated that the applicant’s mental state was fragile and the representative was concerned about the length of the hearing, which she contended went for over 4 hours with only three 10 minute breaks for the applicant to compose himself. This is not correct.

131. At the beginning of the hearing, the Tribunal noted to the applicant that it was aware that the hearing was stressful and asked the applicant to advise the Tribunal if he was feeling uncomfortable. The Tribunal noted that it would be open to taking breaks if the applicant felt overwhelmed. According to the hearing record, the hearing commenced at 12.15. The Tribunal took breaks of approximately 10- 15 minutes at 12.30, 1.30, 2.45 and 4pm. The hearing ended at 4.33pm.

132. According to the hearing record the hearing had a total duration of 4 hours 30 minutes; however, the recording of the hearing is 3 hours 34 minutes long. There were four breaks of between 10 and 20 minutes duration.

133. The Tribunal was aware at the hearing that the applicant is taking medication for mental health issues and attempted to reduce the stress of the hearing whilst observing procedural fairness requirements. The Tribunal took regular breaks and was open to taking more breaks if requested. One of those breaks was at the representative’s request so that she could deal with matters arising from her office.

Another was timed so that the interpreter could deal with his parking, as he had extended his booking past the scheduled time. However the applicant was not giving evidence for the entire duration of the hearing. The Tribunal and the applicant also had the assistance of an interpreter, which also increases the amount of time required to give evidence. Of that time, with the assistance of the interpreter, the applicant was giving evidence for slightly over two hours. The Tribunal also took evidence from [Ms A] and discussed the submissions and other issues with the representative.

134. This was the minimum time necessary in which to address the complex and involved claims which had been made through the process of the protection visa application, and to do justice to the excellent submissions that the representative had provided. Additionally, the Tribunal was aware that the applicant had travelled for 6 hours from [Location A] on the previous day in order to attend the hearing and did not wish to cause him further stress by adjourning the hearing and requiring him to return to Melbourne. The Tribunal also gave considerable further time in which to provide submissions after the hearing.

135. The Tribunal accepts that the applicant's medical conditions are relevant to the applicant's ability to participate effectively in a hearing before the Tribunal: see *SZMOI v Minister for Immigration & Anor* [2008] FMCA 1507. However the applicant did not have difficulty in recalling events at the hearing and until the latter part of the hearing, he was able to give ready answers to the Tribunal's questions.

136. The representative submitted that it was difficult for the applicant to cope with the hearing and the stress of the situation and began to struggle to give coherent evidence. The representative requested that this strain on the applicant be taken into account in assessing the evidence which was provided, particularly in the latter half of the hearing. Having taken account of the applicant's medical conditions the Tribunal consider that he was able to participate effectively in the hearing before the Tribunal; however the Tribunal will take his medical condition into account and allow some leeway in relation to his evidence in the latter part of the hearing, particularly in relation to the claimed events in Amritsar.

137. The Tribunal does recognise that the stress of the hearing could have affected the applicant's evidence and in light of the letters in relation to his mental health, the Tribunal will not make credibility findings in relation to the applicant's evidence at the hearing.

Nationality

138. On the basis of the applicant's claims and the applicant's passport, a certified copy of which is on the Department's file, the Tribunal finds that he is a citizen of India and assesses his claims against that country.

The applicant's claims

139. The applicant claims to fear harm on return to India from his family on the basis of his membership of the purported particular social group of "eldest male children in India". The applicant also claims to fear harm on return to India from his family and from Hindu extremists due to his conversion to Christianity. The applicant states that he is unable to avail himself of police protection because he does not have money to pay bribes. The applicant claims that it is unreasonable for him to relocate elsewhere in India due to his family's ability to find him anywhere, and because Christians are not safe from Hindu extremists anywhere in India.

Fear of harm from his family

Serious harm

140. The applicant has given consistent evidence in relation to his difficulties with his family. The Tribunal accepts, on the basis of the medical certificate dated [in] December 2009, that the applicant has experienced harm at the hands of his family and the Tribunal also finds plausible the applicant's claims that his sisters and brothers-in-law have sought to prevent him from claiming entitlement to his father's estate by physical and psychological harassment. The Tribunal accepts that this harassment constitutes serious harm for the purposes of s 91R(1)(b).

141. In light of the evidence regarding previous instances of harm, the Tribunal is also satisfied that the harm involved systematic and discriminatory conduct for the purposes of s 91R(1)(c).

Whether fear of harm is well-founded

142. The Tribunal accepts that the applicant has a subjective fear of his family harming him if he returns to Mumbai in the reasonably foreseeable future. In light of the medical certificate, if the property issues are not resolved the Tribunal accepts that the applicant's fear of serious harm from his family is also objectively well founded.

143. The Tribunal has considered whether it would be necessary for the applicant to return to India at all, considering that [Ms A] currently has an application for a subclass 485 visa pending. Although the representative has submitted that the applicant would have to apply from offshore to be joined as a secondary applicant to [Ms A]'s application, there is no requirement that the application be made from India. However, the visa for which [Ms A] has applied is a temporary visa, and there is no indication as to whether that visa would be granted or whether a subsequent permanent visa would be granted. The Tribunal considers that a finding that it would be unnecessary for the applicant to return to India in light of his wife's visa status would be premature and [Ms A]'s visa status does not impact on his well-founded fear of serious harm at the present time.

Particular social group

Eldest male child in India

144. Although in the end it is not necessary to make a finding on whether "eldest male children" in India constitutes a particular social group this issue consumed considerable time and energy on the part of the representative and the Tribunal and out of respect for the representative's high quality submissions, the Tribunal will address this point.

145. At the hearing, the Tribunal noted that even on the country information to which the representative had referred, it seemed that family types could be so disparate in India that it was difficult to conceive of a particular social group of "eldest male children in India" being united by their common characteristic, or being an identifiable group with a social presence in India, set apart from other members of the society. It becomes the conundrum that the group becomes so narrowly defined as not be a group "eldest Hindu male children involved in family businesses who have inherited their family wealth" – or so broad as to fail to have a uniting element. Being

the eldest son might be a common attribute, but the country information does not indicate that it is a unifying element, or one that sets its members apart from the other members of the society. At the hearing, the representative submitted that the group could be narrowed or broadened. The Islamic religion followed a similar structure. The Tribunal noted that the country information indicated that there were many different forms of family hierarchy in India, including matrilineal societies.

146. The Tribunal has also taken into account the further submissions made after the hearing. The Tribunal notes that a particular social group can be broad, such as “women in Pakistan” or narrow, such as a family. However to constitute a particular social group, it does still require a unifying element.

147. The Tribunal considers that “eldest male children” do not constitute a particular social group for the purposes of the Convention for the following reasons;

- Although the representative referred to the principal of Kartha as instilling certain rights and obligations on the eldest male child in the Indian family, the Tribunal’s research indicates that the principal of Kartha is relevant to the Hindu United Family, and the applicant’s own family structure does not follow that structure;
- There is no country information to suggest that all male children in India inherit their parents’ property or are under any particular obligations apart from those which are expected of them individually by their own families, as opposed to the society as a whole. Consequently there is lacking the necessary uniting element to constitute a particular social group;
- Not all families in India are Hindu or Muslim and the Tribunal does not consider that the mere fact of being born the eldest male child in a family in India constitutes a unifying element such as to form the posited group into a particular social group.

Essential and significant reason for the harm

Not membership of a particular social group

148. Additionally, the Tribunal is not satisfied that any essential and significant reason for the harm that the applicant fears from his family would be membership of such a purported group, or any group. The Tribunal does not accept that the family sought to harm the applicant because he was the male child or the eldest male child (or the only male child).

149. Although the applicant’s own belief in his entitlement to the whole of his father’s estate might have sprung from being the male child and having paid his sisters’ dowries, on the basis of the applicant’s evidence, the Tribunal finds that the reason that the applicant’s siblings sought to drive him out of the property was the property dispute and a differing view as to their respective entitlements in the absence of any will left by their father. The Tribunal does not accept that the applicant’s position in the family was an essential and significant reason for the harm from his family. On the basis of the applicant’s evidence, the Tribunal finds that the siblings’ aggression towards him was motivated by their view that the applicant was depriving them of assets and income to which they believed they were equally entitled.

150. Contrary to the representative’s submissions, the Tribunal’s questions regarding the set up of the applicant’s family home were relevant because they indicated that the family was not a Hindu United Family. The subsequent information provided indicated that the applicant’s mother was making the decisions in relation to

the running of the family company, and that the applicant's sister and brother in law were living with her to assist in those activities; however this does not accord with the country information regarding the formation of the Hindu United Family and the Tribunal does not accept that the applicant was part of a Hindu United Family or that his family arrangements were subject to the principles of Kartha. Although it is possible that his family wished to prevent the applicant going to court, and discouraged him from producing an heir which might cause him to attempt to assert the rights that he felt that he held, the Tribunal does not consider that this was motivated by the applicant's membership of any group, but as an individual.

151. It is well established that a family is capable of constituting a particular social group within the meaning of the Convention. However, the Tribunal has found that, prior to leaving India, the applicant's siblings were motivated to persecute the applicant due to the property dispute rather than by his membership of the family. Although it is the applicant's membership of the family which generates his own belief in his entitlement, the Tribunal finds that it is his attempt to claim the estate as his own that motivates the siblings, rather than his family relationship.

152. Therefore at the time that the applicant arrived in Australia, the Tribunal also finds that he did not meet the definition of a refugee because there was no nexus between the harm he feared and a Convention ground.

'Sur place' claims
Religion

Conversion to Christianity

153. Persons who are outside their countries of origin may become refugees due to changes in circumstances in their home countries or as a result of their own actions.

Application of s 91R(3)

154. The Tribunal finds the applicant's account in relation to his conversion to Christianity to be plausible. The Tribunal accepts that the applicant converted to Christianity at a low point in his life and that, in the Church, he found the support that he felt his family had denied him. Accordingly, the Tribunal is satisfied that the applicant converted to Christianity otherwise than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention and the Protocol and the applicant's conversion to Christianity is not to be disregarded in determining whether he has a well founded fear of persecution for a Convention reason. Section 91R(3) does not apply to the applicant.

155. In the present case, the Tribunal is satisfied that the applicant has converted from Hinduism to Christianity in Australia and that he has done so for genuine reasons, and not to strengthen his claims for a protection visa. Therefore the Tribunal must consider the effect of the applicant's conversion to Christianity if he returns to India now or in the reasonably foreseeable future.

Whether religious element creates Convention nexus

156. The country information indicates that there is little harassment of Christians in Mumbai. In ordinary circumstances the Tribunal would find that there was not a real

chance that the applicant would be subjected to persecution in Mumbai for reasons of his conversion to Christianity.

157. However, in the present case, the applicant has claimed that his brother-in-law is a member of the Bajrang Dal, and that his other brothers-in-law are influenced by this movement. This claim was not raised until the Tribunal stage and the applicant's description of how he found out that his brothers-in-law were members (through a friend on the telephone) was vague. However, as the representative has submitted, the interview with the delegate was fairly brief, and the representative has had further time in which to draw far greater detail from the applicant. Additionally, the Tribunal accepts that he has mental health issues which might have prevented him from considering the relevance of this information prior to his discussions with his representative.

158. In light of the applicant's condition, the Tribunal has not made credibility findings on his evidence. The Tribunal is not in a position to make a finding that the applicant's claim in relation to the involvement of his brothers-in-law with the Bajrang Dal is untrue. In such circumstances, the *Handbook on Procedures and Criteria for Determining Refugee Status* 1992 and the Tribunal's *Credibility Guidelines* suggest that the Tribunal should make its assessment on the basis that it is possible, although not certain, that the applicant's account of past events is true.

159. The Tribunal considers that this is the appropriate approach in this case. Accordingly the Tribunal will accept that the applicant's brothers-in-law are involved with Bajrang Dal.

160. The applicant has provided a medical certificate as evidence that he has already suffered violence at the hands of one of his brothers-in-law. The Tribunal finds the applicant's claim that his conversion will give his brothers-in-law greater cause to harm him to be plausible, in light of the information provided in relation to that group. In such circumstances the Tribunal accepts that the serious harm that the applicant fears does become infused with a religious element sufficient to find that religion would become an essential and significant reason for the serious harm that he fears from his family (supplementary to the property dispute) in accordance with s 91R(1)(a).

Persecution

State protection

161. It is clear that the state concerned is not required to guarantee the safety of its citizens from harm caused by non-state persons. What is required for the purposes of Article 1A(2) has been described in several ways. The joint judgment in *S152/2003* refers to the obligation of the state to take "reasonable measures" to protect the lives and safety of its citizens, including "an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system", (*MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink_findacts">222 CLR 1 at [26]) or a "reasonably effective police force and a reasonably impartial system of justice", (*MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink_findacts">222 CLR 1 at [28]).

162. In *MIMA v Khawar* ((2002) [210 CLR 1](#)), Kirby J drew a distinction between those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem of domestic violence from those countries that, for supposed religious, cultural, political or other reasons, consciously

withdraw the protection of the law from a particularly vulnerable group within their society. Persons in Australia who are unwilling to avail themselves of the protection of their country where that country falls in the former category do not fall within the Refugees Convention. However, depending upon the evidence and the facts found, the Convention may well be available to persons from the latter category of country. (*MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink_findacts">222 CLR 1at [130]-[131], per Kirby J.)

163. However, as the Federal Court stated in *A & Ors v MIMA*, there is no golden rule which says a person may never be given refugee protection if they come to Australia from a democratic country governed by the rule of law with generally effective judicial and law enforcement institutions. ((1999) [\[1999\] FCA 116](#); [53 ALD 545](#) at [\[39\]](#).)

164. The country information indicates that there are instances of police protection being unavailable to religious converts. The applicant also gave evidence that the police had not responded to a previous complaint that he had made when he was attacked with a knife and that he believed that they had taken a bribe to remove the complaint from the records.

165. The country information indicates that laws against religious violence are not enforced rigorously or effectively, particularly by state governments. In light of the fact that the harm that the applicant fears stems from his family, the Tribunal also accepts that there is a higher chance that the police would resist becoming involved. When considered with the applicant's own anxiety and mental condition, the Tribunal finds that there is a sufficiently high risk in this case that the applicant might not be able to access a reasonable level of protection from the State.

166. Therefore the Tribunal is satisfied that the applicant has a well-founded fear of persecution which meets the requirements of s 91R(1). For these reasons, the Tribunal finds that the applicant does have well-founded fear of Convention related persecution from his family in Mumbai

Relocation

167. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* [\[1994\] FCA 1253](#); [\(1994\) 52 FCR 437](#) per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of "practicable", to expect him or her to seek refuge in another part of the same country. What is "reasonable" in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [\[2007\] HCA 40](#) and *SZFDV v MIAC* [\[2007\] HCA 41](#), per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

168. Although the applicant has given evidence that he has previously stayed with friends in Mubai, the Tribunal does not consider that this is a reasonable option if he

returns to India in the reasonably foreseeable future because the Tribunal accepts the applicant's evidence that it would be easy for his family to track him down if he is required to take this option.

169. Although the applicant could potentially seek the support of [Ms A]'s family in Amritsar, the Tribunal accepts that they have experienced difficulties with [Ms A]'s ex-husband's family in Amritsar which could be inflamed by the presence of the applicant and it is not reasonable for the applicant to live in Amritsar.

170. In the present case, the Tribunal has accepted that the applicant has suffered from [condition deleted: [s.431\(2\)](#)], he is taking medication and his wife is in Australia. The Tribunal does not consider that it would be reasonable for him to relocate to a place where he does not have support. In the circumstances of this case, the Tribunal finds that it is not reasonable for him to live elsewhere in India without support and there is no evidence before the Tribunal that there is such a place in India. The Tribunal finds that it is not reasonable for the applicant to relocate elsewhere in India to avoid the Convention based harm from his family.

CONCLUSIONS

171. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

172. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies [s.36\(2\)\(a\)](#) of the [Migration Act](#), being a person to whom Australia has protection obligations under the Refugees Convention.