1501298 (Refugee) [2015] AATA 3325 (28 August 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1501298
COUNTRY OF REFERENCE:	India
MEMBER:	Amanda Paxton David Corrigan
DATE:	28 August 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection visas.

Statement made on 28 August 2015 at 4:02pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

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 to refuse to grant the applicants Protection visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants, who claim to be citizens of India, applied for the visas [in] July 2014 and the delegate refused to grant the visas [in] January 2015.

3. The applicants appeared before a Tribunal constituted by two Members on 14 August 2015 to give evidence and present arguments.

4. The applicants were represented in relation to the review by their registered migration agent.

RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

7. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

8. 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.

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

10. 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)). Examples of 'serious harm' are set out in 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.

11. 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.

12. 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.

13. 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 being persecuted for a Convention stipulated reason. 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.

14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of 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.

Particular social group

16. 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". …

17. 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 for reasons of the person's membership of the particular social group.

Relocation

18. 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) 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) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

State protection

19. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003 (2004)* 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.

Complementary protection criterion

20. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

21. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

22. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Relocation

23. Under s.36(2B)(a) of the Act, there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm. That relocation must be 'reasonable' is also a requirement when considering the definition of 'refugee' and the tribunal draws guidance from the judgments of the High Court in *SZATV v MIAC* and *SZFDV v MIAC* which held that whether relocation is reasonable, in the sense of 'practicable', must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC (2007)* 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

State protection

24. Under s.36(2B)(b) of the Act there is taken not to be a real risk that an applicant will suffer significant harm in a country if the tribunal is satisfied that the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm. That is, the level of protection must be such to reduce the risk of the applicant being significantly harmed to something less than a 'real risk': *MIAC v MZYYL [2012] FCAFC 147*.

Section 499 Ministerial Direction

25. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Member of the same family unit

26. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa of the same class as that applied for by the applicant. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include spouses.

CONSIDERATION OF CLAIMS AND EVIDENCE

27. Only the first named applicant has made specific claims for the grant of a protection visa. The second named applicant, her spouse, is relying on his membership of her family unit.

28. For convenience the Tribunal will therefore refer to the first named applicant as the applicant and the second named applicant as the applicant's spouse.

29. The Tribunal has before it material including:

- Application for protection visa including a written statement from the applicant;
- Copies of the applicant's divorce certificate and marriage certificate (which shows the applicant and the applicant's spouse married [in] September 2010);
- Copies of both applicants' passports;
- Applicant's Statutory Declaration dated 23 July 2015;
- Applicant's Statutory Declaration dated 5 August 2015;
- Agent's submission dated 6 August 2015;
- Statement from the Head Sewadar [of a village] concerning applicant's caste and ancestry and implications for marriage dated [in] August 2015;
- Further agent's submission dated 13 August 2015;
- Affidavits dated 11 August 2015 from two friends of the applicants concerning the applicants' claims.

30. The applicant's claims and evidence to the Tribunal can be summarised as follows. The applicant was born in into a Sikh family in [a village], near Ludhiana, Punjab in [year]. She lived there all her life before arriving in Australia on a student visa in 2008 with her first husband as dependent. The applicant divorced her first husband when in Australia in July 2010 against the wishes of her family. She married her spouse in Australia in September 2010 without the consent of her family. She did not inform her family of her second marriage until 2014 because she feared they would kill her if they found out because she had married someone of her own choice rather than have a second arranged marriage.

31. The applicant's spouse was also born in Punjab into a Sikh family and came to Australia on a student visa. They married for love.

32. While they were aware of some family connection, when she advised her family of their marriage, they learned that their marriage was counter to Sikh *gotra* avoidance rules, each having a grand-mother of the same sub-caste and from the same village. The marriage is regarded as incestuous, and is therefore totally unacceptable to the family and the Sikh community.

33. The applicant fears harm from her family, particularly from her brother (her father is deceased), and the Sikh community if she returns to India, if she does not separate from her spouse, because she has caused shame to the family through her unacceptable behaviour.

34. Three aspects of the applicant's circumstances give rise to her brother's threats. She divorced from her first husband which is totally unacceptable according to Sikh culture. Against Sikh religious and cultural norms, she entered a second marriage without her family's permission. According to Sikh marriage rules her marriage is consanguineous, because they are from the same *gotra* and same village, and therefore considered incestuous, and their child illegitimate.

35. Honour killings are ordered against young couples in the applicants' circumstances.

36. When the applicant's family discovered that her marriage was a same-*gotra,* same village marriage, they were horrified and demanded that the couple break up. The applicant's family have vowed to disown her if she does not dissolve the marriage. The applicant and her husband have been ostracised by both families. When she advised her family about her marriage, she was sent away from the family home and had to stay with a friend.

37. The applicant's brother has threatened to kill her if she returns to any part of India. The applicant's brother has stated that he will ask their [relative], an infamous career criminal with many connections in many cities, to help him kill her.

38. The applicant believes he will carry out his threats because he, together with 4 other people, including her [relative], and her husband's brother-in-law, surrounded the taxi in which they were travelling to Delhi to depart India, when the taxi was forced to stop by a blockage on the road. They demanded the couple step outside the car and verbally abused them. They damaged the taxi with sticks, probably to look make it appear that the couple died in a car accident. The taxi driver did nothing and stayed in the car. They told the couple to never return to India or they would kill them. The group ran away when passers-by attempted to intervene. The applicant and her spouse do not know how the group found out about their movements or how they organised themselves to carry out such a planned and coordinated attack. They assume that they were followed. They do not know how they involved the applicant's spouse's family because the couple believe the families have not met, but assume they got in contact with each other somehow.

39. The state cannot protect them because it is powerless to stop domestic disagreements resulting in violence towards its victims. The state is also unwilling to protect the applicant because authorities turn a blind eye to violence perpetrated because of religion or cultural beliefs.

40. Relocation to another part of India is not an option for the applicants because the risk remains that the applicant's brother will find them anywhere and harm them. The applicant's brother is well-connected to local politicians in their village because of his involvement door knocking for the Akali Dal party in elections. He will use this connection to find the applicants no matter where they are in India.

41. The applicant fears her newly born child will suffer if she is harmed, and that he will be persecuted and perhaps killed if her family becomes aware of his birth. Her son will be regarded as illegitimate.

Independent country information

Marriage practices in Sikh communities

42. The following information concerns marriage practices in Sikh communities and same-*gotra*, same-village marriage.

43. In 2015 the Department of Foreign Affairs and Trade (DFAT) India Country Report stated that arranged marriages continue to account for the overwhelming majority of marriages across India. Parent and/or significant family members are often solely responsible for making a decision about who children marry, particularly in north India. Many parents consider arranging a marriage for their children a right and a duty, and may not accept modern marriage practice such as a son or daughter choosing their own spouse. Although the divorce rate has increased in recent years, particularly among affluent middle classes,

India has one of the lowest divorce rates in the world at an estimated one in 1,000 marriages.[1]

44. The issue of treatment of same-lineage, or same-*gotra* couples arises in sources addressing inter-caste marriage. This 'lineage' is based on mythical ancestors, and there is not necessarily a blood relationship between two people of the same *gotra*.[2] According to Human Rights Watch in 2011, khaps in Haryana, Punjab and Uttar Pradesh have censured same-*gotra* marriages, reasoning that they are incestuous due to an alleged biological connection through ancestors.[3] Khap panchayats in Haryana have publicly stated that the *Hindu Marriage Act* should be amended to ban same-*gotra* marriage:

> At Kurukshetra, the khap panchayats also demanded that the Hindu Marriages Act should be amended to ban 'same village' marriages and disallow the recognition given by the Arya Samaj to the weddings of "eloping couples" conducted in temples. True to form, they charged the media with "conspiring to destroy the social fabric in rural areas."[4]

45. *Daily News and Analysis* highlights what a disapproval of inter-*gotra* marriage might mean for young Haryana males:

> If you are an eligible jat bachelor living in a Haryana village, landing a suitable bride could be a nightmarish experience. As traditions go, you could not marry another woman from the same village because some time in remote history her ancestors and yours may have been siblings. You cannot hunt for brides in villages that border yours or even distant ones where other clans living in your village have bhaichara [brotherhood]. Break the rules and you are guilty of 'incest'.[5]

Honour killings (treatment by non-state actors)

46. In 2015, DFAT stated that, "So-called honour killings" committed by the families and communities of those involved in inter-faith and inter-caste relationships, are particularly prevalent in villages and small towns in north India. It is estimated that at least 1,000 honour killings take place each year in India."[6]

47. The US Department of State (USDOS) reported that in 2013, Punjab had one of the highest rates of so-called honour killings in India.[7] It is not clear as to what proportion of these killings occur within Punjab's Sikh population; however an Indian Law Commission study

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[1] DFAT Country Information Report, India, 15 July 2015
[2] Law Commission of India 2012, *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework*, Shakti Vahini website, August, pp.3-4 http://shaktivahini.org/wp-content/uploads/2012/03/report242.pdf > Accessed 26 June 2013 ; Human Rights Watch 2010, *India: Prosecute Rampant 'Honor' Killings*, 18 July <http://www.hrw.org/en/news/2010/07/16/india-prosecute-rampant-honor-killings> Accessed 26 August 2010; Encyclopaedia Britannica Online n.d., *gotra* <http://www.britannica.com/EBchecked/topic/239834/gotra> Accessed 2 April 2012; Chamberlain, G 2010, 'Honour killings – saved from India's caste system by the Love Commandos', *The Observer*, 10 October <http://www.guardian.co.uk/world/2010/o ct/10/honour-killings-caste-love-commandos> Accessed 1 December 2011
[3] Human Rights Watch 2011, *India – World Report*, 31 January
[4] ''Honour killings': what needs to be done' 2010, *The Hindu*, 26 April <http://www.thehindu.com/opinion/Readers-Editor/article409862.ece> Accessed 19 December 2011
[5] Nair, M 2010, 'Khap panchayats flex muscle as shifting social dynamics threaten their relevance', *News Day and Analysis*, 18 April <http://www.dnaindia.com/india/report_khap-panchayats- flex-muscle-as-shifting-social-dynamics-threaten-their-relevance_1372608> Accessed 11 August 2011
[6] DFAT Country Information Report, India, 15 July 2015, p. 13
[7] US Department of State 2013, *Country Reports on Human Rights Practices 2012 – India*, 1 April, Section 6 <http://www.state.gov/documents/organization/220604.pdf> <OG0DB543879>

attributes many of these honour killings to '[m]arriages with members of other castes'.[8] In one study of 560 honour killings in Haryana, Punjab and western Uttar Pradesh by Shakti Vahini[9], 83 per cent were related to inter-caste marriage.[10]

48. USDOS also noted in 2014 that, up to ten percent of all killings in Punjab and Haryana were honour killings, some of which were sanctioned by village councils or khap panchayats:

> So-called honor killings continued to be a problem, especially in Punjab, Uttar Pradesh, and Haryana, where as many as 10 percent of all killings were honor killings. These states also had low female birth ratios due to gender-selective abortions. In some cases the killings resulted from extrajudicial decisions by traditional community elders, such as "khap panchayats," unelected caste-based village assemblies that have no legal authority. Statistics for honor killings were difficult to verify, since many killings were unreported or passed off as suicide or natural deaths by family members. NGOs estimated that at least 900 such killings occurred annually in Haryana, Punjab, and Uttar Pradesh alone. The most common justification for the killings offered by those accused or by their relatives was that the victim married against her family's wishes. For example, in January the parents of a 21-year-old woman in Sangrur District, Punjab, killed their daughter because she intended to marry a man of her choice.[11]

State protection

49. Indian law which could provide protection against religiously oriented violence such as 'honour killings' is not always effectively enforced by police. In 2010 USDOS reported that "due to a lack of sufficiently trained police and elements of corruption, the law was not always enforced rigorously or effectively in some cases pertaining to religiously oriented violence".[12]

50. The 2008 UK Home *Office Operational Guidance Note – India* explained that the governments of India's 28 states and seven union territories have primary responsibility for maintaining law and order, with the central government providing guidance and support. Some members of the security forces have reportedly committed human rights abuses, and corruption in the police force exists at all levels. The note states that police have acted with relative impunity, and are rarely held accountable for illegal actions.[13] Human Rights Watch has alleged in the past that "[p]olice routinely fail to investigate

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[8] Law Commission of India 2012, *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework*, Shakti Vahini website, August, p.3 <http://shaktivahini.org/wp-content/uploads/2012/03/report242.pdf> Accessed 6 August 2014 <CIS27209>

[9] Shakti Vahini, a New-Delhi based NGO that advocates against honour crimes and human trafficking.

[10] Immigration and Refugee Board of Canada 2013, *India: Honour crimes, including their prevalence in both rural and urban areas; government protection and services offered to victims of honour crimes (2009-April 2013)*, 9 May, IND104370.E, Refworld <http://www.refworld.org/docid/51ab3f114.html > Accessed 18 June 2013 <CX309546>

[11] US Department of State 2014, *Country Reports on Human Rights Practices 2013 – India*, 27 February, Section 6 Women: Harmful Traditional Practices <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220392> <OG1F18C9077>

[12] US Department of State 2011, *International Religious Freedom Report for 2010 (July-December) – India*, 13 September, Section II

[13] UK Home Office 2008, *Operational Guidance Note – India*, April, p.8

apparent "honor" killings".[14] A 2011 source stated that Punjab police had been unable to find a solution to an apparent 'surge' in the number of honour killings.[15]

51. Human Rights Watch also reported in 2010 that there had been an increase in honour killings in the northern Indian states of Haryana, Punjab, and western Uttar Pradesh. There were also cases reported from the National Capital Territory of Delhi. Human Rights Watch states that these incidences of honour killings involved khap panchayat edicts issued against inter-religious and inter-caste couples. According to the report, "some local politicians and officials have been sympathetic to the councils' edicts, implicitly supporting the violence".[16]

52. According to the *Middle East Quarterly* 2012 article referred to above, khap panchayats exist in regions where honour killings are prevalent. In these areas local politicians reportedly 'turn a blind eye' to honour killings:

> In 2010, a government- funded study on the prevalence of honor crimes in India found that they are most common in regions dominated by *khap panchayats* and increasingly involve inter-caste, rather than intra-sub-caste marriages. In these regions, local politicians turn a blind eye to the murders and resist efforts by the central government and parliament to deal with the problem while local police collude in honor killings or help cover them up, often mischaracterizing the murders as suicides. In 2011, theatres in Haryana refused to screen an Indian film on honor killings because of threats by *khap panchayats*.[17]

Relocation

53. According to its most recent 2011 census, India's population was approximately 1.21 billion[18] in some 27 million towns and settlement, and the largest 8 cities have between 4 and 12 million people in each.[19]

54. In 2013, USDOS stated that Indian law provides for freedom of movement within the country, and the government generally respects this in practice. In late 2010, the government repealed the requirement for nationals to apply for special permits to travel to Manipur, Mizoram and Nagaland. Such permits, however, are still required to travel to Jammu and Kashmir.[20]

55. In 2010, the UK Home Office stated that there are no checks by authorities on newcomers arriving from another part of India; local police "have neither the resources nor the language abilities to undertake background checks on individuals relocating within India". Furthermore, there is no registration system for citizens.[21] The 2008 UK Home *Operational Guidance Note – India* advised that internal relocation was feasible where an applicant's fear was of local police and where a person is not of interest to the central authorities.[22]

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[14] Human Rights Watch 2010, *India: Prosecute Rampant 'Honor' Killings*, 18 July <http://www.hrw.org/en/news/2010/07/16/india-prosecute-rampant-honor-killings> Accessed 26 August 2010
[15] 'Spate of honour killings shakes up Punjab' 2011, *Indo-Asian News Service*, 14 July
[16] Human Rights Watch 2010, *India: Prosecute Rampant 'Honor' Killings*, 18 July <http://www.hrw.org/en/news/2010/07/16/india-prosecute-rampant-honor-killings> Accessed 26 August 2010 <CX744258516864>
[17] Chesler, P & Bloom, N 2012, 'Hindu vs. Muslim Honor Killings', *Middle East Quarterly*, Summer, p.50 <http://www.meforum.org/meq/pdfs/3287.pdf> Accessed 29 August 2014 <CIS29761>
[18] DFAT Country Information Report, India, 2015, p. 4.
[19] https://en.wikipedia.org/wiki/List_of_most_populous_cities_in_India - accessed 20 August 2015
[20] US Department of State 2013, *Country Reports on Human Rights Practices for 2012 – India*, 19 April, Section II
[21] UK Home Office 2010, *Country of Origin Information Report – India*, 21 September, p.95
[22] UK Home Office 2008, *Operational Guidance Note – India*, April, p.6

56. In 2015, the UK Home Office quoted Country Guidance to the Upper Tribunal, which stated that " the possibility of the police, or any other person or body, being able to locate, at the behest of an individual's family, a person who has fled to another state or union in India to be remote".[23]

57. Hindi, one of the two official languages, the other being English, is the majority language in India spoken by 41 per cent[24]. Hindi is spoken by a majority in eight northern states[25] According to the Encyclopaedia Britannica Online, Hindi is spoken as a first language by approximately 425 million people across India, and as a second language by an additional 120 million[26]. Although only a relatively small number speak English as their first language, an estimated 125 million people speak English as either a first, second or third language.

58. The Times of India reported on 23 June 2013 that overall Indian unemployment rate was 3 per cent.

59. In 2015, the World Bank reported that the Indian economy grew 7.4 per cent in 2014 and is likely to grow at 6.4 per cent in 2015.[27]

60. In 2015, DFAT reported that in practice, internal location can be limited by a range of factors, but that despite some difficulties millions of Indians successfully relocate within India either temporarily or permanently every year … In general, DFAT assesses that there are a range of viable internal relocation options for individuals seeking protection from discrimination or violence.[28]

Country of reference

61. The applicants claim to be Indian nationals. Based on the copies of their passports, the Tribunal finds that India is their country of nationality for the purposes of the Convention and also their receiving country for the purposes of s.5 and s36(2)(aa) of the Act.

Assessment of claims

62. The applicants presented in a broadly consistent manner about their individual circumstances in India and Australia at the Tribunal hearing. Their evidence is also broadly consistent with the independent country information, set out above, that indicates that severe friction in intra-family relations may occur in relation to contravention of traditional Sikh marriage practices such as divorce, independent choice of marriage partner and same *gotra* marriage. Their evidence was also broadly consistent with country information which indicates that Punjab has a high rate of punitive behaviour, including "honour killing", often perpetrated by family members in response to perceived shame arising from contravention of Sikh marriage practices.

63. For the reasons above, the Tribunal accepts that the applicant is from a traditional Sikh family in rural Punjab. The Tribunal accepts that she divorced her first husband and that her family and brother were angry and upset when she informed them because divorce is not in line with Sikh cultural values.

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[23] *UK Home Office*, "Country Information and Guidance: India: Background information, including actors of protection, and internal relocation", 6 February 2015, p 5.
[24] DFAT Country Information Report, India, 2015, p. 4.
[25] University of Illinois at Urbana-Champaign – Linguistics Department (n.d.), a *Brief Profile of the Hindi Language*
[26] Encyclopaedia Britannica Online (n.d.), Hindi language
[27] http://www.worldbank.org/en/country/india - accessed 21 August 2015
[28] DFAT Country Information Report, India, 2015, p. 22.

64. Given their consistent and credible evidence, the Tribunal accepts that the applicants married without her family permission and that her brother and family became angry, abusive and upset when informed.

65. For the same reasons, the Tribunal accepts that both the applicant and her spouse are Sikhs from the Jat caste and their grandmothers are of the same sub-caste and village, and that their marriage is a same-*gotra* marriage. The Tribunal accepts that the applicant's family is traditional in its views and that her brother, already disagreeing with the applicant's divorce and her second marriage, has been further angered, humiliated and shamed because she is also now living in a consanguineous marriage.

66. On the evidence before it, the Tribunal finds that as the applicants fear harm because of their same-*gotra* marriage, a claim pertaining to their membership of the particular social group of people in same-*gotra* marriages in India arises in this case. Having regard to the test applied in *Applicant A* and also in *Applicant S's* case, as discussed above, and the country information cited in this case, the Tribunal finds that people in same-*gotra* marriages comprise a particular social group in India.

67. Based on the credible oral statements and other evidence of applicants, the Tribunal accepts that the applicant was made to leave the family home when she told the family of her marriage and that her brother hit her at the time. The Tribunal accepts that the brother, along with four other people including the applicant's [relative] and the brother-in-law of her spouse threatened and intimidated the applicant and her husband as they departed for Delhi as has been claimed. The Tribunal accepts that the applicant's brother has threatened to harm the applicant if she returns.

68. Given the family response to the applicant's marital situation, and considering independent country information outlined above concerning the situation of young people who take action counter to Sikh marriage practices, the Tribunal accepts that the applicants are at risk of family ostracism. Having regard to the non-exhaustive examples of serious harm in s.91R of the Act, and the definition of significant harm in ss.5 and 36(2) of the Act, the Tribunal finds that this does not constitute either serious harm or significant harm to either the applicant or her spouse, and that the chance or risk that in the reasonably foreseeable future that they will be subject to serious harm or significant harm at the hand of their families in general is remote. In making this finding, the Tribunal has taken into account that the applicant's mother tried to help the applicant when her brother hit her in the family house and, although the applicant's spouse's brother-in-law was a member of the party involved in the taxi incident, there has been no claim that the applicant's spouse was harmed by his family in general when he revealed the marriage to them, though he had to leave the house.

69. However, based on credible oral evidence of the applicants, the Tribunal accepts that the applicant's brother and the applicant's spouse's brother-in-law have threatened to harm and kill the applicants, and the Tribunal finds this amounts to serious harm for the purpose of s.91R(1) of the Act. Given the threats of the applicant's brother and spouse's brother-in-law and related past events, and considering independent country information concerning reports of violence and honour crimes involving same-*gotra*/same village couples, the Tribunal finds that the applicants face a real chance of persecution at the hands of the applicant's brother and spouse's brother-in-law in the reasonably foreseeable future in their home area of Punjab on account of their membership of a particular social groups consisting of "members of inter-*gotra*/intra-village marriage in Punjab".

70. Based on the credible evidence of the applicants, and having regard to s.36(2)(aa) of the Act cited above, the Tribunal finds that the applicants face a real risk of significant harm for the purpose of s.36(2).

State Protection

71. The independent country information set out above indicates the law may not be enforced rigorously or effectively in some cases related to religiously oriented violence, because of the high level of corruption, inefficiency and in some cases collusion and sympathy to uphold traditional Sikh values with violence. Considering this information and the circumstances of the applicants' marriage, the Tribunal find that the applicants would not be able to access a level of state protection in Punjab in accordance with the principles of *MIMA v Respondents S152/2003.*

72. Considering the applicant's brother's and spouse's brother-in-law's threats of harm and the country information, the Tribunal finds that the applicants could not obtain protection from the authorities in Punjab such that there would not be a real risk that they will suffer significant harm *MIAC v MZYYL* [2012] FCAFC 147.

Relocation

73. The Tribunal has considered whether the applicants would be able to reasonably relocate to another area of India such as one of India's urban centres, several of which have populations in the millions or another area of India which has a large Sikh population, such as Rajasthan, Uttar Pradesh, Delhi and Himachal Pradesh.[29]

74. It was put to the applicants at the hearing that India is a vast and very populous nation, and that country information does not support that the applicant's family or any else would be able to find them in the rest of India especially given information about the lack of central registries and the difficulties that even the police have in tracking down individuals (as referred to in the country information set out above).

75. The Tribunal accepts that the applicant's brother has connections with local politicians. The Tribunal also accepts that his [relative], a criminal, may try to use his links to find the applicant. However, the independent country information set out above indicates that India has a massive population and enormous cities. There is no national registration system for Indians and information sharing between police forces is very limited. Even taking into account that the applicant's brother has local political and criminal connections, and could use bribery to obtain assistance, the country information concerning the lack of central registries and difficulties police have in tracking down individuals across the nation indicates that the chance or risk they would be able to locate the applicants is remote. The applicants have not claimed that they have any problems on account of their castes or religions, other than because of their marriage. Given the totality of the independent country information and considering their individual circumstances, the Tribunal finds that the applicants could relocate to other Indian states where there is no appreciable risk of the occurrence of the feared persecution.

76. There are a number of factors (put to the applicants for comment at the hearing) that strongly indicate that it would be reasonable for the applicants to relocate to another state of India to avoid any localised risk of serious harm and significant harm in Punjab. The applicant said she would live in fear of being found by her brother. The Tribunal considered her comments but given its finding that there is no appreciable risk of the occurrence of the feared persecution in areas outside Punjab, it does not accept that it would not be

[29] Office of the Registrar General & Census Commissioner 2001, *Population by Religious Communities*, Census India website <http://censusindia.gov.in/Census_Data_2001/Census_data_finder/C_Series/Population_by_religious_communities.htm>.

reasonable for the applicants to relocate to another state in India to avoid the localised threat of serious harm that the applicants face in their home state of Punjab for this reason.

77. At the hearing, the applicant said that the Sikh community would be suspicious of them in another location if they were not with their families and will ostracise them. The Tribunal considered these comments but notes that millions of Indians successfully relocate within India every year and that there are no legislative or other obligations to provide anyone details of their sub-caste or village background. It does not consider there is a real chance that their same-*gotra*/same village marital status will become known in the relocated community.

78. At the hearing the applicant stated that their son will be regarded as illegitimate by her family and will be persecuted and perhaps killed if her family becomes aware of his birth. The Tribunal considered this claim but given the finding that there is not a real chance their marital status will become known in the relocated community, it does not accept that it would not be reasonable for the applicants to relocate to another state in India to avoid the localised threat of serious harm that the applicants face in their home state of Punjab for this reason

79. At the hearing, both applicants said that relocation would be very difficult for them because they have no family support in India and no savings. They said they have now been in Australia for 6 years and it would be difficult to start a new life. They would not be able to find work and they would not be able to survive and raise their child. The Tribunal has taken into account that in relocating they would not have family support and that their present financial situation is limited but it does not accept they would not be able to quickly find work and support themselves and their child given a range of factors discussed below.

80. At the hearing both applicants confirmed they read, speak and write Hindi. This language is understood by around 40% of the Indian population and a majority in eight northern states. At the hearing both applicants stated speak, read and write English. English is recognised as an "associate" official language to Hindi, and is used predominantly by educated and professional groups, media, and in administrative contexts.

81. The applicants are Sikhs and independent country information indicates that Sikhs are present throughout the country and are able to practise their religion without restriction and that they have indiscriminate access to employment.

82. The country information set out above indicates that unemployment is low in India and the country is experiencing substantial economic growth. The applicant has Indian [and Australian tertiary qualifications]. The applicant's spouse has Australian [tertiary qualifications]. Both have employment experience in Australia in casual roles and [in a certain industry]. They are both young and have not claimed to have any health problems and they have been able to adapt to life living in a foreign country together.

83. At the hearing, both applicants said that relocation would be very difficult for them because it is not secure in cities such as Delhi where women are raped and killed, and they do not wish to return to that environment or for their son to grow up in an environment of fear. The Tribunal has considered this claim but considers it entirely speculative that they would be subject to such treatment in other areas of India, particularly as the applicant would be returning to India as a married woman who has a husband. It does not consider their fears to be matters that make it unreasonable for them to relocate.

84. Considering all of the individual circumstances, and the country information, the Tribunal finds that it would be reasonable for the applicants to relocate to another state in India to avoid the real chance of serious harm that the applicants face in their home state of Punjab.

Accordingly, the Tribunal finds that the applicants do not have a well-founded fear of persecution in India.

85. Considering the independent country information and the applicants' individual circumstances, the Tribunal finds that it would be reasonable for the applicants to relocate to an area of the country where there would not be a real risk that they will suffer significant harm and that 36(2B)(a) applies their cases. Accordingly, the Tribunal finds that there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicants being removed from Australia to India that there is a real risk that they will suffer significant harm.

Conclusions

86. For the reasons given above the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

87. The Tribunal affirms the decision not to grant the applicants Protection visas.

Amanda Paxton
Member