

1206698 [2012] RRTA 891 (16 October 2012)

DECISION RECORD

RRT CASE NUMBER: 1206698

DIAC REFERENCES: CLF2011/166562: CLF2012/79613

COUNTRY OF REFERENCE: Pakistan

TRIBUNAL MEMBER: John Godfrey

DATE: 16 October 2012

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(aa) of the Migration Act.

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 (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2 The applicants, who claim to be citizens of Pakistan, applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] September 2011.

3 The delegate refused to grant the visas [in] May 2012, and the applicants applied to the Tribunal for review of that decision.

RELEVANT LAW

4 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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 to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5 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 to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

6 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.

7 The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

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.

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.

10 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.

11 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.

12 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 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.

13 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.

14 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.

Complementary protection criterion

15 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 to 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').

16 '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.

17 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.

Member of the same family unit

18 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. 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 spouse.

CLAIMS AND EVIDENCE

19 In her application for a Protection (Class XA) Visa the first applicant said that she was born on [date deleted: s.431(2)] in [Locality 1] in Afghanistan. The first applicant married , [the second applicant], in Sydney [in] 2010. He is included in the application but has made no claims in his own right. He was born in [Locality 2], Pakistan on [date deleted: s.431(2)]. The first applicant came to Australia [in] January 2009. She said that she had lived in [Locality 1] all her life. The first applicant completed High School in Pakistan and continued on to University. She holds [degrees] from Universities in Pakistan. The first applicant worked as a teacher while studying in Pakistan. She completed a number of courses

in Australia. She now works [in a different occupation]. The first applicant's parents and [siblings] continue to live in Pakistan.

20 [In] November 2011 the applicants' adviser provided a translation of a First Information Report made following an incident in [Locality 1] [in] October 2010. It was alleged that the second applicant and another man had driven from [Locality 2] to [Locality 1] that day and that they had been stopped by a group of men, one of whom was armed. The second applicant had been assaulted and threatened. He claimed that the person who had assaulted him, and who had shot his travelling companion, was [Mr A], the man to whom the first applicant had been promised in marriage. In the FIR the second applicant said that the reason for the assault was enmity between the second applicant and [Mr A]. It was recorded that the reason for the enmity was that [Mr A] is the cousin of the first applicant and that the marriage between the applicants had been by mutual consent. The second applicant had said that the first applicant's cousin, [Mr A] and his branch of the family were not happy about the marriage and had become the second applicant's sworn enemy.

Statutory Declaration before the Protection (Class XA) Visa interview

21 The first applicant declared [in] September 2011:

[personal details]

In our part of Pakistan, there is a custom which promotes child marriages. That is, when a child is born, the family elders who have considerable influence within the family arrange marriages between two children within the family. In line with the above custom, the elders in my family and in the society fixed my marriage with my father's brother's son [name]. Despite, my parents' liberal attitude, they could not go against their families and social rules entrenched in our society.

In 2004, one of my younger sisters, [name] married to one of my cousins with whom the marriage was fixed when she was born. Despite my sister's wish, she was forced into the marriage to my cousin. Though, my parents are liberal minded people, nonetheless, they could not do anything to stop the marriage as they do not want to go against the wishes of the society and the family. My parents feared that if they go against the established custom in the region, they will be isolated from the society and will face social ostracism. In addition, they feared that they will be killed by the family members and the society as a matter of maintaining the family honor. The marriage has devastated the happiness and well-being of my sister. My education and the experience of my sister in her marriage life have enlightened me not to engage in the marriage which was fixed when I was a child. I had no wish to marry someone I did not love. In order to delay my marriage, I continued to engage in studies. My parents understand me and realised that the marriage they fixed with my cousin during my tender age will affect my future and wellbeing. Hence, they did not oppose me to engage in the studies.

In 2004, I started teaching at [college] in [Locality 1] while continuing with my further studies. During that period, I met my husband [name] at the College. We became friends. Our relationship gradually developed into a love affair. In Pakistan, it is very difficult to develop a love relationship as the Islamic fundamentalists and society considers it as against the values of Islam. Hence, we continued our relationship secretly. However, I told my love affair to my mother as she is a broad minded lady. In addition, she does not want to me to enter into a marriage relationship with my cousin as she saw the plight of my sister due to the intra-family marriage. My mother informed this to my father as well. My father said that though he understands my feelings, however, he said he cannot go against the family members and the

society. He warned that if he or I go against the wishes of the other family members and the society, we will be thrown out of the society and could even be killed.

My parents did not tell my love affair to any one including my brothers. My brothers also engaged in intra-family marriage which were decided when they were in their childhood. Due to that, I had to hide my feelings and was denied the right to enter a family relationship with a person of my choice. In addition, I feared that [name] and I will be harmed, if our relationship was exposed to people in my region. Further, we feared that the government of Pakistan also will not protect us even if we moved to some other part of Pakistan to avoid harm after the marriage because my relatives who are Islamic extremists can find out and harm us anywhere in Pakistan. As a result of that, we were forced to continue our relationship secretly. Once I completed my studies at the end of 2006, my parents faced immense social pressure to arrange my marriage with my cousin. Though, they were not happy with that decision, they told that they had no option but to oblige with the family pressure. My parents advised my relatives that they will take the necessary steps for the marriage but told them that they will need some more time.

In the meantime, on [date] April 2008, [name] left Pakistan to come to Australia for his studies. We continued our relationship through phone. During that period, I told my parents that I wanted to study further in a western country. I applied for a student visa to come to Australia which was approved and came here in February 2009.

After I came to Australia, I told my parents to talk to my cousin's family and other members of the family to persuade them to accept that I would not marry him. My parents had for several months tried to convince our relatives regarding our marriage. However, my relatives told my parents that they will not accept my relationship with [name] and warned my parents that I must face the consequence for violating the customary rules and the values of Islam.

[In] 2010, I married to [name] in Sydney, Australia. After the marriage, we informed my parents. Though, my parents were happy for us as a couple, as we are in love, they said that they cannot openly accept the marriage. My parents were scared to accept our marriage because they fear that if they accept our marriage; they will be harmed by the other family members. However, my parents said that they would try to persuade the other family members to accept our marriage.

My relatives, including the Islamic extremists believe that as I have a good education and also have studied abroad, I have become too westernized and do not adhere to their values of Islamic culture. Hence they believe that I have damaged the precepts of Islam.

In October 2010, my husband returned to Pakistan to be with his family for the Eid festival in his birth place [Locality 2]. After he arrived in Pakistan, he went to see my family in [Locality 1] to try to make peace with them. My husband informed me when he reached my village, my cousin [name] and other members of the family attacked my husband and tried to kill him. He informed me that he escaped from the attack but sustained injuries. He was admitted to the hospital. However, the hospital informed him that he needed to make First Information Record [FIR] at the local police station in order to be admitted in the hospital. On [date] October 2010, my husband made a FIR at the Police station in [Locality 1]. However, the police did not take any steps to apprehend the offenders. I suspect that as my brother [name] who is a police officer in [Locality 1] might have used his influence not to proceed with the case. After two days in the hospital, my husband returned to [Locality 2] to be with his brother during Eid festival.

[In] November 2010, my husband returned to Australia. We hoped that we could still

convince my parents and the relatives to accept our marriage and that we could return to Pakistan to be with our family at some stage. We tried to convince our relatives. But we have now realised that we cannot convince them and the radical Islamic fundamentalists, as they still believe that I have violated both the family norms and the Islamic values.

I am undergoing tremendous stress because I fear that my husband and I will be harmed if we returned to Pakistan. [In] 2011, I suffered a miscarriage due to the mental stress I have undergone because of all this drama

I fear I will be harmed by my family members and Islamic fundamentalist and believe that the Pakistani government will not protect me from my persecutors. The persecutors believe that I as an educated female have embraced the western culture and have violated the Islamic values. I fear for my husband's and my life and request the Australian government to protect us from our persecutors. I do not believe we will be safe anywhere in Pakistan."

Submission from adviser before the DIAC interview

22 [In] September 2011, the applicants' adviser lodged a 101 page submission, at folios 1 to 101 of the departmental file CLF/2012/79613. Much of this is country information detailing persecution against women, and in particular against women who had married for love. There is also a considerable amount of information on the general human rights situation in Pakistan. On the specific claims relating to [the applicant], it was submitted that "the applicant is a person to whom Australia has protection obligations, as she has a well-founded fear of suffering persecution for convention reasons if she returned to Pakistan for the cumulative reasons of:

- Membership of the particular social group 'educated Pakistani females'
- Membership of the particular social group 'Pakistani females engaged in love marriages'
- Membership of the political social group 'Pakistani females defying family tradition of arranging marriage'
- Membership of the political social group 'Pakistani women facing honour killing'
- Membership of the particular social group 'Pakistani females facing forced marriage'.

23 We further submit that the current ongoing human rights problems and security situation and political and religious instability in Pakistan, there is no meaningful option there for the applicant to relocate or obtain effective protection from the Pakistani authorities, given the problems she fears."

24 It was further submitted: "Particular Social Group (1): Western Educated Pakistani females: *"We submit that western educated Pakistani females are a particular social group. The immutable characterise of this particular social group is educated Pakistani females which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.*

The reports discussed earlier indicate that Islamic fundamentalists including the very powerful Pakistani Taliban consider western educated women are a morally corrupted and un-Muslim. The reports discussed above indicate that conservative Pakistani society and Islamic

fundamentalists target and harm women whom they consider as un-Islamic. Accordingly, we submit that the applicant who is educated in Australia and has westernised values, and for the following social group reasons, will face a real chance of persecution in Pakistan as a result of her particular social group.

25 Particular Social Group (2): Pakistani females engaged in love marriage.

“We submit that Pakistani females engaging in love marriages are a particular social group. The immutable characterise of this particular social group is Pakistani females engaging in love marriages which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.

In the case of Saad SARHAN and Sara Issa Mohamad Disi, Petitioners, v. Eric H. HOLDER, Jr., Attorney General of the United States, Respondent No. 10— 2899. United States Court of Appeals, Seventh Circuit. Argued April 13, 2011 - September 02, 2011, the US Court of Appeals recognised women in Jordan who have flouted repressive norms as a Particular social group.

The reports discussed earlier indicate Pakistani society is a conservative male chauvinistic society and do not allow women take decisions, in particular regarding their marriage. The reports further show that women who engage in love marriages face harm. Accordingly, we submit that the applicant who married her partner without the approval or consent from the elders in her family will face a real chance of persecution in Pakistan as a result of her particular social group.”

26 Particular Social Group (3): Pakistani females defying family tradition of arranged marriage.

“We submit that Pakistani females defying family tradition of arranged marriage are a particular social group. The immutable characterise of this particular social group is Pakistani females defying family tradition of marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.

The reports discussed earlier indicate females refusing to accept marriage arranged by their elders face serious harm in Pakistan. Accordingly, we submit that the applicant who married her partner defying her family's order will face a real chance of persecution in Pakistan as a result of her particular social group.”

27 Particular Social Group (4): Pakistani females facing honor killing.

“We submit that Pakistani females facing honor killing are a particular social group. The immutable characteristic of this particular social group is Pakistani females defying family tradition of marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.

The reports discussed earlier indicate women are considered as subordinate to men in Pakistan. The Pakistani society target females whom they consider as unIslamic for violating the established Pakistani traditions. Accordingly, we submit that the applicant who has chosen her partner defying the male chauvinistic Pakistani and Islamic

traditions and culture will face a real chance of persecution in Pakistan as a result of her particular social group.”

28 Particular Social Group (5): Pakistani female facing forced marriage.

“We submit that Pakistani females facing forced marriage are a particular social group. The immutable characterise of this particular social group is Pakistani females facing forced marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.”

The Protection (Class XA) Visa interview

29 The first applicant was interviewed [in] April 2012. The first applicant was asked about her proposed arranged marriage, about her marriage to [the second applicant]. She said that she was under pressure to return to Pakistan and marry [the second applicant]. She noted that [the second applicant] could then marry other wives. She clarified that her father was the younger of the two brothers and that he was unable to exercise influence over the family. She added that her father and mother could not take action because if they did the family would lose its honour and her father, who is now retired, would have to leave the house with all of his family. On relocation, she noted that her extended family lived in Lahore, Karachi and Islamabad and she would be at risk everywhere.

The Protection (Class XA) Visa Decision

30 The delegate considered the situation of women in Pakistan in the light of the first applicant’s claim that she feared being killed by relatives and Islamic fundamentalists. In addition to his own research detailed in the decision the delegate also considered the submission from the applicants’ representative. The delegate concluded that the information supported the view that mistreatment of women in the form of forced marriages remains a serious problem in Pakistan and that threats to women increased throughout 2011. As a result he accepted that women in Pakistan who resist entering a planned marriage may be subject to harm amounting to persecution. He also accepted that the Pakistani authorities provide little protection in such circumstances.

31 The delegate considered the first applicant to be credible.

32 While the delegate accepted that an arrangement for the marriage was put in place at the time of the first applicant’s birth, he was not satisfied that the first applicant was being forced to marry her cousin, [Mr A]. The delegate was of the view that the first applicant’s father could have overridden any pressure on the first applicant by the extended family. The delegate also noted that the first applicant was able to postpone the marriage until she left Pakistan, [age deleted: s.431(2)].

33 The delegate found that the first applicant’s experiences meant that she did not face any retribution from other family members or Islamists. He formed the view that the first applicant’s circumstances were different to that of many women from rural areas of Pakistan.

34 The delegate considered also that the delay in lodging a protection visa application and found it was a legitimate matter to bear in mind when assessing the genuineness or depth

of an applicant's fear. He noted that the application was lodged two and a half years after the first applicant's arrival in Australia.

35 The delegate concluded that the first applicant could relocate elsewhere in Pakistan.

36 The delegate found that the first applicant did not have a real chance of Convention based persecution should she returned to Pakistan.

37 The delegate considered the first applicant's claim under the Complementary Protection legislation. He found that he was not satisfied that there were substantial grounds for him believing that as a necessary and foreseeable consequence of the first applicant being removed from Australia to Pakistan, there was a real risk the applicant will suffer significant harm.

The RRT hearing

38 The hearing was conducted at the Sydney Registry of the RRT [in] October 2012. Both applicants attended. The hearing was conducted in English. Also present was [the applicant's representative].

39 I began by asking the second applicant to tell me about his trip to Pakistan in 2010, after the couple had married. [The second applicant] said that he had visited his parents in [Locality 2] and had then tried to visit his wife's parents in [Locality 1]. He said that he had been travelling with a friend. In [Locality 1], near a large service station, he said, his car was stopped by three men, one of whom was his wife's cousin, and the man to whom she had been promised in marriage, [Mr A]. He said that he was kicked and beaten by [Mr A] and threatened with death. He said that when his friend tried to stop [Mr A] from assaulting the second applicant, [Mr A] shot his friend. He said that the resulting commotion resulted in people intervening and stopping any further bloodshed. The second applicant said that he and his friend were taken to hospital for treatment. As is the custom, he said, a First information Report was prepared (A copy of which, dated [in] October 2010 is on file CLF2011/166562, in translation, at folios 135 and 136.) The second applicant said that he had gone back to his parent's house and stayed there until his return to Australia.

40 I asked the second applicant if [Mr A] had given any reason for the attack. He said that [Mr A] had been abusive and had said that he would kill the second applicant for marrying his cousin, the first applicant, because she had been promised as [Mr A]'s wife.

41 I said that I accepted the First Information Report and the evidence of the second applicant as to the motivation for the attack. I accepted that the attack happened as claimed.

42 I asked the first applicant about her upbringing. She said that she had been able to attend school and university. She has a cousin who has also been able to study. She said that she her sisters and brothers were all married to cousins as this was the tradition in the family. She added that she had betrothed 'since birth' to [Mr A]. I asked if her father was the oldest in the family. She said that he was not. She said that [Mr A]'s father was the head of the family now. [Mr A] would assume that role in time. I asked how [Mr A] had reacted when she had gone to University She said that her father had been able to convince him to put off the wedding until [Mr A] had a job and to allow the first applicant to continue studying.

43 I asked how [Mr A] had reacted when she had said that she wanted to study in Australia. The first applicant said that he had not found out until after she had arrived in Australia. She said this had caused major problems for her father. She said that if they had found out [Mr A] and his father would have stopped her from travelling to Australia. After she married [the second applicant], she said, the situation became even worse for her parents. The first applicant said that her father is not allowed to be consulted on matters affecting the family or to be consulted by clan elders on broader issues. She said that she cannot speak to her parents except on those occasions her mother travels to Islamabad.

44 I asked the first applicant what she thought would happen to her if she were to return to Pakistan. She said that she feared she would be killed by [Mr A] and his family. She said that the elders were concerned that other girls in the family would follow her example and bring shame on them all.

45 I said that I had read the submission made by the applicants' representative very carefully, especially those sections dealing with the five different particular social groups defined by the representative. I noted that the relevant Australian law was complex. I said that I would also have to consider complimentary protection issues in this case. I explained the relevant law. In that context I asked the first applicant to tell me what she understood the Pashtun Code of Conduct 'Pashtunwali' to mean in this case. The first applicant said that if she were to be returned to Pakistan she would be killed because she had not married her cousin to whom she was betrothed but had instead married another man in Australia. She said it would be an honour killing and no one would or could protect her in Pakistan. The first applicant said that it was not possible for her to escape if she was to return to Pakistan. She said that finding a person in Pakistan was not a problem. She could be found whichever city she went to. The family have relatives in major cities.

46 I said that I had read a range of material about Pashtunwali I said that I accepted what she was telling me about honour killings and I noted the country information indicated that a person carrying out such a killing was unlikely to be pursued, charged or punished.

COUNTRY INFORMATION

47 Law, custom and transgressive marriage

On 30 December 2003 it was reported that: "Pakistan's highest court of law, the Supreme Court of Pakistan, ruled earlier this month that an adult Muslim female was entitled marry any man of her own free will without having to obtain the consent of her wali, or guardian". The report also related that: "The verdict has overturned the ruling of a provincial court, in two separate decisions in 1997, confirming that marriage without the approval of a guardian was invalid". Yafeet's August 2009 study of marriage and law in Pakistan reports that: "Any discussion of Pakistan's marital regime and the implementation of constitutional rights within its borders cannot be confined to the black-letter law"; and that: "In order to get a true sense of the extent to which women's marital rights are exercised and enjoyed, one must take into account customary practices that define and confine marriage in Pakistan". According to Yafeet, Pakistan's higher courts "have generally recognized and respected women's basic Islamic and constitutional freedom to exercise choice in marriage". Nonetheless, such rulings reportedly have only limited effects in terms of the broader occurrence of such customary

behaviors. Yafeet writes that persons who conduct honor killings in response to love marriages “are not perceived as criminals, but rather as persons rendering punishment to a wrongdoer, they may even be applauded and respected by their peers, and may not face criminal prosecution. Even when they do, lower courts have tended to be lenient and forgiving, either drastically reducing the killers’ sentences or acquitting them of murder altogether” (‘Pakistan: Supreme Court legalises “free-will” marriages’ 2003, *IRIN News*, 30 December <http://www.irinnews.org/PrintReport.aspx?ReportId=21457> see pp.347-348 in: Yafeet, K.C. 2009, ‘What’s the constitution got to do with it? Regulating marriage in Pakistan’, *Duke Journal of Gender Law & Policy*,

48 Love marriages and violence

Reports of persons being attacked by family members after entering into a relationship which transgresses family expectations have appeared from both rural and urban areas.

Asian Human Rights Commission 2009, ‘Pakistan: Police complicity and judicial inaction lead to the murder of a girl on the pretext of an honor killing’, 14 May <http://www.ahrchk.net/statements/mainfile.php/2009statements/2026/> Asian Human Rights Commission 2009, ‘Pakistan: Love marriage greeted by the torture of a family; one girl is abducted by a Punjab MP’, 20 May <http://www.ahrchk.net/ua/mainfile.php/2009/3159/> Asian Human Rights Commission 2009, ‘Pakistan/Kashmir: Two women are abducted and three others are arrested as a result of a love marriage’, 9 July <http://www.ahrchk.net/ua/mainfile.php/2009/3203/>

49 Love marriages and honor killing

On 12 April 2007 *Pakistan Press International* reported on the findings of a report into such killings conducted by “UNISEF and NGO Lawyers for Human Rights and Legal Aid (LHRLA)”. The study found that “Karo-kari” honor killing incidents resulted in the death of “1305 people including women, children and men were murdered across the country during 2006”; and that of those murdered: “428 people were killed because they got married on their own free will”. Yafeet’s August 2009 study writes similarly: “In fact, honour killings in general, and in response to love marriages in particular, are so prevalent that government statistics report that not a day goes by without at least one woman being killed in the name of distorted notions of honour” Writing of the kind of customary justice that may be exacted in this regard Yafeet states: “While a woman who marries without parental consent is frequently murdered to restore her family’s honour, her husband can escape this fate by paying her father what her “worth” was. More often than not, the man “pays” his wife’s family not financial compensation, but another woman such as his sister or cousin”. The Shirkat Gah organisation has completed a specific study on the manner in which honor killings occur in Pakistan, and in the Sindh and the Punjab in particular, noting that such killings are often referred to via the Sindh term, *karo kari* (“karo being man; kari being woman”), and killings in the Punjab are sometimes reported on through the local term *kala kali*, referring “to honor killings in Punjab where the victims are accused of illicit relationship (kala being man; kali being woman)” (‘1567 fall prey to honour killings in 2006: Report’ 2007, *Pakistan Press International*, for another report associating such matters with honour killing, see p.361 in: Yafeet, K.C. 2009, ‘What’s the constitution got to do with it? Regulating marriage in Pakistan’, *Duke Journal of Gender Law & Policy*, vol.16, August and: Sarwar, B. 2008, ‘No “honour” in killing’, source: *The News*, Sisterhood Network website, 3 September [http://www.global-sisterhood-network.org/content/view/2185/59/Shirkat Gah 2001, Karo Kari, TorTora, Siyahkari, Kala Kali – “There is no ‘honour’ in killing”](http://www.global-sisterhood-network.org/content/view/2185/59/Shirkat_Gah_2001_Karo_Kari_TorTora_Siyahkari_Kala_Kali_-_There_is_no_honour_in_killing): National Seminar

Report, 25 November

<http://www.sgah.org.pk/special%20bulletin%20of%20karo%20kari.pdf>

50 Statistics: 2009 honor killing violence

Reporting on violence against love-marriages in Pakistan in March 2009 a *Dawn* news report noted that: “An annual report published by the Aurat Foundation puts cases of honor killing reported from across the country at 472 and of them an overwhelming majority of 220 were reported in Sindh, 127 in Balochistan, 91 in Punjab, 32 in the NWFP and two in Islamabad”. Reporting on the phenomenon of honor killings more generally *The News*, in January 2009, reported that: “As many as 179 persons were killed in 141 incidents of honor killing throughout the country in year 2008”; that: “Most of such incidents took place in interior Sindh, especially Sukkar, Khairpur and Mirpurkhas”; and that: “It is, however, astonishing to note that a great number of honor killing incidents also took place in the urban areas of Punjab like Lahore, Sialkot, Gujranwala and one such incident in Rawalpindi” (Khan, M.H. 2009, ‘No relief in sight for karo-kari couple’, *Dawn*, 9 March <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/sindh/no-relief-in-sight-for-karo-kari-couple-international-women-s-day-hs> Pasha, F.K. 2009, ‘2008 saw 179 honour killings’, *The News*, 1 January http://www.thenews.com.pk/daily_detail.asp?id=154963

51 Pashtunwali

“According to Pashtunwali Honour and Bravery or Nang are foremost in the Code. It is the absolute duty of men to protect the respectability of women and to protect the integrity of the homeland. Honour demands the maintenance of sexual propriety. Complete chastity among female relatives is of the essence; only with the purity and good repute of his mother, daughters, sister or wife does a man ensure his honour. Thus women are restricted to private, family compounds. In the code of revenge or Badal, minor problems can be settled by negotiation but partners in illicit sexual relations are killed if discovered. Killings associated with sexual misconduct are the only ones that do not demand revenge. Even the courts are accustomed to dealing leniently with such cases.”

“Nowhere is fear of shaming the group stronger than in the requirement to defend the honour of women (namus)... while they cannot accumulate honour in their own right, they can lose it through misbehaviour or attacks on them. Any attack on a women, physical or verbal, is seen as an attack on a mam’s honour. Such attacks must be revenged. Similarly any sexual improprieties by women themselves are deemed such serious violations of the honour code that they can and should be killed by their male relatives.”

FINDINGS AND REASONS

52 I found the applicants to be credible. I found their statements through the case to consistent as was the interview with the departmental delegate.

53 In the particular circumstances of this case, I accept that the first applicant was born into a traditional Pashtun family in the North-West Frontier Province. I accept that she was betrothed ‘from birth’ to a first cousin who is the son of the present head of the family and who will inherit that position on the death of his father. I accept that the first applicant was

able to attend school and then University and was able to defer the marriage on the grounds that her prospective husband could not yet support a wife. I further accept that the first applicant's departure from Pakistan to study in Australia was concealed from her extended family, including her betrothed. I accept that this caused an immediate estrangement between first applicant's family and the extended family. I also accept that the first and second applicants married in Australia, causing even further rifts in the family in Pakistan.

54 I accept that the second applicant was threatened at gunpoint, beaten and injured by the betrothed and hospitalised. I further accept that a First Information Report was created at the time.

55 I accept that the applicants are citizens of Pakistan and that they have no right to enter or remain in any other country.

56 In the light of the circumstances outlined above I considered whether the first applicant has a well-founded fear of persecution should she return to Pakistan for reason of:

- Membership of the particular social group 'educated Pakistani females'
- Membership of the particular social group 'Pakistani females engaged in love marriages'
- Membership of the political social group 'Pakistani females defying family tradition of arranging marriage'
- Membership of the political social group 'Pakistani women facing honour killing'
- Membership of the particular social group 'Pakistani females facing forced marriage'.

I will consider these reasons individually and cumulatively.

57 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". ...

58 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.

"Particular Social Group (1): Western Educated Pakistani females:

59 I note that the applicant's representative submitted: "*Western educated Pakistani females are a particular social group. The immutable characterise of this particular social group is educated Pakistani females which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.*

The reports discussed earlier indicate that Islamic fundamentalists including the very powerful Pakistani Taliban consider western educated women are a morally corrupted and un-Muslim. The reports discussed above indicate that conservative Pakistani society and Islamic fundamentalists target and harm women whom they consider as un-Islamic. Accordingly, we submit that the applicant who is educated in Australia and has westernised values, and for the following social group reasons, will face a real chance of persecution in Pakistan as a result of her particular social group."

60 I am not convinced that a case can be made that all Western educated Pakistani females constitute a particular social group as the term has been defined by the Australian courts. The serious harm in the particular circumstances of this case is personal to the first applicant. It would be for reason of her contravention of Pashtunwali and is specific to the man she was intended to marry not for reason of her education or her subsequent life in Australia.

61 I do not find that there is a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social group 'Western educated Pakistani females' should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

Particular Social Group (2): Pakistani females engaged in love marriage.

62 I note that the applicant's representative submitted: "*Pakistani females engaging in love marriages are a particular social group. The immutable characterise of this particular social group is Pakistani females engaging in love marriages which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.*

In the case of Saad SARHAN and Sara Issa Mohamad Disi, Petitioners, v. Eric H. HOLDER, Jr., Attorney General of the United States, Respondent No. 10— 2899. United States Court of Appeals, Seventh Circuit. Argued April 13, 2011 - September 02, 2011, the US Court of Appeals recognised women in Jordan who have flouted repressive norms as a Particular social group.

The reports discussed earlier indicate Pakistani society is a conservative male chauvinistic society and do not allow women take decisions, in particular regarding their marriage. The reports further show that women who engage in love marriages face harm. Accordingly, we submit that the applicant who married her partner without the approval or consent from the elders in her family will face a real chance of persecution in Pakistan as a result of her particular social group"

63 I am not convinced that a case can be made that all Pakistani females engaged in a love marriage constitute a particular social group as the term has been defined by the Australian courts. I accept the country information, cited above, about the harm suffered by some women who have married someone of their own choosing. I do not accept that in all those cases the harm suffered was for a collective reason. I accept that in this case, the serious harm in the particular circumstances is personal to the first applicant because of the nature and beliefs of the man to whom she was betrothed. The serious harm in this case is for reason of her contravention

of Pashtunwali and is specific to the man she was intended to marry.

64 I do not find that there is a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social group ‘Pakistani females engaged in a love marriage’ should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

Particular Social Group (3): Pakistani females defying family tradition of arranged marriage.

65 I note that the applicant’s representative submitted: *“We submit that Pakistani females defying family tradition of arranged marriage are a particular social group. The immutable characterise of this particular social group is Pakistani females defying family tradition of marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.”*

The reports discussed earlier indicate females refusing to accept marriage arranged by their elders face serious harm in Pakistan. Accordingly, we submit that the applicant who married her partner defying her family's order will face a real chance of persecution in Pakistan as a result of her particular social group.”

66 I am not convinced that a case can be made that all ‘Pakistani females defying a family tradition of arranged marriage’ constitute a particular social group as the term has been defined by the Australian courts. I accept the country information, cited above, about the harm suffered by some women who have defied family tradition in this way. I do not accept that in all those cases cited the harm suffered was for a collective reason. I accept that in this case, the serious harm feared in the particular circumstances is personal to the first applicant because of the nature and beliefs of the man to whom she was betrothed and his family. The serious harm in this case is for reason of her contravention of Pashtunwali and is specific to the man she was intended to marry.

67 I do not find that there is a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social group ‘Pakistani females defying a family tradition of arranged marriage’ should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

Particular Social Group (4): Pakistani females facing honour killing.

68 I note that the applicant’s representative submitted: *“We submit that Pakistani females facing honour killing are a particular social group. The immutable characteristic of this particular social group is Pakistani females defying family tradition of marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.”*

The reports discussed earlier indicate women are considered as subordinate to men in Pakistan. The Pakistani society target females whom they consider as unIslamic for violating the established Pakistani traditions. Accordingly, we submit that the applicant who has chosen her partner defying the male chauvinistic Pakistani and Islamic traditions and culture will face a real chance of persecution in Pakistan as a result of her particular social group.”

69 While I accept honour killings occur in Pakistan and elsewhere, I am not convinced that a case can be made that all ‘Pakistani females facing honour killing’ constitute a particular social group as the term has been defined by the Australian courts. I find that the shared characteristic here is the feared harm of an ‘honour killing’. I do not find that there is a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social group ‘Pakistani females facing honour killing’ should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

Particular Social Group (5): Pakistani females facing forced marriage.

70 I note that the applicant’s representative submitted: “*We submit that Pakistani females facing forced marriage are a particular social group. The immutable characteristic of this particular social group is Pakistani females facing forced marriage which distinguishes this group from the rest of the society. Further, this shared characteristic is not the shared fear of persecution.*”

71 There is considerable information, including that cited above, to indicate that it is through an arranged marriage that most couples marry in Pakistan. While I accept that for a proportion of those involved the marriage will be against their will, I do not accept that a case can be made that ‘Pakistani females facing forced marriage’ constitute a particular social group as the term has been defined by the Australian courts. I do not accept that in all those cases cited the harm suffered was for a collective reason. I accept that in this case, the serious harm feared in the particular circumstances is personal to the first applicant because of the nature and beliefs of the man to whom she was betrothed and his family. The serious harm in this case is for reason of her contravention of Pashtunwali and is specific to the man she was intended to marry. I do not find that there is a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social group ‘Pakistani females facing forced marriage’ now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

72 I have also considered whether these grounds, considered cumulatively, could result in a finding that there is a real chance that the first applicant would suffer serious harm should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded. I find that they would not.

73 In the particular circumstances of this case I find that there is not a real chance that the first applicant would suffer serious harm for reason of her membership of the particular social groups outlined above or for any other reason should she return to Pakistan now or in the reasonably foreseeable future, or that her fear for that reason would be well-founded.

Complementary Protection

74 As the first applicant does not meet the criteria for the grant of a protection visa under s36 (2) (a) I have to consider whether she meets the criteria under the Complementary protection legislation. The relevant law is contained in s. 36 (2) (aa) of the Migration Act. “A non-citizen in Australia (other than a citizen mentioned in paragraph (a)) to 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 non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.”

75 I have considered the submission made on behalf of the first applicant by her adviser. I have dealt with the claims that the applicant has a well-founded fear of persecution in Pakistan in paragraphs 53 to 73 above. I have found that, even when the claims are considered cumulatively, there is not a real chance that the first applicant would be persecuted for a Convention reason now or in the reasonably foreseeable future and that her fear of persecution in Pakistan is not well-founded.

76 I have considered whether the claimant would suffer significant harm in terms of the wording of s. 36 (2A) (a), (b), (c), (d) and (e). ‘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.

77 As I noted above when discussing claims under the Refugees Convention, the first applicant’s claims relate to a fear of serious harm that would be directed at her by the man to whom she was betrothed at birth. I accept that this man threatened and attacked the second applicant when he attempted to visit the first applicant’s parents. I accept that as a Pashtun man from a rural area of the North-West Frontier Province he is bound by the code of Pashtunwali. I accept the published advice: *“According to Pashtunwali Honour and Bravery or Nang are foremost in the Code. It is the absolute duty of men to protect the respectability of women and to protect the integrity of the homeland. Honour demands the maintenance of sexual propriety. Complete chastity among female relatives is of the essence; only with the purity and good repute of his mother, daughters, sister or wife does a man ensure his honour. Thus women are restricted to private, family compounds. In the code of revenge or Badal, minor problems can be settled by negotiation but partners in illicit sexual relations are killed if discovered. Killings associated with sexual misconduct are the only ones that do not demand revenge. Even the courts are accustomed to dealing leniently with such cases.*

Nowhere is fear of shaming the group stronger than in the requirement to defend the honour of women (namus)... while they cannot accumulate honour in their own right, they can lose it through misbehaviour or attacks on them. Any attack on a women, physical or verbal, is seen as an attack on a mam’s honour. Such attacks must be revenged. Similarly any sexual improprieties by women themselves are deemed such serious violations of the honour code that they can and should be killed by their male relatives.”

78 I accept that the first applicant has transgressed Pashtunwali by not marrying her first cousin as arranged. I accept that while the first applicant was able to delay the marriage without suffering harm this was because she was still betrothed and so no harm was done to the family honour. By travelling to Australia and marrying someone else, I accept that, in the eyes of a conservative Pashtun guided by his code of Pashtunwali, the first applicant has shamed her betrothed and through him the entire family and that such an insult could not go unpunished. I accept that if the first applicant were to be returned to Pakistan there are substantial grounds for believing that she would face a real risk of suffering significant harm, in this case the significant harm being arbitrarily deprived of her life.

79 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.

80 I accept the first applicant's claims about her inability to relocate to another area of Pakistan where she would be safe. I accept that the family has links into a number of major cities and that her whereabouts would become known through those clan and family links. I also accept the published evidence, cited above, about the inability and unwillingness of the police and judiciary to protect would be victims of honour killings, to charge perpetrators after the fact and to impose any meaningful sentences on them. I accept that in this case the significant harm feared is specific to the first and second applicants, not to the general population of Pakistan.

81 On the basis of the evidence before me in this particular case, I am satisfied there are substantial grounds for believing that as a necessary and foreseeable consequence of her removal to Pakistan there is a real risk that the first applicant will suffer significant harm.

82 I note that the second applicant made no claims under the Refugees Convention. At the hearing he described to me the assault he suffered and the threats made by [Mr A], the man to whom the first applicant was promised in marriage. I accept his account of the attacks and the threats made because the second applicant had married the first applicant. I accept that if he were to return to Pakistan the second applicant would be at real risk of again suffering significant harm. I am satisfied, in the particular circumstances of this case, that there are substantial grounds for believing that as a necessary and foreseeable consequence of his removal to Pakistan there is a real risk that the second applicant will suffer significant harm.

CONCLUSIONS

83 The Tribunal is satisfied that each of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants satisfy the criterion set out in s.36(2)(aa) for a protection visa.

84 I note that the applicants' now have a child [name and date of birth of the child deleted: s.431(2)] As the child was not included in the Protection (Class XA) Application, and was not included in either the decision of the delegate or in the application for review, I am unable to include him in my decision.

DECISION

85 The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(aa) of the Migration Act.