



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA

IAA reference: IAA23/10430

INDIA

IAA reference: IAA23/10431

Date and time of decision: 21 March 2023 11:25:00

S Kamandi, Reviewer

Decision

In respect of the referred applicant (IAA23/10430) the IAA remits the decision for reconsideration with the direction that:

- The referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicant (IAA23/10431), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicants (applicants) claim to be citizens of India and consist of a mother (the applicant) and her son. The applicant travelled from India to Australia with her husband and they arrived in Australia in June 2013. Their son was born on [Date]. On 19 October 2016, the family lodged a combined Safe Haven Enterprise Visa (SHEV) application.
2. On 4 September 2017, a delegate of the Minister for Immigration (the delegate) refused to grant the visas on the basis that the applicants were not persons in respect of whom Australia owed protection obligations. The delegate accepted that the applicant and her husband were in an inter-caste and inter-cultural marriage without the applicant's father's approval. The delegate was satisfied that the applicants faced a real chance of serious harm if they returned to their home areas, and that they may not have access to adequate state protection in those areas. However, the delegate was not satisfied that the applicants faced a real chance of persecution or was at a real risk of significant harm in all areas in India and decided that it was reasonable for the applicants to relocate to Chennai.
3. The matter was referred to the Immigration Assessment Authority (IAA) which made a decision affirming the delegate's decision on 17 November 2017.
4. The applicants applied for judicial review of the IAA's decision to the Federal Circuit and Family Court of Australia which, on 7 December 2022, quashed the IAA's decision on the basis that the IAA erred in its consideration of whether relocation was reasonable, and remitted the matter to be determined according to law.
5. The applicant's daughter was born on [Date], after the refusals of the applicants SHEV application, and was not the subject of the delegate's decision. The applicant claims that she separated from her husband due to domestic violence and provided evidence of a current Apprehended Domestic Violence Order (ADVO) issued to protect her and her children from her husband. This decision relates to only the applicant and her son.

Information before the IAA

6. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). This review material includes a number of documents which have been identified as information not provided to the IAA previously. This includes a form relating to consular access, the applicant's detention notice after arrival in Australia, a document signed by the applicant's husband that he had received the detention notice, a copy of the applicant and her husband's compliance interview relating to grant of their son's Bridging Visa, a document signed by the applicant consenting to the Department to access her identity documents, a copy of the applicant's biographic details confirmation form, and a one-page document titled "enhanced screening interview transcript pro-forma" which only includes the applicant's personal details, her husband's boat ID and date of birth, and her brother-in-law's and sister-in-law's Boat ID numbers. These documents are administrative in nature, and in my view, do not contain information that would materially assist in the determination of the applicants' claims for protection. I do not consider them to be relevant in the assessment of the applicants' claims.

7. The IAA has also been provided with a copy of the written record of the applicant's arrival interview held on 18 August 2013, documents relating to the applicant and her husband's request to be returned to India and their subsequent withdrawal of that request, and a copy of the applicant's son's birth certificate. The delegate's decision refers to the applicant's arrival interview and her son's birth certificate. During the applicant's husband's SHEV interview, the delegate referred to the applicant and her husband's request to voluntarily return to India and that they subsequently withdrew their request and made claims to be at a real risk of harm if returned to India. I do not consider these documents to be new information and have considered them in undertaking this review.
8. In addition, the IAA has been provided with an email which the applicant sent to the Department, via a case manager at the Safe Haven – DFV Crisis Accommodation and Support, on 21 January 2021. The applicant indicated that she was residing in a transitional housing provided by Safe Haven Women's Refuge with her two children, that she had separated from her husband for over 14 months due domestic and family violence, and that a provisional ADVO was in place against her husband. This email post-dates the delegate's decision and is new information. It is credible personal information that may have affected the consideration of the applicants claims. It relates to the change in the circumstances of the applicant and directly supports her claim that she is no longer with her husband and is fearful of him. I am satisfied that there are exceptional circumstances to justify considering the new information.
9. In 2017, the IAA received several emails from the applicant and her husband's former representative attaching a submission, a country information report, and various documents in support of their claims for protection.
10. The submission refers to the delegate's decision and puts forward arguments against the delegate's finding that the applicant and her husband could reasonably relocate to Chennai. I do not consider those aspects of the submission to be new information and, where relevant, have considered them in undertaking this review. The submission also includes extracts from the June 2012 MRT-RRT country advice on mixed marriages in India (the report), a copy of which was also provided. The report was before the delegate and is not new information.
11. The IAA was also provided with copies and English translations of the following documents:
 - A "first Information report" and statement made by the applicant's father on 18 February 2013. It indicates that on 17 February 2013, the applicant went to the stationary shop to purchase household provisions. As she did not return, they went looking for her and came to know that she had eloped. The document indicates that it was "confirmed" that the details of the statement were true and that the applicant's husband committed the offence of kidnapping the applicant who was underage at the time.
 - A "first information report" regarding a complaint made by the applicant's mother-in-law on 25 February 2013 against the applicant's father. She alleged that the applicant's father and 'a gang of four BJP members' assaulted her at her home and destroyed her belongings. It also indicates that the applicant's father was aware that his daughter eloped and was asking about her whereabouts. The mother-in-law sustained injuries to her head, escaped the home and reported the matter to the police.
 - A petition lodged by the applicant's mother-in-law on 17 July 2016. She reported that on 17 July 2016, she was assaulted by a "gang of four people from the same Kerala BJP party". She sustained serious injuries and was insulted with derogatory language. They inquired about her son and threatened to kill him if he returned.

- A “receipt of petition” from the Tamil Nadu police station indicating that the petition was received on 17 July 2016 with the nature of the petition described as “attempted murder”.
 - An “accident report” from the hospital indicating that the applicant’s mother-in-law was brought to the hospital at 5:55pm on 17 July 2016 and alleged that she was assaulted by “4 brown persons (2 males 2 females)” at her home.
 - Two photographs of a female and a child sleeping on what appears to be hospital beds with bandages around their heads.
12. These documents were not before the delegate and are new information. The documents refer to events that are claimed to have occurred prior to the applicant and her husband’s SHEV application. The Photographs are also said to relate to events prior to the delegate’s decision. It is not claimed that this information was obtained after the delegate’s decision, and I am not satisfied that this information could not have been obtained earlier and provided to the delegate. I am not satisfied that s.473DD(b)(i) of the Act is met.
 13. In their combined SHEV application, while the applicant’s husband referred to his mother having been assaulted and that she sustained injuries, he stated that his family were unable to make complaints to the police due to the applicant’s father’s influence on the police. During their SHEV interviews, the applicant referred to her father having gone to her husband’s mother’s house and broken stuff. The applicant’s husband also stated that after their departure for Australia, the applicant’s father went to his mother’s house and destroyed furniture, a week later they came again, his mother made a complaint, but nothing happened. He confirmed that these incidents happened in 2013 but did not refer to any documentary evidence that he could provide in support of these claims. In addition, there is no explanation as to how the applicant and her husband were able to obtain the complaint said to have been made by the applicant’s father in 2013, given their claim that the father was an influential politician in the area. While I accept that the content of the 2013 documents is capable of being believed, given that the delegate accepted that the applicant’s father went looking for his daughter and intimidated the applicant’s husband’s family in 2013 and that the applicant’s mother-in-law made a complaint to the police, claims which I am also willing to accept, I am not satisfied that these documents may have affected the consideration of the applicants’ claims or that there are exceptional circumstances to justify considering them.
 14. At the SHEV interview, the applicant’s husband confirmed that he maintained contact with his mother and did not refer to any further incidents, such as the July 2016 incident referred to in the documents provided to the IAA. I am not satisfied that if the applicant’s mother-in-law was the subject of the claimed 2016 assault and made a complaint to the police in 2016 that the applicant or her husband would not have referred to this during their SHEV interviews, when discussing the applicant’s father’s actions due to their marriage. I am not satisfied that the documents are credible or that there are special circumstances to justify considering them.
 15. While the photographs can be said to be credible personal information, in that they appear to be genuine photographs of people who appear to be in hospital with head wounds, it is not explained when the photographs were taken and there is no way of verifying that the photographs are of the applicant’s mother-in-law or that she was injured in the circumstances claimed. I am not satisfied that the photographs are of the applicant’s mother-in-law or that they establish that the claimed incidents occurred. Given these matters, I am not satisfied that ss.473DD(b) or (a) of the Act are met.

16. After the remittal of the matter to the IAA in 2022, the IAA received emails from the applicants' representative, attaching a submission, a statutory declaration from the applicant dated 24 January 2023, a country information bundle, and documentary evidence in support of the applicants' changed circumstances.
17. The submission and the applicant's statutory declaration include some information, including background details and claims in relation to the applicant's inter-caste marriage, that was before the delegate. The submission also refers to the delegate's findings and puts forward arguments that relocation is no longer reasonable given the applicant's changed circumstances. I do not consider those aspects of the information provided to the IAA as new information and have considered them in undertaking this review.
18. The applicant's statutory declaration and submission to the IAA also include information about the changes in her personal circumstances after the delegate's decision which is new information. The applicant has also provided documentary evidence in support of her changed circumstances which was also note before the delegate and are new information. The new information is as follows:
 - The applicant's and her husband's second child was born on [Date]. In support, the IAA has been provided with the child's birth certificate which notes the names of the names of the applicant and her husband as the parents of the child.
 - The applicant's relationship with her husband broke down due to family violence. He started drinking at around 2018/19 and started to physically abuse the applicant. Their relationship initially broke down in November 2019, when the applicant was [Number] months pregnant. The applicant was physically abused by her husband. She called the police who organised for an ambulance to check the baby. A social worker at [Hospital] gave the applicant and her son food and arranged for them to go to a women's refuge, where she stayed for six months and gave birth to her daughter in [Month]. An ADVO was issued against the husband on 22 November 2019.
 - After the ADVO against her husband, her husband's family called her and threatened her. Most threats were made by her husband's brother, "[Mr A]". The applicant was advised by her case worker to record the calls, but she was unable to do so due to not having a videophone. She blocked the number, but he started calling from another number. Her husband's family kept pressuring her to reunite with her husband and told her that she must stay with him after what she put him through to get married. She was fearful of her husband's family as she knew that they would be her only support if returned to India. She said that she would reunite with her husband after the expiration of the 2019 ADVO.
 - After the ADVO expired in around December 2021, the applicant and her husband got back together at around February 2022. They got together because of their son's [Medical condition] and during the time that their son was admitted into hospital. A copy of medical certificate dated 25 January 2023, indicates that the applicant's son suffers from [Medical condition] and needs to use [Medication]. A copy of the Hospital discharge documents indicate that the applicant's son was admitted into emergency at [Hospital] on 23 February 2022.
 - The applicant's husband moved in with her and shortly after started abusing her. One night after being bashed by her husband, the applicant called the police who arranged an ambulance for her and helped her to get another ADVO against her husband. The IAA has been provided with a copy of a NSW Ambulance document, indicating that on 25 February 2022, the applicant was assaulted by her husband, called the police for

help, and that she suffered minor injuries. It also indicates that the applicant declined going to the hospital and stated that she felt safe being at home with her two children and without her husband. The IAA has also been provided with a copy of an ADVO issued against her husband on 8 April 2022 for a period of two years, expiring on 7 April 2024.

- After the second ADVO issued in 2022, the husband's family began harassing her again. She received calls from her husband's brother in India. She was threatened and told that she would not have been able to do this in India. Her mother-in-law died in September. The applicant was told that their mother died because of all the stress she put the family under and that she would pay for it. The applicant's husband's siblings are after revenge.
- While in Australia, the applicant is confident that she would be protected, despite not having many friends who were willing to house her and her children due to the embarrassment of associating with a single mother. In Australia she does not have to rely on the community to survive, which is not the case if returned to India where she would need family support to survive.
- The applicant fears for her life in India due to her relationship with her husband. Since their relationship ended, her husband's family has turned against her for disgracing them and making their son a criminal. The applicant's husband is very angry and has told his family everything.
- The applicant's husband told her that once in India, he would find her and the children. He can take the children from her, and no one would help her as the police would be on his side. Her husband would not do anything in Australia as he would not want to breach the ADVO due to consequences for his visa, but in India he won't have to worry about that. Her husband feels like she has ruined his life and is very vengeful towards her. He cannot see the children and blames the applicant for it. The applicant fears for her and her children's safety in the event they are all returned to India.
- Although separated from her husband, the applicant and her children do not have the support of her family. She spoke to her brother prior to Christmas and was told not to return if she valued her life. The applicant's family are still facing issues, such as her brother's inability to marry due to the applicant's marriage to her lower caste husband and will never forgive her. The separation from husband has not restored her family's reputation and she has brought more shame on the family by having two fatherless low-caste children. The applicant would need her family to feed her children, but she won't be able to ask for their help.
- The applicant has been away from India for more than 10 years and doesn't have any friends in India. The applicant and her children cannot go anywhere in India because her husband, his family or her family will find them. She cannot live in the north of the country with two young children and without a man to support her. She would not be able to leave her children alone as her husband would be able to find and kidnap them. She would be too scared to drop them off at school. She will not be able to find a house or food without money. In India, a woman must have male protection, otherwise it is difficult to do even small things like walking home. Other men follow women without protection and the applicant does not have any family or friends to help her. Police in India do not care about domestic violence and the applicant will not be able to seek their protection.
- The applicant fears that her two lower caste children will not get proper care at hospitals and schools.

- The applicant fears persecution for reasons of her membership of a particular social group of women who are separated, single mothers facing domestic violence with no family support. Given her circumstances it is not reasonable or practicable for the applicant and her children to relocate to any part of India.
19. It is submitted that the delegate's decision pre-dates the birth of the applicant's second child and the breakdown of her relationship with her husband. It is argued that information about these events and the applicant's fear at the hands of her husband could not have been provided to the delegate. I accept that the new information about the change in the applicant's circumstances and the birth of her second child could not have been provided to the delegate prior to the decision being made. I am satisfied that the new information is credible personal information and had it been known, it may have affected the consideration of the applicants claims. I am satisfied that ss.473DD(b)(i) and (ii) of the Act is met. It is submitted that the new information relates to significant developments in the applicants' circumstances and support the applicants' claims which is critical in making a future looking assessment of the possibility of harm faced by the applicants. I am satisfied that the new information relates to new events in the applicants' personal circumstances said to give rise to a need for protection, and I am satisfied that there are exceptional circumstances to justify the new information, including the supporting documentary evidence.
 20. The country information bundle includes copies of reports on India, including the 2015 Department of Foreign Affairs and Trade (DFAT) report¹ which was before the delegate and is not new information. The other country information reports include the most recent 2020 DFAT report² on India; the 2021 Unites States Department State on Human Rights Practices in India; the July 2018 and November 2022 United Kingdom Home Office reports on women fearing gender-biased violence in India; the November 2022 Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) report on the situation of destitute, single women without family support in India; and news report published in IndiaSpend on 23 June 2018. These reports were not before the delegate and are new information. These reports post-date the delegate's decision and I am satisfied that they could not have been provided to the delegate. The bulk of the information in these reports is general country information about India and does not meet s.473DD(b)(ii) of the Act. To the extent that part of the information refers to identifiable individuals, I am satisfied that it is credible personal information that may have affected the consideration of the applicant's claims. The 2020 DFAT report has been prepared specifically for the purposes of assisting in determination of protection status of applicants and the other reports also published by reputable organisations and include recent information relating to the situation of women/single women/separated women in India and treatment of those involved in inter-cate marriages in India and are said to support the applicants' claims for protection. In the circumstances, I am satisfied that there are exceptional circumstances to justify considering the country information reports.
 21. I have also obtained new information, including the 2019 DFAT report on Nepal³ and information obtained from Embassy of India in Nepal⁴ and High Commission of India in Canberra⁵ websites. This information relates to the India-Nepal Treaty of Peace and

¹ DFAT, "DFAT Country Information Report India", 15 July 2015, CISEC96CF12827.

² DFAT, "DFAT Country Information Report India", 10 December 2020, 20201210103716.

³ DFAT, "DFAT Country Information Report: Nepal", 1 March 2019, 20190301094546.

⁴ www.indembkathmandu.gov.in/page/valid-travel-documents accessed on 20 March 2023; www.hcicanberra.gov accessed 20 March 2023.

⁵ <https://www.vfsglobal.com/one-pager/india/australia/passport-services/English/pdf/Form-I.pdf> accessed on 20 March 2023.

Friendship and the steps the applicants would require to take in obtaining the documentation which would enable them to enter Nepal under the Treaty. This information post-dates the delegate's decision and relate to an issue that was not considered by the delegate. I am satisfied that there are exceptional circumstances to justify considering this information.

22. It is submitted that should the IAA have any doubts about the credibility of the applicant's evidence, or require further information, it must exercise its power under s.473DF of the Act to interview the applicant. It is argued that the applicant has never had the opportunity to provide oral evidence relating to her change of circumstances. It also submitted that a long period of time has elapsed since the delegate's decision and the duty of the IAA is to apply future looking test and must consider changes in "motivation" since the delegate's decision; and that significant evidence attesting to the applicant's claims has been presented. I accept that a significant time has elapsed since the delegate's decision and there have been significant developments in the applicants' personal circumstances. The applicant has detailed the changes in her circumstances and the events leading to and after her separation from her husband, including her fears resulting from the changes in her circumstances. She has also provided documentary evidence in support of her claims, all of which will consider in undertaking this review. The IAA is required, subject to Part 7AA of the Act, to review a matter without accepting or requesting new information and without interviewing the applicant. It is for the applicant to make out their case before the IAA and there is no obligation on the IAA to interview applicants. While there is a discretion to obtain new information (whether at interview or otherwise), which must be exercised reasonably, which I have considered, in the circumstances I have decided to conduct the review without inviting the applicant to provide further information at an interview or otherwise.

Applicants' claims for protection

23. The applicant's son, born in Australia, was part of the family's combined SHEV application. He is a minor and relied on her parents claims. The applicant and her husband's claims before the delegate can be summarised as follows:
- The applicant was born and resided in Kerala, India. The applicant's husband was born in Tamil Nadu, India. The applicant is of Malayalam ethnicity and from [Caste 1]. Her husband is Tamil speaking and of [Caste 2].
 - The applicant and her husband were in a romantic relationship prior to their marriage. The applicant's father who was a member of the Baratha Janatha Party (BJP) did not approve of their relationship because the husband is from a lower caste, they speak different languages, and they are from different states. He wanted the applicant to marry a man from Kerala who had money.
 - The applicant and her husband married in a temple in February 2013. After their marriage, the applicant's father sent people looking for her. He sent people to harm them, but they managed to escape. They could not go to the police because of the applicant's father's political position and influence over the police in the area.
 - The applicant and her husband moved to Tamil Nadu and lived there from approximately 17 February 2013 until 31 March 2013. They then departed India illegally by boat.
 - After their departure, the applicant's father went to her husband's mother's house, broke some of her furniture and told her that if the applicant's husband returned, he would be killed. He also did the same to the applicant's husband's brother.

- While in immigration detention, the applicant’s father became aware of their arrival in Australia through speaking with family on the phone and due to the applicant and her husband’s details being leaked by the Department’s data breach incident in 2014.
 - The applicant spoke to her father while in immigration detention. She told him that she was pregnant and was told that if she returned, they will be killed.
 - The applicant and her husband are unable to seek help from the authorities due to the applicant’s father’s political position. They are also unable to relocate to any other part of India, as her father would find them through his connections.
24. The applicant and her husband had their second child in 2019 and have since separated. The applicant has made claims to fear harm at the hands of her husband and his family due to the circumstances of their separation in Australia. Details of her new claims and evidence in support of the new claims is set out above.

Refugee assessment

25. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

26. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
27. The applicants claim to be citizens of India. The applicant has given consistent evidence regarding her identity, date of birth, and that she was born in and is a citizen of India. Her evidence is that she did not apply for or hold an Indian passport and that her birth certificate is with her father, and she is unable to request the document due to the breakdown of her relationship with her father. The only documentary evidence she provided the delegate was copies of her educational and work experience certificates from India which confirms her identity. I accept that the applicant was born in India to Indian parents and is a citizen of India. The delegate was provided with the applicant’s son’s Australian birth certificate which includes the names of the applicant and her husband as the parents, indicating that they

were born in India. The family's combined SHEV application indicates that the applicant's son's parents are Indian citizens and that he is also an Indian citizen at birth. I accept that India is the receiving country for the purposes of this review.

28. The applicant claims that she resided in Trivendram in Kerala with her family. Her mother passed away when she was in grade [Number] (around 2006) and that her father and brother remain in India. She completed her [education] in 2008, following which she attended [Subject] school between the years of 2010 and 2011. After completion of the course, the applicant did work experience from February 2012 until 30 January 2013 at [a Workplace] in Bangalore. At the SHEV interview, the applicant stated that she stayed at the [Workplace] hostel during her work experience. I accept the applicant's evidence in this regard.
29. The applicant and her husband have concisely claimed that they belong to two different casts, they speak different languages and lived in different areas in India. Their evidence is that the applicant's husband belongs to a Tamil caste, [Caste 2] and that the applicant belongs to the higher caste of [Caste 1]; the applicant's husband resided in Tamil Nadu and speaks Tamil, and the applicant is of Malayali ethnicity with Malayam as her native language although she can also speak Tamil.
30. In her SHEV statement, the applicant claimed that her father was a an "MP" for [Location] in the BJP and was very well connected. When the applicant was 16 years old, her father wanted her to marry one of his friends who was wealthy. The applicant refused which made her father very upset. She claims that she met her husband when she was [Age] years old and that her father did not want her to marry him because they were from different castes, ethnicities and spoke different languages. The applicant and her husband's evidence were that they married at a Hindu temple on [Date], without the knowledge or approval of their families. They did not register the marriage as the applicant was under the age of 18. The applicant's SHEV statement indicates that that two days after their marriage, the applicant's father organised for men to attack the applicant's husband. It is claimed that during this incident, the men tried to force the applicant into their car but due to her husband's friend's intervention, they managed to escape and went to Cochin to seek safety. After the applicant's father alerted the police, they started moving around and could not stay in the same place until they departed the country. In his SHEV statement, the applicant's husband referred to many instances of being threatened and physically beaten by the applicant's father prior to their marriage. He claimed that the applicant's father told him to end the relationship. As the relationship continued, the applicant's father sent people to assault him at the [Workplace] where he worked on five or six occasions. He stated that sometimes people would go and see him two to three times a day. The applicant's husband also claimed that in about January 2013, the applicant's father himself started threatening him and then physically beat him up.
31. At the SHEV interview, the applicant was asked about her father's role with the BJP. The applicant stated that her father was a member of parliament. The delegate stated that he had undertaken a search and could not find her father as an MP in India at the state level or otherwise and that at best the delegate considered her father to have been involved with the party at a local level. The delegate also stated that if the applicant thought that her father was an MP in India, she would need to provide documentary evidence in that regard. The applicant did not provide any documentary evidence in this regard. The applicant then referred to her father as a counsellor and that he had a lot of influence in the local area. I am willing to accept that the applicant's father was involved with the BJP at a local level at the time. I do not accept that he had any role in federal or state parliament or that he was influential outside of his local area in Kerala.

32. At the SHEV interview, the applicant and her husband were asked about how their relationship developed and the incidents involving the applicant's father. The applicant stated her husband was [an Occupation] and that they saw each other at various places and started communicating by phone. The applicant referred to her father wanting her to marry his friend when she was [Age] years old. She stated that when she was [Age], and after having met her husband, her father told her that she had to marry his friend. The applicant said that she refused and told her father that she wanted to marry her husband and that once she told him that he was Tamil, her father said that the marriage could not happen as it would disgrace the family. The applicant claimed that she told her husband about these issues, and they decided to get married without their family's knowledge. The applicant stated that after she did not return home that night, her father sent people looking for her. She stated that two days after their marriage, the men sent by her father came to the house, beat her husband, and tried to take her. When asked about how her father found her, she referred to him having connections and that she was not sure how he found them. When asked about what they did next, the applicant stated that they went to Tamil Nadu and then to Cochin. She also said that they went to her husband's mother's house, stayed there for a week or two, and that although they told her husband's mother about their problems, she did not accept it and told her husband to please take this girl from Kerala and leave. The applicant claimed that they had to leave the country as no matter where they went, they would have been found and killed. At his SHEV interview, the applicant's husband claimed that the incident involving men sent by the applicant's father to harm him and to take the applicant back to her home happened on the day of their marriage and that after they escaped, they never talked to his mother. Despite his claims in his SHEV statement that the applicant's father came to harm him and told him to discontinue the relationship, the applicant's husband stated that he never spoke to the applicant's father, but he sent people looking for them.
33. The applicant and her husband claimed that after their departure from India in April 2013, the applicant's father visited the husband's mother's house, broke some of her furniture and threatened to kill him if he returned to India. After their arrival in Australia, the applicant claims that she contacted her brother and was told that their father was very angry and that if she returned her life would be in danger. The applicant also claims that while in immigration detention and pregnant with her son, she called her father to tell him about the pregnancy hoping that he would be more accepting of their relationship. The applicant claimed that she was told that if they returned, they would all be killed. The applicant's husband also claimed that the applicant's father made a complaint with the police accusing him of abducting his daughter.
34. Country Information⁶ reports that caste is an enormously important factor in Indian society. It is a system of social stratification which separates communities into hereditary groups. In the Hindu tradition, four main groups exist within the system's hierarchy with thousands of subgroups based on their occupation. While caste is predominantly a Hindu concept, it has become a cultural phenomenon that exists within other religions and across India's many social, linguistic, and religious communities. Last names usually indicate to what caste a person belongs. While inter-faith and inter-caste marriages are legal, there is significant social pressure for individuals to marry within their own caste and/or religion. Despite their legality, in practice, there is continued and growing intolerance in Indian society to inter-caste and inter-faith marriages. Many families cut off social relations with sons and daughters who undertake such actions, while other families commit or instigate acts of violence against the

⁶ DFAT, "DFAT Country Information Report India", 15 July 2015, CISEC96CF12827; DFAT, 'DFAT Country Information Report India', 10 December 2020, 20201210103716.

person who undergone the marriage. So-called “honour killings” committed by families and communities of those involved in inter-caste relationships are prevalent in villages and members of the lower casts are vulnerable to violent reprisal if they are perceived to have entered a relationship with members of a higher caste. The 2021 US Department of State report on human rights in India refers to a suspicious death of a girl allegedly killed when she refused to end her relationship with a man of another caste; and that there were questions over police statistics regarding the number of honour killings.

35. I accept that the applicant and her husband are from different caste groups, with the applicant belonging to a higher caste group than her husband, and that they resided in different areas in India prior to their marriage and are of different ethnicities. The applicant has consistently claimed, and I accept, that the applicant’s father wanted her to marry a man within their caste. The applicant and her husband have given broadly consistent evidence that they met while the applicant was working at a [Workplace] in Bangalore and that after seeing each other around, they started communicating and at times saw each other in person. I accept that their evidence in this regard. I accept that the applicant’s evidence that after she completed her [Subject] course her father approached her again about marrying his friend and that at the time the applicant had already met her husband and told her father about him. I accept that the applicant’s father opposed their relationship, given the differences in their caste, ethnicities, and languages they spoke, and that he may have approached the applicant’s husband and told him to end their relationship. The applicant and her husband have consistently claimed that they decided to marry at a temple and were married on [Date]. They did not register the marriage because the applicant was under the age of 18. I accept their evidence in this regard and accept that after the applicant did not return home that night, her father sent people looking for her and became aware of their marriage. I accept that given the applicant’s father’s opposition to their relationship and having been a member of a political party with some connections in the area, that the applicant and her husband had a subjective fear of being harmed. There are some significant differences in the applicant and her husband’s evidence regarding when the men sent by the applicant’s father found them and what they did after they escape. While I am willing to accept that the applicant and her husband were found by men sent by her father to return her home, and that there was a confrontation, I am not at all convinced that the applicant and her husband moved around to avoid being found or that the applicant’s husband’s family were not accepting of their marriage. At the SHEV interview, the applicant stated that they stayed at her husband’s mother’s house for a week or two, and that she met the applicant’s brothers, and I note that the applicant and her husband departed India with one of her brothers-in-law and his wife. I accept that after the applicant and her husband’s departure from India, her father visited the applicant’s mother-in-law, asked about his daughter’s whereabouts, expressed his anger and may have broken some furniture.
36. I accept that after their arrival in Australia, the applicant made contact with her brother who told him that their father remained upset and angry due to her actions. I accept that the applicant called her father while she was pregnant and still in immigration detention and that her father did not agree to reconcile and may have threatened to harm her and her family if they returned. The applicant maintains, and I accept, that she has had no meaningful contact, in the decade that she has been living in Australia, with her family in India.
37. The applicant claims that since refusal of their SHEV application in 2017, her relationship with her husband broke down due to family violence. She states that in around 2018 and 2019, her husband started drinking and started to physically abuse her on a weekly basis. The applicant states that because in her culture it is normal for men to hit their wives, she stayed with her husband. In November 2019, when she was [Number] months pregnant with her

second child, she was physically abused by her husband and was hurt in the stomach. She called the police who arranged for an ambulance to check on her, and she was taken to a women's refuge where she gave birth to her daughter in [Month] and remained with her two children for a period of six months. The applicant claims that she took out an ADVO against her husband and provided the IAA with her daughter's birth certificate which shows that her daughter was born on [Date], and that the applicant and her husband were living at different addresses at the time. The IAA has also been provided with a copy of an email sent to the Department in January 2021, indicating that the applicant was separated from her husband for over 14 months and that she and her children were living in transitional housing provided by women's refuge.

38. The applicant claims that after the ADVO was issued in 2019, her husband's family started calling her and threatening her. She was being pressured to reunite with her husband and as she knew that if returned to India, her husband's family would be her only support, she told them that she would try to make it work. The applicant claims that after the expiration of the ADVO in around December 2021, she reunited with her husband and in around February 2022, he moved back into her place. She states that she reunited with her husband due to people within the community telling her to reunite with him for her children and because her son was suffering from [Medical condition] and was admitted into hospital, and she felt the need for support from her husband. The applicant's son's medical evidence provided to the IAA confirms that he suffers from [Medical condition] and that he was admitted in hospital on 23 February 2022.
39. The applicant claims that soon after, her husband started physically abusing her and that she became fearful for safety of her children. After being assaulted, she called the police who arranged for an ambulance to investigate her injuries and assisted her to get another AVO against her husband. The IAA has been provided with notes taken by the NSW Ambulance on 25 February 2022 and a copy of the ADVO issued in April 2022 which is valid until April 2024.
40. The applicant claims that her husband is very angry with her and told his family about what had occurred. He also told her that when they are back in India, he would find her and the children and that he could easily take the children from her as the police would be on his side. She claims that her husband's family also started harassing her and told her that she would have never tried something like this in India. The applicant was also told that her husband's mother died because of what the applicant had done to her son and that she would pay for it once she returned to India.
41. The applicant has provided a detailed statement and documentary evidence to support her claims of separation from her husband and the abuse she suffered at the hands of her husband which started in around 2018/2019. I accept the applicant's evidence in this regard and that due to her taking out ADVOS against her husband, his family have contacted her, blaming her for the situation and death of their mother, and threatened her with harm if she returned to India. I also accept that the breakdown of their marriage has caused her husband to become antagonistic towards her and that he also has made threats to find her and her children, take her children away, and harm if returned to India.
42. Given her current circumstances, I accept that if returned to India, the applicant will be returning as a single/separated woman with two young children. There is no information before me that the applicant's husband has been granted a protection visa or that he will not be returning to India. The applicant's husband resided and worked in Tamil Nadu, where his family remain, and it is highly likely that if returned to India, he would return to his home area in Tamil Nadu. Given the applicant's evidence, which I accept, that she has been

threatened with harm by her husband and his family, she will not be returning to Tamil Nadu where I am satisfied that she faces more than a remote chance of facing serious harm in the form of threats to her life, her children being taken away from her, and significant physical harassment or ill treatment, at the hands of her husband and his family.

43. The applicant grew up, attended school, and resided in Kerala before her marriage to her husband in 2013. I note the applicant's evidence that she stayed with her aunt after her mother's death in 2006 for a period of two years. I accept that the applicant has not maintained contact with her father and brother in the years that she resided in Australia due to the breakdown of her relationship with her father and her inability to reconcile with him. While I accept that the applicant may still have some extended family in Kerala, she has not claimed, and there is no evidence to indicate, that the applicant has maintained contact with her extended family or that she would have their support if she returned to Kerala. Nonetheless, given that the applicant grew up in Kerala and resided in the area for almost the whole period she resided in India, I consider that Kerala would be the place where the applicants would likely return to if returned to India.
44. The applicant's husband evidence is that he worked as [an Occupation] in Kerala for a period of three years, during which he met and married the applicant. At the SHEV interview, he confirmed that he travelled to Kerala for work and that she met the applicant while working as [an Occupation]. Given the proximity between the applicant's husband's family home in Tamil Nadu to Kerala and his familiarity with Kerala area, I consider that her husband would be able to locate her and her children in Kerala. I am satisfied that there is more than a remote chance that the applicant would be found and would face serious harm in the form of threats to her life, her children being taken away from her, and significant physical harassment or ill treatment, at the hands of her husband if returned to Kerala.
45. I do not accept the applicant's husband has the capacity to locate the applicant and her children if they returned to an area outside of Tamil Nadu and Kerala. On the evidence before me the applicant's husband primarily lived and worked in his village in Tamil Nadu and went to Kerala for work in the last three years before departing India. There is no evidence to indicate that he is familiar with areas out of Tamil Nadu and Kerala or that he has any connections or resources available to him to assist him in locating the applicants in other parts of the country. I consider the chances of the applicants being located or facing any harm at the hands of her husband or his family, to be no more than remote should they return to areas outside of Tamil Nadu and Kerala.
46. Section 5J(1)(c) of the Act provides that for a person to have a well-founded fear of persecution, the real chance of persecution must relate to all areas of a receiving country, which in this case is India.
47. I accept that if returned to India, the applicant will be returning as a single/separated woman with two young children. I accept that she will have no family support or social connection in India. She would need to secure employment to support herself and her children and obtain accommodation for her family.
48. Country information⁷ reports indicate that as there is no uniform civil code in India which means under India's system of personal laws, rights for women on issues of marriage, divorce

⁷DFAT, "DFAT Country Information Report India", 15 July 2015, CISEC96CF12827; DFAT, 'DFAT Country Information Report India', 10 December 2020, 20201210103716; United Kingdom (UK) Home Office, "Country Policy and Information Note India: Women fearing gender-based violence", November 2022; United States Department of State, "Country Reports on Human Rights Practices for 2021", 2021.

and custody can differ between religions and states, resulting in persistent discrimination for the majority of women in India. While domestic violence against women has been a criminal offence since 1983, credible non-government organisations in India have described a very high prevalence of domestic violence, with many cases not reported to the authorities. It is reported that traditional social practices and the low status of women in many parts of India results in domestic and gender-based violence and discrimination against women. Recent reports indicate that despite the plethora of laws to prevent crimes against women, in practice domestic violence and sexual harassment continue to be a problem in India and that rape is reported to be a persistent problem in India, including gag rape, rape against lower-caste women by upper-caste men, and rape by government officials. According to latest data available in 2018, there were one case of sexual harassment every 59 minutes, one rape every 34 minutes, and one case of torture every 12 minutes. The quality and availability of services for survivors of domestic violence is limited, with women shelters being described as 'unhygienic', 'jail-like' which do not always provide a safe environment for women. The 2020 DFAT report⁸ assessed women across society, but particularly in rural areas and from lower casts, face a moderate risk of societal discrimination and violence with the state failing to protect them from violence. Few police stations have specialised women's mechanisms to address the concerns of women and some police reportedly encourage dispute resolution at a local level.

49. The reports also indicate that discrimination against women in employment and credit application is common, with the government not effectively enforcing anti-discrimination laws. It is reported that economic gender gap 'runs particularly deep' in India and has widened significantly since 2006, with female estimated earned income being one-fifth of that of males. Stigma and setbacks are also reported to be more severe for women who decide to dissolve their marriage. The sociodemographic and sociocultural risk factors for various forms of violence and abuse against women in India is noted to include the patriarchal attitudes towards marriage and motherhood, stigmatisation of unmarried, separated, and divorced women, low socioeconomic status, and lack of independent income. Given the stigma against divorced women, and discrimination against women in employment who are paid much less than men, divorced women are forced to depend on goodwill of others, such as parents and in-laws, for a roof over their heads and for their children to continue in school.
50. It is reported that laws prohibiting discrimination against women and laws prohibiting child and forced marriages, and sexual harassment of women are not effectively enforced by the government. The country's criminal justice system as well as prominent politicians have been repeatedly faulted for their poor handling of such matters. Law enforcement and legal resources for rape victims is considered inadequate, with the judicial system unable to address the problem effectively. Police and government officials have reportedly failed register reports of rape. Corruption within the police and judicial system has also been cited as reasons for the state not adequately addressing these issues and enforcing laws to protect women in India.
51. The country information cited above paints a grim picture of the status of and situation for women in India. Women are not only discriminated in securing employment and other financial services such as credit and are paid less than men but are also often subjected to domestic violence and sexual harassment and violence. The Indian authorities are viewed as ineffective in enforcing laws to protect women in India, have been accused of acts of sexual violence against women, and seen to engage in corrupt conduct. The information further

⁸ DFAT, 'DFAT Country Information Report India', 10 December 2020, 20201210103716.

indicates women who are divorced and have children are at elevated risk of facing discrimination, stigmatisation and treatment that impacts on their ability to have financial independence and are easy targets of sexual harassment and violence. While the information suggests that family support and networks are factors that may mitigate risk factors for vulnerable women, the applicant has been estranged from her family and due to her absence from the country for a period of almost a decade, apart from her in-laws who she fears, she has no other contacts or support in India.

52. I accept that the country information indicates that single/divorced women with children and without family support are identifiable social group in India. I accept the characteristic is innate and immutable and as such is a particular social group under s.5L of the Act.
53. The applicant has limited work history, having only undertaken a work experience program in Bangalore prior to her departure almost a decade ago. There is no evidence that she has worked in Australia. As she will be returning to India with two very young children, and without any family support or a support network, it would be very difficult for her to work outside of her home. Given the country information, I am satisfied that part from practical challenges of finding employment, she is at a real risk of discrimination in obtaining employment and will face harassment and stigmas as a divorced woman with two children. In addition, I am satisfied that she would face real challenges in obtaining accommodation and will be at a real risk of exploitation, harassment, and violence. I also accept that given lack of any documentation, the applicant would face challenges in accessing government services.
54. Considering the country information cited above and what I have accepted of the applicant's claims, I am satisfied that the applicant, in the reasonably foreseeable future, will face more than a remote chance of serious harm, in the form of threats to her life, significant physical harassment or ill treatment, and significant economic hardship threatening her capacity to subsist. I am satisfied the treatment amounting to serious harm would involve systemic and discriminatory conduct for the essential and significant reason of the applicant being a member of particular social group of single/divorced women with children and without any family support in India.
55. Section 5J(2) of the Act provides that a person does not have well-founded fear of persecution if effective protection measures are available to the person in the receiving country. Considering the country information cited above which indicates that despite the availability of laws that is enacted to protect women in India, the state is ineffective in enforcing the laws, accused of engaging in conduct against women and the corruption and lack of resources within the police and judiciary, I am not satisfied that effective protection measures are available to the applicant.
56. I am also not satisfied that the applicant could take reasonable steps to modify her behaviour to avoid a real chance of persecution as her gender is a fundamental to her identity. I am satisfied that the applicant has a well-founded fear of persecution under s.5J of the Act.

Refugee: conclusion

57. The applicant meets the requirements of the definition of refugee in s.5H(1) of the Act. The applicant meets s.36(2)(a) of the Act.

Third country protection

58. Section 36(3) of the Act (as set out in the attachment to this decision) provides that, subject to certain qualifications, Australia is taken not to have protection obligations to an applicant who has a right to enter and reside in any country apart from Australia and has not taken all possible steps to avail themselves of that right.

Application of s.36(3) to this case

59. DFAT⁹ reports that India and Nepal agreed their Treaty of Peace and Friendship in 1950 (the Treaty). Article seven of the Treaty provides for each country 'to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature'. The Treaty therefore provides for freedom of movement across borders between the two countries and equal participation in the economy and legal system.
60. Information obtained from the Government of Nepal, Ministry of Home Affairs, Department of Immigration and Embassy of India in Nepal¹⁰ indicates that Indian citizens travelling to Nepal need a document that exclusively proves their nationality. They need to produce either a valid Indian Passport or Election Card (issued by Election Commission) to enter Nepal. The applicant claims, and I accept, that she has never held an Indian passport. There is no evidence that the applicant's son has an Indian passport. On the information before me, for the applicants to enter Nepal from Australia, they would require valid Indian passports as prove of their Indian nationality.
61. The applicant claims, and I accept, that she does not have access to her birth certificate which remains with her father in India and that her father would not assist her or provide her with her birth certificate. In addition, there may also be other documents that the applicant may be required to produce to establish her identity which she would not be able to provide. Even if the applicant can obtain her birth certificate and other requisite documents, according to the High Commission of India in Canberra website¹¹ there is a declaration form with an affidavit¹² which is required to be completed when obtaining an Indian passport after a month of expiry of the old passport. It also indicates that the affidavit, to be submitted as part of the declaration, is required for the issue of a new passport, which would be the case for the applicant and her son. The website does not provide any further information about obtaining an Indian passport for the first time. Given that the applicants have never held Indian passports, they would be required to apply for their Indian passports by lodging the declaration form requiring the applicants to, among other things, declare that they have neither taken asylum nor applied for asylum/refugee status. Given the applicants application for protection visas in Australia, they would not be able to make such declaration.
62. Given the applicants circumstances, I am not satisfied that they have a right to enter and reside in Nepal. Section 36(3) of the Act does not apply to the applicants.

⁹ DFAT, "DFAT Country Information Report: Nepal", 1 March 2019, 20190301094546.

¹⁰ www.indembkathmandu.gov.in/page/valid-travel-documents accessed 20 March 2023

¹¹ www.hcic Canberra.gov.in accessed 20 March 2023

¹² www.vfsglobal.com/one-pager/india/australia/passport-services/English/pdf/Form-I.pdf accessed 20 March 2023

Member of same family unit

63. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A 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: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include dependent children.
64. As the applicant meets the definition of refugee under s.36(2)(a) of the Act, it follows that her son meets the family unit criterion under s.36(2)(b) of the Act.

Decision

In respect of the referred applicant (IAA23/10430) the IAA remits the decision for reconsideration with the direction that:

- The referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of the other referred applicant (IAA23/10431), the IAA remits the decision for reconsideration with the direction that:

- the other referred applicant is a member of the same family unit as the above-named applicant and satisfies the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) 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 non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.