# FEDERAL CIRCUIT COURT OF AUSTRALIA

*SZTPK v MINISTER FOR IMMIGRATION & ANOR* *[2014] FCCA 2259*

Catchwords:
MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Nepal – applicant believed but Tribunal withholding protection on the basis that the applicant had a right to enter and reside in India – whether the Tribunal erred in relation to its interpretation of the Treaty of Peace and Friendship between India and Nepal or in relation to its complementary protection assessment considered.

Legislation:
*Migration Act 1958* (Cth), ss.36, 425

Cases cited:
*Dhiman v Minister for Immigration* [2012] FCA 1254
*Minister for Immigration v SZRHU* [2013] FCAFC 91; (2013) 215 FCR 35
*Politis v Federal Commissioner of Taxation* (Cth) (1988) 20 ATR 108
*V856/00A v Minister for Immigration* (2001) 114 FCR 408
*VBAP of 2002 v Minister for Immigration* [2005] FCA 965
*SZRTC v Minister for Immigration* [2014] FCAFC 43

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| Applicant: | SZTPK |
| First Respondent: | MINISTER FOR IMMIGRATION & BORDER PROTECTION |
| Second Respondent: | REFUGEE REVIEW TRIBUNAL |
| File Number: | SYG 2998 of 2013 |
| Judgment of: | Judge Driver |
| Hearing date: | 1 October 2014 |
| Delivered at: | Sydney |
| Delivered on: | 31 October 2014 |

**REPRESENTATION**

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|---|---|
| Counsel for the Applicant: | Mr J R Young |
| Solicitors for the Applicant: | Shamser Thapa & Associates |
| Counsel for the Respondents: | Mr B Kaplan |
| Solicitors for the Respondents: | Australian Government Solicitor |

**ORDERS**

(1) The application as amended on 15 September 2014 is dismissed.

# FEDERAL CIRCUIT COURT
# OF AUSTRALIA
# AT SYDNEY

## SYG 2998 of 2013

**SZTPK**
Applicant

And

**MINISTER FOR IMMIGRATION & BORDER PROTECTION**
First Respondent

**REFUGEE REVIEW TRIBUNAL**
Second Respondent

# REASONS FOR JUDGMENT

## Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal (Tribunal). The decision was made on 30 October 2013. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant claimed to fear political persecution in Nepal. The following statement of background facts relating to the applicant's claims to protection and the Tribunal's decision on them is derived from the submissions of the parties.

2. The applicant is a citizen of Nepal. He arrived in Australia on 23 July 2008 and applied for the protection visa on 18 August 2011.

3. In support of his protection visa application[1], the applicant provided to the Minister's Department a statement made by him on 18 August 2011[2] and other documentation[3].

[1] Court Book (CB) 1-42
[2] CB 48-51

4. On 16 November 2011, the Minister's delegate decided to refuse to grant a protection visa to the applicant[4].

5. The applicant applied to the Tribunal for review of the delegate's decision on 7 December 2011[5]. He provided written submissions to the Tribunal on 27 March 2012[6].

6. On 5 April 2012, the Tribunal made a decision to affirm the delegate's decision[7].

7. The applicant subsequently applied to the then Federal Magistrates Court for judicial review of the First Tribunal Decision. On 14 December 2012, Smith FM made orders setting aside the First Tribunal Decision and requiring the Tribunal to determine the applicant's application for review according to law[8].

## The Tribunal decision

8. The applicant attended before the reconstituted Tribunal on 31 May 2013[9] and 30 October 2013[10]. Before the second hearing, on 19 August 2013, the Tribunal sent to the applicant a letter to notify him that "[a]n issue that will arise for consideration at the resumed hearing is the application of [ss.36(3)-(5A)] of the *Migration Act 1958* (Cth) (Migration Act), in relation to a possible right to enter and reside in India"[11].

9. The reconstituted Tribunal made a decision to affirm the delegate's decision on 30 October 2013[12].

10. The Tribunal found that the applicant had a well-founded fear of persecution in the reasonably foreseeable future in Nepal on the basis of his membership of the particular social group comprising Pahadis and his pro-monarchist political opinion that would be imputed to him

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[3] CB 58, 60, 62, 64, 66, 68-69 and 112
[4] CB 132-151
[5] CB 152-156
[6] CB 177-184
[7] CB 199-216 (First Tribunal Decision)
[8] CB 217
[9] CB 229-231
[10] CB 248-250
[11] CB 237-238
[12] CB 253-270

by extremist groups[13]. It further found that Nepal could not offer to the applicant "protection according to international standards"[14] and that relocation within that country was not reasonable[15].

11. The Tribunal went on to consider whether the applicant had a right to enter and reside in another country, within the meaning of s.36(3) of the Migration Act. It found that Article 7 of the Treaty of Peace and Friendship between India and Nepal 1950 (Treaty), considered in the light of the administrative arrangements in place at the border between Nepal and India, which the Department of Foreign Affairs and Trade (DFAT) discussed in an advice dated 18 September 2013 (DFAT Advice), "establish[ed] for the applicant the requisite right to enter and reside in India"[16]. The consequence of this finding was that the Tribunal could not be satisfied, for the purposes of s.36(2), that the applicant is a person to whom Australia owes protection obligations[17].

12. The Tribunal found that while certain groups such as Nepalese Maoists may wish to harm the applicant and operate in "the immediate Nepalese border region in India", none operated "more broadly in India" or was "based in India", as the applicant asserted[18]. The Tribunal observed that there were reports of some Nepalese Maoist activity in India, but that this was "in the decline and is largely controlled by the Indian authorities"[19]. It also observed that the Indian authorities had arrested or deported suspected Nepalese Maoists, which suggested that neither they nor their activities were tolerated by the authorities[20]. In any event, the Tribunal considered that, even if the applicant faced a threat from Maoists in India, state protection against that threat would be available to him[21].

13. The Tribunal did not accept that the applicant had a well-founded fear of persecution in India[22]. Nor did it have substantial grounds for believing that, as a necessary and foreseeable consequence of the

[13] CB 263 [20]-[22]
[14] CB 263 [21]
[15] CB 263 [23]
[16] CB 269 [38]
[17] CB 270 [43]
[18] CB 269 [40]
[19] CB 269 [40]
[20] CB 270 [40]
[21] CB 270 [40]
[22] CB 270 [41]

applicant moving to India, there would be a real risk that he will suffer significant harm in that country[23]. Thus, s.36(4) was not enlivened.

14. The Tribunal also was not satisfied that the applicant had a well-founded fear that India would return the applicant to Nepal. Consequently, neither s.36(5) nor s.36(5A) was enlivened[24].

## The judicial review application

15. These proceedings began with a show cause application filed on 3 December 2013. The applicant now relies upon an amended application filed on 15 September 2014. The grounds in that application are:

> *1. The Second Respondent made jurisdictional error in making findings which no reasonable decision-maker could make in relation to the meaning and effect of the provisions of the Treaty of Peace and Friendship 1950.*
>
> *2. The Second Respondent made jurisdictional error in making legal error as to the meaning, operation or effect of Article 7 of the Treaty.*
>
> *3. The Second Respondent made jurisdictional error by failing to have regard to the full* [judgment] *of the Full Federal Court in* MIMAC v SZRHU *[2013] FCAFC* [91] *by which decision it was bound.*
>
> *3A. Further or in the alternative to 3 above, the Second Respondent made jurisdictional error at [38] by failing to engage in any process of evaluation of the provision of the relevant Treaty and the administrative arrangements but simply states a conclusion based upon what the RRT "regarded" the Treaty provided, considered in the light of administrative arrangements in a DFAT response.*
>
> *4. The Second Respondent made jurisdictional error by depriving the Applicant of procedural fairness and/or failing to comply with s.425 of the Migration Act 1958 by providing the Applicant of procedural fairness by providing him with incorrect or misleading information about the operation of the Treaty.*

[23] CB 270 [41]
[24] CB 270 [42]

5. *The Second Respondent made jurisdictional error at [40] by failing to have regard to the provisions of section 36(4) and* [assuming] *that the concepts of relocation and state protection expressed in s.36(2B)(a) and (b) applied to s.36(4).*

6. *Further or in the alternative to (5) above, if s.36(2B)(a) or (b) applied to s.36(4), the Second Respondent made jurisdictional error by failing to have regard to the terms of s.36(2B)(a) and (b) and regarding the availability of the possibility of relocation and/or the availability of state protection (without regard to the qualifications in s.36(2B)] as being sufficient in themselves.*

16. Ground 4 was not pressed. Counsel for the applicant agreed that Grounds 1, 2 and 3 could be considered concurrently with Ground 3A.

17. I have before me as evidence the book of relevant documents filed on 3 February 2014.

18. Both the applicant and the Minister made written and oral submissions.

## Consideration

### Grounds 1 - 3A – did the Tribunal misconstrue or misapply the Treaty?

19. There is no substance to the first ground which asserts legal unreasonableness. While the ground was not formally withdrawn, it was not addressed in oral argument and neither do the applicant's written submissions provide support to it.

20. Grounds 2, 3 and 3A focus upon the Tribunal's conclusion concerning the application of the Treaty at [38] of its reasons where the Tribunal concluded[25]:

> *I regard Article 7 of the Treaty which provides for citizens of Nepal the same freedom of movement enjoyed by citizens of India, when considered in light of the administrative arrangements discussed in the above DFAT response, as establishing for the applicant the requisite right to enter and reside in India contemplated by section 36(3) of the Act.*

[25] CB 269

21. The applicant asserts that the Tribunal's conclusion quoted above is incompatible with the judgment of Buchanan J (with whom Tracey, Robertson and Griffiths JJ agreed) in *Minister for Immigration v SZRHU*[26] where his Honour said:

> *However, on the facts found by the RRT no right of entry appears to arise from the terms of the Treaty itself. There is certainly no legally enforceable right arising from the terms of the Treaty, but neither does the Treaty refer in terms to any entitlement of entry which would satisfy the test expressed in* V856/00A. *The rights given by the Treaty which appear to satisfy that test are the rights arising from the mutual covenants in Article 6 and Article 7. Article 7 articulates a right of residence, but it assumes that a citizen of one country is in the territory of the other. The arrangements at the border, whereby entry from one country to another is permitted generally upon satisfactory proof of identity, appear to be the result of administrative arrangements, rather than arising directly from the terms of the Treaty. In other words, the Treaty itself does not appear to give rights of entry. If the administrative arrangements for entry (even though they appear intended to facilitate the operation of the Treaty) do not satisfy the test in* V856/00A, *then the composite test in s 36(3) will not be satisfied either. That is a question which should not be decided in the present appeals. The possibility adverted to by Stone J in* Applicant C *at [60] is one which requires evaluation applying the proper test. That evaluation should be made by the RRT which will, if it chooses to do so, be in a position to seek further information relevant to the correct test to be applied.*

22. I accept the Minister's submission that the Tribunal did consider *SZHRU*. It set out what it saw as the relevant parts of the judgment of Buchanan J at [26]-[27][27]. The Tribunal's reasons at [28]-[35][28] demonstrate an understanding of the correct test under s.36(3) which Buchanan J articulated in *SZRHU* at [77]-[79] and [89]-[90].

23. Further, the Tribunal was alive to the need to look beyond the terms of the Treaty (which the Tribunal set out at [28])[29] to the administrative arrangements at the land and air border of India. The Tribunal set out

[26] [2013] FCAFC 91 at [88]
[27] CB 264-265
[28] CB 265-269
[29] CB 265-266

advice it received from the DFAT at [29][30]. The DFAT advice provided that a Nepalese citizen entering India:

a) "does not require a visa or passport for entry into India"[31];

b) may do so even if flying direct from Australia, as long as he or she is "in possession of a valid Nepalese passport"[32];

c) is granted "[u]nlimited stay … in India and there are no restrictions on their ability to remain, reside or work in India"[33]; and

d) could only be forcibly removed from India if convicted of a crime in Nepal or India[34].

24. It was plainly open to the Tribunal to conclude that the administrative arrangements for entry at the Nepal/India border, set out in the DFAT Advice, when read in the light of Article 7 of the Treaty, amounted to an entitlement to enter and reside in India of the kind referred to by Allsop J (as his Honour then was) in *V856/00A v Minister for Immigration*[35], that is:

> *… [a] liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of any particular enforcement … .*

25. There is nothing in the Tribunal's reasons, particularly [30][36] and [38][37], to suggest that it did not understand this. This was not a case like *SZRHU* where the Tribunal concluded "that the terms of the Treaty represented or reflected a legally enforceable right to enter and reside in India."[38] The advice that the Tribunal received from the Nepalese government in that case was based on the terms of the Treaty alone.[39] It was for that reason that Buchanan J observed that the Tribunal:

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[30] CB 266-267
[31] CB 266[29]
[32] CB 267[29]
[33] CB 267 [29]
[34] CB 267 [29]
[35] (2001) 114 FCR 408 at 419 [31]
[36] CB 267
[37] CB 269
[38] *Minister for Immigration v SZRHU* (2013) 215 FCR 35 at 54 [90]
[39] *Minister for Immigration v SZRHU* (2013) 215 FCR 35 at 40-41 [18], [20]-[21]

> *was in error to conclude that **the terms of the Treaty** represented or reflected a legally enforceable right to enter and reside in India*

and that it

> *should pay regard to the actual terms of the Treaty and should also evaluate whether, in combination with the terms of the Treaty, the administrative arrangements for entry by Nepalese citizens at the Indian border (or any other arrangements with respect to entry identified by it) satisfy the test.* [emphasis added]

26. By contrast, in this case the DFAT Advice discussed the administrative arrangements at the border between Nepal and India. The Tribunal was entitled to have regard to it. Unlike *SZRHU*, the Tribunal in the present case did not conclude, on the basis of the Treaty *alone*, that the applicant had a right to enter and reside in India.

27. I accept that [38] of the Tribunal's reasons could have been better expressed. The question to be answered by the Tribunal was whether the Treaty and the administrative arrangements provided a right of entry and residence in India for Nepalese citizens. The Tribunal's reference to "freedom of movement" is curious as I take that reference, consistently with the judgment of Buchanan J, to mean movement within the borders of the two countries and not between them. Further, [38] is open to an interpretation that the source of the right was Article 7 of the Treaty as illuminated by the administrative arrangements discussed by the Tribunal, whereas the better view is that the administrative arrangements themselves detail the right of entry and Article 7 of the Treaty relevantly provides a right of residence to those who have entered.

28. Nevertheless, I am not persuaded that [38] of the Tribunal's reasons should be read in isolation. The paragraph needs to be read in the context of the analysis which preceded it. When the Tribunal's reasons are read as a coherent whole, it is tolerably clear that the Tribunal found that the Treaty combined with the administrative arrangements at the border provided a right of entry and residence.

29. Accordingly, I find that none of these grounds have been made out.

## Grounds 5 and 6 – did the Tribunal err in dealing with the risk of significant harm in India?

30. Grounds 5 and 6 focus on the Tribunal's reasons at [40] where the Tribunal stated[40]:

> *Whilst I accept that Nepalese Maoists, Janatantrik Morcha. Madhesi groups and Terai based political or criminal based groups who might wish to harm the applicant do operate in the immediate Nepalese border region in India, I do not accept that they operate more broadly in India or that, as the applicant asserts, are based in India. The applicant has provided no information to support his claims and I can find none. Whilst there are reports of some Nepalese Maoist activity in India, the reports indicate this is in the decline and is largely controlled by the Indian authorities. For example, in the United States Department of State's Country Reports on Human Rights Practices for 2012, published on 19 April 2013, the section on Nepal, which was accessed from http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204399#wrapper, indicates that there is general Maoist activity in India, it also suggests that it is largely confined to limited 'conflict zones', that it is declining, and that the Indian government actively and violently suppresses that activity. As far as* Nepalese *Maoists operating in India are concerned, RRT Research Response NPL31374 dated 23 February 2007 indicates that the Indian authorities have arrested or deported suspected Nepalese Maoists, suggesting that their activities are not tolerated by the Indian authorities, and that even if the applicant were facing a threat from Maoists in India, state protection against this threat would be available to him.*

31. I accept the Minister's submissions in relation to these grounds.

32. In Ground 5, the applicant asserts that the Tribunal "fail[ed] to have regard to the provisions of s.36(4) and assuring that the concepts of relocation and state protection expressed in s.36(2B)(a) and (b) applied to s.36(4)." In his written submissions, the applicant says that ss.36(2B)(a) and (b) do not apply to s.36(4)(b).

33. As a matter of statutory construction, the applicant's submission must fail.

[40] CB 269-270

34. Section 36 relevantly provides:

> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *...*
>
> *(aa) a non-citizen in Australia ... in respect of whom the Minister is satisfied that Australia has protection obligations because there are 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 ...*
>
> *...*
>
> *...*
>
> *(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 ...*
>
> *...*
>
> *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.*

35. Sub-section 36(3) deems a person not to be entitled to Australia's protection obligations, which would otherwise be owed, if the person has not taken the steps set out in that provision. One does not get to s.36(3), however, unless the requirements in s.36(2) are satisfied.

36. I note in that connection that counsel for the applicant properly withdrew during the course of oral argument his criticism in his written submissions that the first of the two hearings conducted by the Tribunal as presently constituted was a "waste of time" because it dealt only with the issue of the exposure of the applicant to serious or significant harm in Nepal. In fact, as was made clear by the Full Federal Court in *SZRTC v Minister for Immigration*[41] the Tribunal followed the correct approach of considering first whether the applicant satisfied one or more of the criteria for a protection visa in s.36(2). It was only because that question was answered in the affirmative that it was necessary for the Tribunal then to turn to s.36(3) and determine whether or not the applicant was a person to whom that subsection applied. This means, in my view, that the "protection obligations" which Australia is taken not to have by reference to s.36(3) are not hypothetical but, rather, are protection obligations that have been established.

37. Sub-section 36(4) is an exception to the deeming provision. In other words, even if a person has not taken the steps set out in s.36(3), he or she may, nonetheless, be owed protection obligations if the matters set out in ss.36(4)(a) or (b) were satisfied. Paragraph 36(4)(b) uses the language "real risk that the non-citizen will suffer significant harm". That expression appears in s.36(2)(aa) and, subject to the definite article being replaced with the indefinite article, the chapeau to s.36(2B). There is no reason why the meaning of that expression is not

[41] [2014] FCAFC 43 at [25]

the same as the meaning given to the same expression in s.36(2)(aa)[42]. Indeed, there is nothing in s.36(4)(b) to suggest otherwise. If that is so, then s.36(2B) conditions the applicant's entitlement to Australia's protection obligations under s.36(4)(b) in the same way that it conditions his entitlement to those obligations under s.36(2)(aa). A useful way to test this proposition would be to ask whether the applicant accepts that the definition of "significant harm" in s.36(2A) applies to s.36(4)(b), which uses that expression. If so, then there is no good reason, as a matter of statutory construction, why s.36(2B) ought not to apply to s.36(4)(b).

38. In Ground 6, the applicant contends that the Tribunal "fail[ed] to have regard to the terms of s.36(2B)(a) and (b) and regarding the availability of the possibility of relocation and/or the availability of state protection (without regard to the qualifications in s.36(2B) as being sufficient in themselves."

39. There are two reasons to reject this ground.

40. First, the primary basis upon which the Tribunal found, at [41][43], that s.36(4) had not been enlivened was that the applicant did not have a well-founded fear of persecution for Refugees Convention reasons and would not face a real risk of significant harm because:

    a) the groups which he feared do not operate more broadly in India and are not based in India[44];

    b) Nepalese Maoist activities in India are in decline and largely controlled by the Indian authorities [45]; for example, some Nepalese Maoists operating in India have been arrested or deported[46]; and

[42] See the cases collected in Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) at [4.6]
[43] CB 270
[44] CB 269 [40]
[45] CB 269 [40]
[46] CB 270 [40]

c) general Maoist activity in India is largely confined to limited "conflict zones", is in decline, and the Indian government "actively and violently suppresses that activity"[47].

41. These findings cannot be read in isolation; they need to be read with the Tribunal's findings at [41][48], to which they relate[49].

42. The availability of state protection was a separate and independent basis upon which the Tribunal concluded that the requirements of s.36(4) had not been satisfied.[50] So much is clear from the words "**even if** the applicant were facing a threat from Maoists in India". [emphasis added.] One does not get to state protection, therefore, unless the Tribunal's earlier findings can be challenged. There is no basis for such a challenge.

43. Secondly, and in any event, the Tribunal's consideration of state protection is devoid of error.

44. On the hypothesis that the applicant did, relevantly, face a risk of significant harm at the hands of Maoists in India, the Tribunal found, at [40][51], that the applicant could obtain protection from the Indian authorities "against th[at] threat". This finding had the consequence that "there [wa]s taken not to be a real risk that [the applicant] will suffer significant harm in [India]"[52]. That, in turn, had the consequence that the Tribunal did not have "substantial grounds for believing that, as a necessary and foreseeable consequence of the [applicant] availing himself … of a right mentioned in [s.36(3)], there would be a real risk that [he] will suffer significant harm in relation to [India]"[53].

45. There is nothing in [40] or [41] of the Tribunal's reasons to suggest that it misunderstood ss.36(2B) or (4). The Tribunal was required to turn its mind to the language used in s.36(4), and it did so in the penultimate sentence of [41][54]. The Tribunal was also required to turn its mind to

[47] CB 270 [40]
[48] CB 270
[49] *Politis v Federal Commissioner of Taxation (Cth)* (1988) 20 ATR 108 at 111 per Lockhart J
[50] Cf *VBAP of 2002 v Minister for Immigration* [2005] FCA 965 at [25], [33] per North J; *Dhiman v Minister for Immigration* [2012] FCA 1254 at [22] per Katzmann J
[51] CB 270
[52] see the chapeau to s.36(2B)
[53] Section 36(4)(b)
[54] CB 270

the criteria for the grant of the visa in ss.36(2)(a) and (aa), and it did so in the first sentence of [41][55]. In that connection, it needs to be emphasised that the criteria for the grant of a protection visa are set out in s.36(2), not ss.36(3) or (4). The latter two sub-sections go to the question whether "protection obligations" (an expression used in ss.36(2)(a) and (aa)) are owed to a particular non-citizen. The heading immediately above s.36(3) supports this construction.

46. In summary, the exhaustive definition of "significant harm" in s.36(2A) applies to all references to significant harm in s.36. Secondly, the provisions of s.36(2A) and s.36(2B) condition not only the assessment required in s.36(2)(aa) but also s.36(4)(b). This means that a decision maker is entitled to have regard to the availability of state protection and the possibility of relocation when considering the risk of significant harm facing a visa applicant in a country in which they have a right to enter and reside. Thirdly, properly understood, the reasons of the Tribunal at [40] involved a conclusion that the limited, declining and strenuously opposed activities of the Nepalese Maoists in the border regions of India did not pose a real risk of significant harm to the applicant in India as a whole. The Tribunal did not make any relocation finding in relation to India and its finding in relation to state protection was a secondary and hypothetical finding not essential to its reasons.

## Conclusion

47. The applicant has failed to establish any jurisdictional error in the decision of the Tribunal. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.

48. I will hear the parties as to costs.

**I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of Judge Driver**

Associate:

Date: 31 October 2014

[55] CB 270