

1419277 (Refugee) [2016] AATA 3602 (16 March 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1419277
COUNTRY OF REFERENCE:	Nepal
MEMBER:	Suhad Kamand
DATE:	16 March 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 16 March 2016 at 4:24pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The applicant, a male national of Nepal, applied for a [temporary visa] [in] October 2011. That visa was granted [in] October 2011. The applicant arrived in Australia holding that visa [in] November 2011. He departed Australia [in] December 2011, returning to Nepal. [In] September 2013 he lodged an offshore [different temporary visa] application. The visa was granted [in] October 2013 and the applicant arrived in Australia [in] November 2013. He lodged the Protection visa application the subject of this review [in] December 2013. The delegate refused to grant the visa [in] November 2014 and the applicant sought this Tribunal's review of that decision. On the basis of all the evidence before it, and for the cumulative reasons given below, the Tribunal has concluded that the applicant is not a person in respect of whom Australia has protection obligations and affirms the delegate's decision.
2. Relevant law has been included at Appendix 1.

CONSIDERATION OF CLAIMS AND EVIDENCE

3. The applicant was born in [year]. He is a national of Nepal¹ and of no other country.
4. His express claims and those arising on the evidence are that he fears harm in Nepal from a range of underground extortion gangs linked to the Madhesi cause. He claims to fear being extorted for money, physically harmed and killed by such groups. He claims that he was extorted by these groups in the past in Nepal and that he has had his life and his family threatened in connection with those extortion attempts. He fears harm of the same nature in the reasonably foreseeable future should he return to Nepal. He claims that he has been and will be targeted in the future for such harm in Nepal for reason of his perceived wealth as well as for his known political profile as an active member of the Tarun Dal, the youth wing of the Nepali Congress.

Delegate's decision

5. The delegate was not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention or under complementary protection. A copy of the delegate's decision record was provided to the Tribunal by the applicant.

Issues before the Tribunal

6. The Tribunal must generally assess whether: it is satisfied of the credibility and truth of relevant aspects of the applicant's claims and evidence; on the evidence before it, it is satisfied that the applicant faces a well-founded fear, based on a real chance, of persecution involving serious harm for a Convention reason, if he returns to Nepal. If the Tribunal is not satisfied that he is owed Australia's protection under the Refugees Convention, it must then consider whether he is owed complementary protection. That involves an assessment of whether there are substantial grounds for believing that he faces a real risk of significant harm in Nepal for any of the reasons claimed or arising on the evidence.
7. The Tribunal's assessment is informed by a range of sources including: the Department's file relating to the applicant which includes his protection visa application form and documents

¹ His original Nepali passport was sighted during his appearance before the Tribunal on 15 March 2016

provided in support, including an extensive written statement detailing his circumstances in Nepal; and an audio recording of his Department interview held [in] July 2014, conducted through a Nepali interpreter, which the Tribunal has listened to. The Tribunal's assessment is also informed by its detailed exploration of the applicant's claims when he appeared in person before it on 15 March 2016. During that appearance he communicated with the assistance of an interpreter in the Nepali and English languages. When asked at the commencement of his Tribunal appearance whether he has any concerns about his capacity to communicate his claims and evidence to the Tribunal, he responded in the negative. The Tribunal has had regard to the above as well as to other material available to it from a range of sources, referred to, where relevant, in its considerations below.

Assessment of the applicant's claimed circumstances – credibility

8. Having had the opportunity to discuss the applicant's claims and evidence with him during his Tribunal appearance; and reflect on that evidence in the context of all the evidence before it, the Tribunal has significant concerns regarding the truth of central aspects of the applicant's claims and evidence. While the concerns detailed below are not singularly determinative of the credibility of the applicant's claims overall, cumulatively, they cast such doubt on his reliability as a truthful witness that the Tribunal cannot be and is not satisfied: that central aspects of the applicant's circumstances in Nepal are as he has claimed; and/or that the applicant is a person in respect of whom Australia has protection obligations.
9. Certain aspects of the applicant's circumstances have been maintained consistently over time. It is not in dispute that the applicant: was born in [District 1] in the Terai region of Nepal where his elderly father and mother continue to live; has, since [year], lived in rented accommodation in Kathmandu, returning regularly to [District 1] to visit his parents; is [one of a few] children, his [siblings] residing with their own families in Kathmandu; is married and has left his wife [and children] residing in the same home he shared with them in Kathmandu; has held various positions at [an organisation] from [year] until departing Nepal in December 2013, most recently holding the position of [occupation]; travelled to Australia on both occasions as a representative of the [organisation] to participate in [events], both of his trips being funded by the [organisation]. On his oral evidence to the Tribunal, he undertook those trips with colleagues from [organisation], all of whom he says have now returned to Nepal. He said that he is not aware of those colleagues having any specific difficulties on their return to Nepal.
10. The essence of the applicant's claims is that he has, since around 1990, been involved with the Tarun Dal, which he described as the "sister party" of the Nepali Congress; he remains a member of the Tarun Dal; his father was also a prominent member of the Nepali Congress in [District 1]; the applicant developed a profile in and around [District 1] as an active member of the Tarun Dal; as a result he made enemies in opposing parties and was always threatened by Maoists during the People's War; while the threats from Maoists have long abated² in around February 2011 he began receiving threats to his life from underground Madhesi groups who were seeking financial donations; while he paid them a sum of Rs[amount] on one occasion, their demands for money continued and increased, and their threats to his life and his family's safety escalated; the applicant did not pay them any further money; on returning to Nepal after his 2011 visit to Australia, these threats and extortion attempts increased as he was viewed as wealthy due to his position at the [organisation] and his travels to Australia; as a result of such constant attempts at extortion and threats he decided to come to Australia to seek asylum; he fears ongoing attempts at extortion and threats to his and his family's safety and lives from underground Madhesi groups should he return to Nepal.

² The applicant gave this evidence orally during his Tribunal appearance on 15 March 2016

11. The applicant told the Tribunal that his Protection visa application form was completed with the assistance of a friend in [Australia] who he thinks is a migration agent. He also told the Tribunal that his written statement (written statement), which is typed in English and undated³ (stamped as received by the Department [in] December 2013) was prepared first by himself in the Nepali language and then sent to his friend in Nepal who is the [occupation] of [a newspaper], a Nepali [newspaper], for translation into English. The applicant told the Tribunal that: he chose this friend to help him translate his statement because he is very good in both English and Nepali; he is very confident that the contents of his English language statement are accurate and correct; while he, personally, is not fluent in English, he has read over the English statement and has not seen any errors. The Tribunal asked the applicant where his Nepali language statement is. He said that he does not have it any more. When the Tribunal suggested that he should still have a copy in his sent email folder if he emailed it to Nepal for translation, he responded that his email account has been hacked and he can no longer access it.
12. The claims detailed in the applicant's Protection visa application form and written statement, together with the applicant's circumstances in Nepal more generally, were explored in detail during his Tribunal appearance. As detailed below, many aspects of his oral evidence did not accord with or support his written claims, and no plausible explanation as to why was provided.

Claimed political profile

13. Regarding his political involvement and profile in Nepal, in his written statement he describes himself as having a long personal and family history of political involvement in support of the Nepali Congress and Tarun Dal. He states that: he was an active member of the Nepali Congress youth wing, the Tarun Dal; as such "I participated in all (except the one [specified]) the revolutionary changes that took place in Nepal"⁴; ... "During the 1990 (2046 BS) Revolution, I actively participated in that revolution to reinstate democracy in Nepal. As a result of my participation I grew popular within my party and society and even made some enemies in the opposing parties"; he was "a die-hard Nepal Congress party member" who was "always threatened by the then underground Maoist party during their so called "People's War"; however, "Luckily I was in the capital city and no harm came to me"⁵. He told the Tribunal that the threat from the Maoists has long abated and he does not fear harm from them in the reasonably foreseeable future. However, he claims in his written statement, that since around February 2011, he has been adversely targeted by underground Madhesi groups operating primarily in the [District 1]/Terai area, and that he has been specifically targeted for reason of his political profile in connection with the Tarun Dal/ Nepali Congress, as well as for reason of his perceived wealth. It is the underground Madhesi groups he fears serious and significant harm from in the reasonably foreseeable future.
14. During his Tribunal appearance the Tribunal discussed with the applicant the nature of his political activities and involvement in Nepal. His evidence impressed the Tribunal as being very general and lacking detail, and did not appear consistent with his claimed profile and involvement spanning some 25 years, as claimed in his written statement.
15. For instance, regarding his claimed involvement in the "1990 (2046 BS) Revolution" which he claims to have actively participated in, resulting in his enhanced popularity and profile within the party and society, the Tribunal asked him to describe what he recalls of his specific involvement and role in that revolution. In response he offered that he participated in the 2046 (1989) Democratic Movement in Nepal. He made specific reference to a strike

³ [File number] folios 62-70

⁴ [File number] folio 65

⁵ *ibid*

aimed at establishing a multiparty democracy in Nepal. When asked what his role in the strike was he said that he acted on the instruction of his party. When asked to describe some of the things he was instructed to do he said that “they would ask me to participate in the movement”. The Tribunal explained to the applicant that it is trying to understand what he did on a practical level in order to understand how his political profile was enhanced by his participation in these events, he repeated that he would follow the rules and instructions of the Tarun Dal. When asked for an example of an instruction he had to follow he said he had to motivate people to support the Nepali Congress by telling them the rules and regulations. When asked if there was a specific event relating to the 1990 revolution that he participated in he said that he was part of a group that destroyed a [public art work]. When asked what his role in the group was, he responded that he was young and strong at the time and so he was part of the group, but he had no specific role beyond that. When asked how he earned a prominent political profile with such marginal involvement in the above events he responded that the Tarun Dal party was a very good organization.

16. When asked to detail any other specific Tarun Dal activities he was involved with in Nepal he referred to the 2050/1 earthquake (around 1994⁶). He said that houses were destroyed so the Tarun Dal conducted hundreds of programs at the time. When asked to detail some of the programs he was involved in he said that most were political movements to raise awareness. He said that the Tarun Dal would visit districts and organise district level programs. When asked to give an example he said that they would tell people about the Tarun Dal and motivate them join by talking about multiparty democracy. His evidence was general and did not contain a level of detail which would reflect or support his claimed personal participation in any such Tarun Dal activities.
17. At another point in his oral evidence to the Tribunal (ie, when explaining the discrepancy between the date on which his Tarun Dal membership card was issued and his claimed date of joining the Tarun Dal, detailed in paragraph 20 below), he said that he started to become an active member of the Tarun Dal in around 2061 (ie around 2005), being the year his membership card was issued. When asked to give examples of how he became very active in 2005 his evidence again impressed the Tribunal as being vague. He said that he was asked to do speeches for the Tarun Dal. The only example he gave was of an event in 2012 in [Town 1], where he said he was asked to speak to the community regarding women’s health issues. When asked if he presented speeches on any other topics at any other time or place he said that the Tarun Dal would organize them and they were in various locations. When asked to elaborate on the speech he gave in [Town 1] in 2012 he said that the speech was around 10 minutes long. When asked to detail the content of his speech he said that there were many female health problems in the area and the event was aimed at education. When pressed he said “I would just talk about health”. When asked why he was specifically chosen to speak on the topic of women’s health he said that it was a neighbouring village which was deprived of health services. When asked what experience he had in respect of women’s health he said that he has a special respect towards women.
18. The applicant’s evidence overall regarding his claimed involvement with the Tarun Dal in Nepal was vague and unconvincing. The lack of detail he provided regarding the nature of his personal involvement over time does not impress the Tribunal as consistent with his claimed involvement with the Tarun Dal since 1990. Nor does his oral evidence to the Tribunal support his claim to have developed any profile as an active or popular member of that party, either within the party, society, or amongst opposition groups.
19. The above concerns are compounded by the following. The Tribunal discussed with the applicant, during his hearing, when he became a member of the Tarun Dal, given that the evidence detailed above suggests he was actively involved from as early as 1990. He

⁶ <http://www.rajana.com/calendar/convert.asp>

responded variously that he joined around 17 years ago (which would have been around 1999). He said he is [age] now so it was when he was around [age range]. He also offered at another time that he joined in 1990. He submitted to the Department a letter from [an office bearer] of the Tarun Dal [Office] stating that he obtained “whole timer membership” the Tarun Dal on “[date] BS (August [date] 2000AD)” and “has been actively engaging in the Democratic movement in Nepal since that time”⁷. He also showed the Tribunal a copy of his Nepal Tarun Dal membership card, however that card has a date of issue of “[date format]”, which is around [May] 2004⁸. When the Tribunal asked the applicant why his membership card was issued in May 2004 he responded that this is when he became a very active member. However, his oral evidence to the Tribunal regarding his actual participation in the Tarun Dal does not support his claims to have ever been an active member of the Tarun Dal, nor is the date of issue of his Tarun Dal membership card consistent with the letter he provided from the Tarun Dal [Office] stating that he was a full time member of the party since around 2000. As explained to the applicant, another concern regarding the Nepali documentation provided is that reliable independent sources report a high level of document fraud in Nepal⁹, which means that the documents from the Tarun Dal [Office] and his Tarun Dal membership card cannot be assumed to be genuine documents. Rather, those documents form part of the total body of evidence available to the Tribunal, and must be assessed in the context of all the evidence advanced.

20. Having considered all the evidence advanced, including the cumulative concerns detailed above, the Tribunal is not satisfied that the applicant was or is a member of the Tarun Dal. The Tribunal does not accept that he has any actual or imputed profile as a member or as an active member of the Tarun Dal or as a supporter of the Nepali Congress. The Tribunal does not accept that the applicant was a speaker at a health education event in [Town 1] in 2012 and does not accept that he was assaulted while attending that event as claimed.

Claimed past experiences of extortion and harm

21. During the applicant’s hearing the Tribunal also explored, in detail, his claims of being personally targeted in the past by Madhesi groups seeking financial donations. As detailed below, multiple, significant aspects of his oral evidence to the Tribunal did not accord with his written claims. Nor did his evidence regarding the adverse approaches and threats made to his family in Nepal impress the Tribunal as consistent with the applicant’s evidence regarding his family circumstances in Nepal, also detailed below.
22. In his written statement the applicant claims that, in or around February 2011 “the threat to my life from an underground armed group became very real to me” when an underground Madeshi group “wrote a letter asking me donation money in the name of running their movement”. He expressly states, in his written statement, that “They issued a warning letter to me on February 2011 stating that if I did not provide the donation, they would take physical action against me”. He claims that they demanded Rs [a large amount] but he only paid only Rs [a smaller amount]. He states that a few months later they wrote another letter asking Rs [an even larger amount] and again warned that they will take physical action and/or kill him if he didn’t pay. He “tried to ignore their threats for money despite being afraid” and “luckily no harm came to me or my family during that time”¹⁰ He speculates in his written statement that maybe they were afraid to harm him in the capital city.

⁷ Ibid, folio 77

⁸ <http://www.rajan.com/calendar/convertn.asp>

⁹ Eg, Immigration and Refugee Board of Canada 2009, *NPL103010.E - Nepal: Prevalence of forged, fake or falsely acquired documents, including identity documents, professional certifications, membership cards and employment records*, 26 January http://www.irb-cjsr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=452196&l=e – Accessed 4 May 2010

¹⁰ Ibid, folio 64

23. However, in his oral evidence to the Tribunal he gave a very different account. He said that the first time he was approached by underground Madhesi groups was at his father's home in [District 1]. He said, however, that he was living in Kathmandu at the time. He said that the Madhesis knocked on his father's door but his mother and father were asleep and did not get up so the Madhesis left. When asked how he knows this if his parents remained asleep and he was living in Kathmandu at the time he said that the Madhesis rang him in Kathmandu and told him. He then varied this evidence a number of times including to the effect that his parents neighbours told him of the incident and told him the Madhesis ran into the jungle. When asked what the Madhesis were running from if they had knocked on his parents' door and his parents remained asleep he offered a further variation to the effect that: his parents woke up; his father saw the Madhesis and started yelling; people from the surrounding area came out to see what happened and the Madhesis ran away.
24. When asked how the Madhesi's delivered their demand for money on the first occasion he said that they phoned him. He said that they initially asked for Rs [a large amount] but the applicant only paid Rs[a smaller amount]. He said that they then increased their demand to Rs [the even larger amount]. He said that he never paid them any more money, and that all their demands for money and their threat of harm were delivered to him by phone, including at his workplace and his phone in Kathmandu. When asked if the demands or threats were delivered in any way other than by phone he said they were not, repeating that it was only by phone that they contacted him.
25. The Tribunal put to the applicant that this does not appear consistent with his written statement in which he claims that the Madhesis left letters requesting money from him and warning him that he would be harmed if he didn't pay. Initially the applicant responded that he did not say that in his department interview. However, the Tribunal explained to the applicant that it is referring to his written statement, not his department interview. In response, he said that it is not true that the Madhesis left a letter. When asked why such a central aspect of his claims would be repeated multiple times in his written statement if he didn't say it, particularly given his earlier evidence that the English translation he provided was based on his written Nepali statement which was translated by a Nepali newspaper [staff] proficient in both English and Nepali, he responded that he doesn't know why it was written like that and he never mentioned that the threats were made in writing.
26. The Tribunal explained to the applicant that he earlier gave evidence regarding his confidence in the accuracy of the English language written statement he has provided. The Tribunal also noted that the written statement refers more than once to the Madhesi's leaving letters for him demanding money and delivering threats. The Tribunal explained to the applicant that he has given no explanation as to why such a claim would appear in his written statement if, as he claimed earlier, that statement is an accurate reflection of events he has personally experienced. While mindful that the applicant has limited English language skills, the Tribunal is also mindful of the cumulative credibility concerns detailed in the balance of the Tribunal's considerations. Those concerns cast doubt on the credibility of the applicant as a truthful and reliable witness. The applicant has provided no plausible explanation as to why his oral evidence and his written evidence conflict on such a central aspect of his claims, and the Tribunal considers the discrepancy detailed above to be significant and to cast doubt on the truth of the applicant's claims that he or his family was or will be, in the reasonably foreseeable future, personally targeted for extortion or harm by any underground movement, including any underground Madhesi movement.
27. Compounding the above concerns is the following. The applicant's written statement continues that, "Because of these threats "we decided to sell our house in the hometown as I lived in the city and my father wanted to live in the town where he thought it was safer". However, his oral evidence to the Tribunal was that: he does not and has not ever owned any property or a home in Nepal; the house which was sold was registered in the names of

his parents; while they sold one home in [District 1], they bought another one around a 10 minute walk away. His evidence was also that his parents continued to be approached by Madhesi even after they moved to their new [District 1] residence.

28. He told the Tribunal that: his father is aged in his [age range] and his mother in her [age range]; both of his parents have significant health problem; both his parents are known in their local area where they have lived for many decades; they live alone [in] the home the applicant says has been approached on multiple occasions by underground Madhesi groups threatening harm and demanding money; despite the visible vulnerability of his elderly parents living [alone], his evidence did not reveal them to have been harmed in any way by anyone in connection with any extortion demands, despite the applicant's evidence that it was his parents who own property in Nepal and who, on the evidence advanced, impress the Tribunal as having more actual and perceived wealth than the applicant. As explained to the applicant, this appears to undermine his claims that anyone intends to harm him or any member of his family in pursuit of extortion money or otherwise.
29. The above concerns are compounded by the following. The applicant told the Tribunal that he has received threats to his life since around 2010, including threats to kidnap his children if he did not pay the money demanded. Yet he also told the Tribunal that his wife was willing to continue living in the house they rented together in Kathmandu with her young [children] after the applicant departed in December 2013. He said that his children continue to attend school, [one child] walking to and from school. He said his wife remains in the house as a housewife. He did not identify any of his family members suffering harm of any nature either in the time he was in Nepal or since he left, despite his wife's added vulnerability as a female living alone with her 2 children since December 2013. That the applicant's wife was willing to remain alone with her young children in a home the applicant claims was known to his pursuers undermines the applicant's claims that he and/or his family were adversely pursued in any way in Nepal at any time.
30. Those claims are further undermined by the following. The applicant claims that, while he was scared for his life from at least February 2011, and that the threats to his life were coming from Madhesi groups most active in and around the [area], he continued to make weekly trips to [District 1] from Kathmandu to look after his elderly parents until he came to Australia in December 2013. He told the Tribunal that he would often sleep at his parents' home in [District 1] for one night and return to Kathmandu the next day. He would always visit on weekends as he was working in Kathmandu through the week. Despite this predictable pattern in which his presence [would] have been known to anyone locally who took an interest, the applicant's evidence does not reveal him to have been harmed or adversely approached at his parents home at any time. Similarly, the applicant's oral evidence to the Tribunal was that the Madhesi's who were threatening him also knew where he worked in Kathmandu and delivered threats by phone to his workplace. Yet, despite continuing to work at the same place until leaving Nepal in December 2013 the applicant's evidence does not reveal him to have been harmed in any way either at work or on his way to or from work. As explained to the applicant, it appears that, if anyone was truly interested in harming him or any member of his family, they have had many opportunities to do this, but on his own evidence, they have not harmed anyone linked to him, including him.
31. Further, on the applicant's evidence, he had begun receiving threats to his life and family linked to attempts at extortion, prior to his first trip to Australia in 2011. On his own evidence to the Tribunal he already knew a migration agent in Australia at that time, and he had already heard of the protection visa at that time. However, he did not seek Australia's protection on that occasion and instead returned voluntarily to Nepal, where he remained for around two years before returning to Australia. While not determinative of the applicant's risks of future harm in Nepal, the Tribunal considers the applicant's failure to seek protection

during his first stay in Australia, and his voluntary return to Nepal, to compound the Tribunal's concerns regarding the truth of his claimed past experiences of harm in Nepal.

32. Based on all the evidence before it, including the cumulative and significant concerns detailed above, the Tribunal is not satisfied that the applicant or any member of his family has been targeted by anyone seeking to extort him or his family for money. The Tribunal is not satisfied that the applicant or any member of his family in Nepal have been harmed or threatened with harm for any reason, including for reason of the applicant's claimed perceived wealth or his claimed political profile.
33. While the Tribunal accepts that the applicant has occupied a senior position within the [organisation], on his own evidence to the Tribunal he has resigned from that position and he has no significant markings of wealth in Nepal. He has no property registered in his name and the home in which he lives in Nepal is rented. While the Tribunal is mindful that extortion, continues to be reported in Nepal, the reports indicate that the incidents of extortion have reduced significantly in recent years¹¹. The Tribunal is not satisfied that the applicant has or will have in the reasonably foreseeable future, any actual or perceived wealth or political profile which gives rise to a real chance of him being targeted for extortion by groups or individuals of any inclination, including those linked to the Madhesi cause.
34. The Tribunal is mindful also of the applicant's evidence that, should he return to Nepal he will have nothing, as he no longer has a job and he is [age] years old, making it difficult for him to find work. However, on his own evidence, he receives rental income from the home owned by his parents in [District 1], and he has had employment experience in the [organisation] spanning over 20 years. He also told the Tribunal that he has been working in Australia. The Tribunal is not satisfied on the evidence before it that the applicant, in the context of his extensive work experience, will not be able to source some employment on his return to Nepal or that he faces a real chance of significant economic hardship, denial or access to basic services or a denial of a capacity to earn a livelihood which threatens his capacity to subsist in the reasonably foreseeable future. Nor is the Tribunal satisfied that any difficulties he anticipates in sourcing employment in Nepal on his return there will amount to or give rise to significant harm as contemplated by the relevant law.
35. Having considered all the evidence before it, including the cumulative concerns detailed above, the Tribunal is not satisfied that the applicant's circumstances in Nepal are as he has claimed. The Tribunal is not satisfied that the applicant has any actual or imputed political profile as an active or ordinary member of the Tarun Dal or supporter of the Nepali Congress. The Tribunal is not satisfied that he was ever adversely targeted or harmed in connection with such a profile. The Tribunal is also not satisfied that the applicant was or is, in Nepal, a person with any particular markings of wealth, or that he was specifically extorted or threatened or had his family extorted or threatened by any group or individual linked to the Madhesi cause or otherwise. The Tribunal is not satisfied that the applicant faces, in the reasonably foreseeable future, a real chance of any such harm from any individuals or groups, nor is the Tribunal satisfied that what it accepts of the balance of his circumstances, including in respect of his concerns about sourcing employment on his return to Nepal, give rise to a real chance of persecution involving serious harm as contemplated by section 91R(1)(b) and 91R(2) of the act, or significant harm as contemplated by section 36(2A) of the Act.
36. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

¹¹ NPLCI41115090858607 – Extortion by Madhesi Janadhikar Forum and Black Cobra, 7 January 2014; CI150608145103324 – Janatantrik Terai Mukti Morcha violence, 18 June 2015

37. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
38. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

39. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Suhad Kamand
Member

RELEVANT LAW

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

Refugee criterion

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
3. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
4. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
5. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
6. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
7. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
8. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

9. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
10. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
11. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

12. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
13. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
14. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

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