

**1404235 [2014] RRTA 645 (14 August 2014)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1404235  
**COUNTRY OF REFERENCE:** Nepal  
**TRIBUNAL MEMBER:** John Blount  
**DATE:** 14 August 2014  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Statement made on 14 August 2014 at 3:05pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Nepal, applied to the Department of Immigration for the visa [in] August 2013 and the delegate refused to grant the visa [in] January 2014. On 5 March 2014 the applicant applied to the Tribunal for review of that decision. The case was constituted to this Member on 25 June 2014.
3. The applicant appeared before the Tribunal on 6 August 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepalese and English languages.

### CONSIDERATION OF CLAIMS AND EVIDENCE

4. 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. The applicant's claims are made in his own right, not as a member of a family unit.
5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia 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). Article 1A(2) of the Convention sets out a definition of who is a refugee.
6. 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').
7. However, Australia will not owe protection obligations if, as provided in s.36(3), the non-citizen has what is generally referred to as 'safe third country protection'. Subsection 36(3) is as follows:
  - (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.

8. This means that where a non-citizen in Australia has a right to enter and reside in a third country, Australia will not have protection obligations in respect of that person if he or she has not availed himself or herself of that right. Subsection 36(3), however, is qualified by s.36(4), (5) and (5A) which provide that s.36(3) will not apply in certain circumstances as follows:

(4) However, subsection (3) does not apply in relation to a country in respect of which:

- 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
- 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

- the country will return the non-citizen to another country; and
- 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:

- the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
- 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.

### **Claims for protection**

9. The applicant is a [age] year old man from Nepal, who arrived in Australia [in] April 2008 with a student visa which was subsequently renewed and which ceased [in] March 2010. The applicant then remained in Australia unlawfully.
10. [In] March 2013 the applicant contacted the Dept. to advise that he wished to apply for permanent residence and was given advice regarding skilled and employer-sponsored visa options. [In] August 2013 the applicant applied for a Protection Visa.
11. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision as well as country information cited in this decision.

12. The applicant's circumstances and claims were in the first instance provided to the Department in his protection visa application [in] August 2013 and at an interview [in] January 2014.

### **Protection visa application**

#### *Protection visa application , [in] August 2013*

13. The applicant speaks Nepali, Hindi and English. He stated that he left Nepal to obtain education in Australia.
14. The applicant stated that in 2009 news of him eating beef in Australia and not following his religion became known to his family and villagers. Someone from his village informed Shiv Sena about him. Shiv Sena is not Nepalese but Indian people. Some people working for a 'Save Hindu religion' program, connected with Shiv Sena in India, threatened his family that they will harm him when he goes back there and to inform them once he returns. They are likely to harm or kill him, to show other people what will happen if they do not follow their religion. They have been waiting for him for the last 4 or 5 years; they visit his house two or three times a year. They have asked his family to cut the landline phone so he does not have any connection with them. He contacts his family by mobile phone as they disconnected the landline.
15. The applicant stated that his family near the border to India; it takes [number] minutes to reach India. Shiv Sena has specifically said that if they give any information to the police or try to get help or move out of that place, if they find his family they will kill them.
16. The applicant has remained in Australia and let time pass, hoping they will forget one day and stop coming to his family, but it has been more than 4 years and things did not change and he cannot hide anywhere. His family could not send money because of Shiv Sena and his family told him that he cannot go back as Shiv Sena will harm him. So he thought he would wait for things to be safe. But Shiv Sena disconnected his family's landline phone and started checking family bank accounts just to make sure he and his family do not have any financial transactions. He feared that if he went to Immigration he would be detained and deported.
17. The applicant in his application form acknowledged that he has the right to enter India

#### *Protection visa interview, [in] January 2014*

18. The applicant repeated his claims at a subsequent interview with the delegate [in] January 2014.
19. It was put to the applicant that although some Hindus in India may find the eating of beef distasteful or offensive and it has been reported that some Hindu landlords have refused to rent accommodation to persons who eat meat, an aversion by certain individuals to certain other persons because of their personal practices does not in itself constitute persecution or serious harm.
20. The delegate put to the applicant that he could reside in India without a real fear of persecution or real risk of significant harm. The applicant conceded that Shiv Sena would be unlikely to make much of an effort to track him down in India, but claimed

that he would not be safe from harm, because he would have to see his parents eventually and would live in fear as a consequence, as he would remain at risk of harm in Nepal. The applicant made no further comment other than to indicate that living in India was not a preference for him.

*Delegate's decision, [in] January 2014*

21. In rejecting the applicant's claims, the delegate found that he could access effective protection in a third country (India) in accordance with s.36(3) of the Migration Act.

**Review application, 5 March 2014**

22. A copy of the delegate's decision record dated [in] January 2014 was provided to the Tribunal by the applicant with his review application.
23. On 13 May 2014 the applicant contacted the Tribunal by telephone to enquire about an extension of time before hearing/decision for 4 months and was advised that any request should be made in writing. He also flagged the possibility of withdrawing his application.
24. On 26 June 2014 the Tribunal wrote to the applicant (with a copy sent to his nominated email address) inviting him to attend a hearing on 6 August 2014. The applicant returned the completed *Response to Hearing Invitation* form on 1 July 2014, indicating that he would attend.
25. On 21 July 2014 the applicant again contacted the Tribunal by telephone saying that he would like to postpone his hearing by a month and a half as he needs more time to provide evidence. He was advised that he should put the request for postponement in writing, with reasons, and the Member would consider it. He asked if at the hearing he could request an extension of time after the hearing for a month and a half in order to provide further documents and was advised that he could raise this at the hearing.
26. On 5 August 2014 the Tribunal received a brief letter from the applicant requesting an extension of 30 days "as I am unable to provide sufficient supporting documents to assist my review in my favour at upcoming hearing on 6 August 2014". Although the Tribunal did not agree to a postponement of the hearing the applicant did not attend the scheduled hearing on 6 August 2014. Nonetheless the Tribunal wrote to the applicant setting a new hearing date for 13 August 2014, emphasising that this hearing would go ahead unless he satisfied the Tribunal that he had a very good reason for an adjournment and that if he did not attend the Tribunal may proceed to make a decision.
27. The applicant did not complete the *Response to Hearing Invitation* form as requested but did subsequently appear before the Tribunal on 13 August 2014 to give evidence and present arguments.

*RRT hearing, 6 August 2014*

28. The Tribunal explored with the applicant his pre-hearing requests for an extension of time to provide documents. The Tribunal noted that his problem was said to have arisen five years ago in 2009, he had applied for a Protection visa twelve months ago and had received his primary decision and applied for review six months ago. There

seemed to have been more than enough time for him to gather any relevant evidence or material.

29. In response, the applicant did not assert that there was any particular documentation he was seeking or awaiting. Rather, he said that he was hoping that with time it would become clearer what was behind the harassment of his family. This had been going on for more than 4 years and he had difficulty in understanding that a big party would pursue one individual over such a small issue. This was something new, this was not something that Shiva Sena had been doing previously. He therefore thought that maybe some persons were using Shiv Sena threats to harass his family for some unknown personal reason, for revenge for something; he did not know. There was nothing in the past of himself or his family which would provide a reason for such actions. He does not understand why this has been happening. He had wanted to get some more time to get something to clarify matters, but could not suggest what specifically might have been forthcoming. Asked what it is he believes or fears may actually happen if he now returns to Nepal, the applicant replied that he does not know. They might harm him personally. Shiv Sena had continued to harass and threaten his family. His father had been slapped once or twice in 2012.
30. The applicant stated that although eating beef is not part of Nepali culture, he had been doing so in Australia. After a year or so he had told his mother who had arranged rituals to cleanse their house. This had attracted attention and this was when Shiv Sena had come to ask why their son had been eating beef and to demand that he return. He had not taken this seriously at first as he had not heard about such actions in the past; he could not find anything on the internet, just one or two cases. He therefore believed that with time this would go away and he had remained unlawfully in Australia for a long time before seeking protection, hoping for a solution.
31. Asked how these people had been able, as claimed, to disconnect his family's landline phone and to check their bank account statements, the applicant said that they just told his parents to do so, they had to do what they were told. These people would come from time to time, maybe after 3 or 6 months, at night with their faces covered. Because his family's home was near to the border it was easy for them to come and go. They spoke both Nepali and Hindi when they came but he thought from their speech that they were actually Indian although he was not exactly sure. The Nepali Shiv Sena is a small party and the Indian Shiv Sena is bigger and more powerful so he thinks that maybe Nepali Shiv Sena is getting the Indian Shiv Sena to come and do this for them. He did not know why a group from India would concern itself with what a Nepalese student does.
32. The Tribunal asked about the applicant's previous claim to have himself received a telephone call from Shiv Sena, just days before he applied for a protection visa in August 2013. It was hard to understand why they would contact him directly after more than 4 years and how they had his telephone number. The applicant replied that they had called him on his mobile, using his mother's mobile, and had asked when he was coming back and abused him and said he would get the lesson of his life. He had said nothing to them in reply.
33. The applicant said that his family had offered them money to get rid of them, A\$40,000-A\$50,000 which was a very large sum of money in Nepal but they had rejected this.

34. The Tribunal asked the applicant why this would be a problem for him outside his own area, especially if it was some local personal issue. Why could he not live somewhere else in Nepal, such as Kathmandu, more than 100 kilometres from the border. The applicant said that he did not believe that anywhere in Nepal is safe. Kathmandu was not a solution, he might be safe there for some time or only for a short while. He did not know anyone there and could not support himself. The Tribunal observed that the applicant is an educated adult with work experience and a good command of the English language.
35. The Tribunal put to the applicant that if this situation had arisen and he took it seriously, it was hard to understand that he had waited four years to apply for a protection visa, unlawfully since 2010. On the other hand, if he had not taken it seriously, why had he not returned. The applicant responded that he had been young when he first came to this country. He had thought about going to Immigration but was afraid of being detained.
36. The Tribunal noted that in Nepal although it was an offence to kill a cow, it is not an offence to eat beef. Nor was the Tribunal aware that persons had been threatened or harmed by Shiv Sena or others for eating beef. The applicant acknowledged that he had been unable to find reports of any such incidents in Nepal and only a few in India. He acknowledged that there are people in Nepal, non-Hindus, who eat beef.
37. The Tribunal advised the applicant that the Migration Act provides [ s.36(3) ] that Australia does not have protection obligations where a person has a right to enter and reside in any other country, whether temporarily or permanently, and has not taken all possible steps to avail himself of that right.
38. The Tribunal noted that it is well documented that Nepali nationals can readily enter and reside in India without a visa or further formality. In determining whether these provisions apply, relevant considerations include whether a person is able lawfully to enter and reside in India either temporarily or permanently; whether he has taken all possible steps to avail himself of that right; and whether he would face there a real chance of persecution or a real risk of significant harm. The Tribunal would have to consider whether the applicant might avoid the harm he feared in Nepal by going to India.
39. The Tribunal had seen no evidence suggesting that, although persons in India who eat beef (as oppose to killing cows) may upset some people, they are for that physically harmed or killed. Indeed, there are many millions of non-Hindus in India who eat beef. The Tribunal referred to information about beef in India, including that no state in India actually bans the consumption of beef and that there is not even a restriction on cattle slaughter in some states, e.g. Kerala. There are approximately 3,600 slaughterhouses operating legally in India which produced 3.6 million metric tons of beef in 2012, almost 2 million metric tons of which was consumed domestically in India.
40. The applicant readily acknowledged that he was able to enter and reside in India. But he does not know anyone and does not feel he would be safe there. There is an open border so people would have easy access to him in India. The Tribunal noted that India is a large country with a huge population, including several million Nepalis. It was hard to understand that someone would want or be able to track and target him there.

### *Claims against Nepal*

41. The applicant's evidence raised some serious questions about his claims and the motivation for any harassment of his family. He now volunteered that Shiv Sena seemed unlikely to target an individual like himself but could suggest no alternative explanation, other than that for some unknown reason persons were using the cover of Shiv Sena to seek revenge or harm his family. He also made the claim that his parents had offered their harassers a very large sum of money to leave them alone and which had been rejected. It seems highly unlikely that any conceivable harassers would reject the offer (whether or not they subsequently left the family alone). The sustained interest over such a long period for this reason also seems highly problematic. Further, the Tribunal was not satisfied by the applicant's explanation for why his claims for protection were lodged so long after this situation as said to have emerged. Finally, the Tribunal is satisfied that the applicant's requests for time to provide (non-existent) documents was simply a time-wasting exercise.
42. Nonetheless, for reasons concerning the availability to the applicant of safe third country protection the Tribunal has not found it necessary to reach final conclusions as to whether Australia has protection obligations towards the applicant under the 'refugee' criterion or on other 'complementary protection' grounds based upon his claimed fear of returning to Nepal.

### **Third country protection**

43. The primary issue in this case is whether Australia does not owe protection obligations to the applicant because he has a right to enter and reside in India within the meaning of s.36(3). There is no suggestion that the applicant has a right to enter and reside in a third country other than India.
44. The matters which must be considered by the Tribunal in determining whether third country protection is available to the applicant are:
  - whether the applicant, a citizen of Nepal, has a right to enter and reside in India (s.36(3));
  - whether he is at risk of Convention-related persecution or 'significant harm' in India (s.36(4));
  - whether the Indian authorities might return him to Nepal or another country where he is at risk of Convention-related persecution or 'significant harm' (s.36(5) and s.36(5A)); and
  - if he has a right to enter and reside in India, whether he has taken all possible steps to avail himself of that right.

### *Whether the applicant has a right to enter and reside in India*

45. The Full Federal Court in considering an appeal from the Federal Magistrates Court in relation to *MIMAC v SZRHU* [2013] FCAFC 91 held that the term 'right' in s.36(3) should not be restricted to a right in the strict sense which is legally enforceable. Rather, it should include the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of enforcement; or a liberty, permission or

privilege which does not give rise to any particular correlative duty upon the state in question.

46. The starting point for consideration of whether the applicant has a right to enter and reside in India is the *Treaty of Peace and Friendship between India and Nepal 1950* (the Treaty). Articles 6 and 7 of the Treaty are the most relevant for present purposes. These two articles concern the treatment to be given to the nationals of one country in the territory of the other. Importantly, Article 7 grants to Nepalese nationals in India and Indian nationals in Nepal ‘the same privileges in the matter of residence, ownership of property, participation of trade and commerce, movement and other privileges of a similar nature’.
47. The Treaty itself does not deal with the rights of Nepalese nationals to enter India (and vice versa) but rather concerns their treatment once in India. It is therefore necessary to turn to other sources to further examine the right of entry question.
48. Information provided by the Australian Department of Foreign Affairs and Trade (DFAT) and contained on the website of India’s Bureau of Immigration is to the following relevant effect:<sup>1</sup>
  - A citizen of Nepal entering India by land or air does not require a passport or visa for entry in India.
  - A citizen of Nepal while travelling by air between Nepal and India is required to show any of the following valid identity documents to establish his/her identity as a Nepalese citizen:
    - Nepalese Passport.
    - Nepalese Citizenship Certificate.
    - Voter's Identification Card issued by the Election Commission of Nepal.
    - Limited Validity photo-identity certificate issued by Nepalese Missions in India when deemed necessary.
  - A citizen of Nepal must be in possession of a Passport when entering India from a place other than Nepal.
  - A citizen of Nepal in possession of a valid Nepalese passport flying direct from Australia could gain entry to India.
49. The applicant has a Nepalese passport valid until 2017. The applicant has acknowledged that, as a citizen of Nepal, he would be able to enter and reside in India.
50. DFAT advises that unlimited stay is granted to Nepalese nationals in India and there are no restrictions on their ability to remain, reside or work in India.<sup>2</sup> Other reports

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<sup>1</sup> Department of Foreign Affairs and Trade 2013, *DFAT report – India: Information request IND42609*, 18 September 2013; Bureau of Immigration, Ministry of Home Affairs, Government of India at <http://boi.gov.in/content/nepalese-passengers>

confirm that Nepalese citizens may reside, work, attend school and access health services in India.<sup>3</sup> A BBC report from 2008 states: “Over five million Nepalese people work and own property in India.”<sup>4</sup> A policy paper in 2011 estimated that some 10-12 million ‘Nepalis’ live in India.<sup>5</sup> This latter figure includes both migrants from Nepal living in India and Nepali speaking Indian citizens.

51. It seems that there is a shifting population between the two countries and ‘free border movement between Nepal and India has led to transnational social networks, by which people sustain contacts between families in Nepal and migrants in India’.<sup>6</sup> Various sources state that there are sizeable Nepalese communities particularly in India’s north eastern states.<sup>7</sup> Urban centres such as Delhi, Mumbai and Bangalore are also popular destinations for Nepalese migrants.<sup>8</sup>
52. Taking into account the terms of the Treaty itself, the information from Indian and Australian authorities about the administrative arrangements concerning entry to India by Nepalese nationals and the country information and other commentary on the ability of Nepalese citizens to enter and reside in India, the Tribunal is satisfied that that, as a matter of practical reality, the applicant has a right to enter and reside in India.
53. The Tribunal further notes that the applicant is a confident and reasonably-educated adult with work experience and an excellent command of the English language.

*Risk of Refugees Convention-related persecution or of ‘significant harm’ in India*

54. Subsection 36(3) of the Act will not apply if the applicant has a well-founded fear of Convention-related persecution in India or there are substantial grounds for believing that, as a necessary or foreseeable consequence of him availing himself of his right to enter and reside in India, there would be a real risk that he will suffer significant harm (s.36(4)).
55. The Tribunal does not accept that the applicant would be targeted and harmed in India, including by Shiv Sena, simply as someone who eats or has eaten beef. As noted on Wikipedia (in an extensive and comprehensively-footnoted article at [http://en.wikipedia.org/wiki/Cattle\\_slaughter\\_in\\_India](http://en.wikipedia.org/wiki/Cattle_slaughter_in_India), accessed 14 August 2014), in India no state law bans the consumption of beef and although some states completely

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<sup>2</sup> Department of Foreign Affairs and Trade 2013, *DFAT report – India: Information request IND42609*, 18 September 2013

<sup>3</sup> Immigration and Refugee Board of Canada 2008, *Nepal/India: Nepali citizens living in India; whether they are legally entitled to reside, work, attend school, and access health care services; whether there are any repercussions for “illegal” residence, or whether illegal status is tolerated or ignored by Indian authorities*, ZZZ103009.E, UNHCR Refworld, 18 December

<sup>4</sup> BBC News, 15 September [http://news.bbc.co.uk/2/hi/south\\_asia/7616316.stm](http://news.bbc.co.uk/2/hi/south_asia/7616316.stm) -

<sup>5</sup> Behead, S 2011, *Trans-border Identities (A study on the impact of Bangladeshi and Nepali migration to India)*, Indian Council for Research on International Economic Relations, May, p.9

<sup>6</sup> Thyme, S and Müller-Booker, U 2010, ‘Social networks and migration: Women’s livelihoods between Far West Nepal and Delhi’, *European Bulletin of Himalayan Research, Special double issue: Nepalese migrations*, The Nepal Research Group, Autumn 2009–Spring 2010, p. 110

<sup>7</sup> Behead, S 2011, *Trans-border Identities (A study on the impact of Bangladeshi and Nepali migration to India)*, Indian Council for Research on International Economic Relations, May, p.4; South Asia Terrorism Portal nod, *Communist Party of Nepal – Maoist* <http://www.satp.org/satporgtp/countries/nepal/terroristoutfits/index.html>

<sup>8</sup> Thyme, S and Müller-Booker, U 2010, ‘Social networks and migration: Women’s livelihoods between Far West Nepal and Delhi’, *European Bulletin of Himalayan Research, Special double issue: Nepalese migrations*, The Nepal Research Group, Autumn 2009–Spring 2010, pp. 107-121

ban cattle slaughter and others impose onerous restrictions, there is no restriction on the slaughter of cattle in some states. There are approximately 3,600 slaughter houses operating legally in India (and a great many more operating illegally). Beef is consumed widely and sold openly in areas such as Arunachal Pradesh, Kerala, Meghalaya, Mizoram, Nagaland, Sikkim, and Tripura. India produced 3.643 million metric tons of beef in 2012, of which almost 2 million tons was consumed domestically. Although occasional incidents cannot be excluded in a population of 1.2 billion, country information does not suggest that persons who eat beef in India face any real chance or real risk of being targeted or harmed for that reason, including by Hindu organisations such as Shiv Sena.

56. Nor is the Tribunal satisfied that the applicant would be pursued, identified, targeted and harmed in India by persons from Nepal, either because he has eaten beef or for personal reasons affecting himself or his family in their own locality in Nepal. As noted, India is a very large country with a population in excess of a billion. Millions of Nepalese live in India, mostly in very large cities.
57. No information before the Tribunal suggested that Nepalese in India are pursued in relation to personal feuds or other matters arising locally in their home areas in Nepal.
58. The Tribunal has carefully considered whether, having regard to the provisions of s.36(3), there is anything else in the applicant's personal circumstances which would exclude him from its operation. The Tribunal is satisfied that in all the circumstances, the provisions of s.36(3) apply.
59. In summary, the Tribunal is not satisfied that the applicant has a well-founded fear of Convention-related persecution in India or that there are substantial grounds for believing that, as a necessary or foreseeable consequence of him availing himself of his right to enter and reside in India, there would be a real risk that he will suffer significant harm. The provisions of s.36(3) are therefore not excluded on this basis.

*Whether the Indian authorities might return the applicant to Nepal or a third country*

60. The Tribunal must also consider whether the applicant has a well-founded fear that India will return him to Nepal or another country where he will be persecuted for a Convention reason or there is a real risk he will suffer significant harm.
61. Recent advice obtained from DFAT states that Nepalese nationals already in India can be forcibly removed if convicted of a crime in either Nepal or India. The advice also states that if a Nepalese national commits a crime in Nepal and travels to India, the Nepalese police can request the assistance of the local Indian Police to arrest the person. The Nepalese Police will then travel to India to escort the Nepalese national back to Nepal. There are also provisions which allow for the deportation of Nepalese nationals from India to Nepal after the completion of their sentence for a crime committed in India.<sup>9</sup> The applicant stated in his protection visa application that he has not been convicted of any crime, and there is no suggestion that he would engage in criminal activity in the future.

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<sup>9</sup> Department of Foreign Affairs and Trade 2013, *DFAT report – India: Information request IND42609*, 18 September 2013

62. The advice from DFAT identifies criminal activity as the sole reason that the authorities in India would return a Nepalese national resident there to Nepal. There is no other independent information before the Tribunal to suggest that the Indian authorities could or would return a national to Nepal for any other reason.
63. The Tribunal is not satisfied that the applicant has a well-founded fear that India will return him to Nepal, his country of nationality. Nor is there anything to suggest that the Indian authorities would send the applicant to a country other than Nepal, his country of nationality.
64. As the Tribunal is not satisfied that the applicant has a well-founded fear that the Indian authorities will return him to Nepal or any other country, it is unnecessary to assess whether he would be subject to a real chance of persecution or a real risk of significant harm in Nepal.

*Whether the applicant has taken all possible steps to avail himself of his rights in India*

65. For the reasons set out above, the Tribunal is satisfied that the applicant has a right to enter and reside in India and that he is not subject to the qualifications in s.36(4), s.36(5) or s.36(5A) of the Act. Apart from a visit as a schoolboy, he has not in fact taken any steps to avail himself of his right to enter and reside in India.

## **CONCLUSIONS**

66. The Tribunal finds that the applicant has a right to enter and reside in India and has not taken all possible steps to avail himself of that right.
67. The Tribunal also finds that applicant does not have a well-founded fear of being persecuted for a Convention reason in India and that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of availing himself of the right to enter and reside in India, there would be a real risk of him suffering significant harm in India. The Tribunal further finds that the applicant does not have a well-founded fear of being returned from India to a country where he has a well-founded fear of being persecuted for a Convention reason. Nor does the applicant have a well-founded fear of being returned by India to a country where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the availing himself of the right to enter and reside in India, there would be a real risk of him suffering significant harm.
68. Accordingly, Australia does not have protection obligations in respect of the applicant.

## **DECISION**

69. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

John Blount  
Member