

1405095 [2014] RRTA 544 (10 July 2014)

DECISION RECORD

RRT CASE NUMBER: 1405095
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: Stuart Webb
DATE: 10 July 2014
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Statement made on 10 July 2014 at 11:27am

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] April 2013 and the delegate refused to grant the visa [in] February 2014.
3. The applicant appeared before the Tribunal on 15 May 2014 to give evidence and present arguments. The applicant provided the Tribunal with a copy of the delegate's decision.

RELEVANT LAW

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.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia 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).
6. 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.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.

10. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
11. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase ‘for reasons of’ serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
12. Fourth, an applicant’s fear of persecution for a Convention reason must be a ‘well-founded’ fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a ‘well-founded fear’ of persecution under the Convention if they have genuine fear founded upon a ‘real chance’ of being persecuted for a Convention stipulated reason. A ‘real chance’ is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
13. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person 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

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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').

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

18. 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The applicant provided the following claims with her application. She is a Hindu woman from Nepal. She is separated from her husband. She came to Australia [in] June 2009 on a student visa. She stated that she lived in [City 1], Kathmandu since birth. The applicant provided no details of her husband in her 866C or 8bbB application forms. She claimed she left Nepal for religious and social reasons. She married a Muslim. Society did not accept this, it was a dangerous sin. Her family did not accept this. Cross religious marriages make people be hated. She is unable to do anything in society because of the humiliation and misbehaviour/mistreatment. Her family hates her and does not accept her. According to religious and social rules she is not allowed to live in society. Her husband has left her, he can't take her into his home either. Her character has been assassinated in her country. She has received severe mental torture. Majority of people in Nepal are Hindu. The society was against her. It is not going to change. The Muslim society hates her because she is a Hindu, and the Hindu society hates her because she married a Muslim. Her society is male dominated, when a woman's character is assassinated she can't live her life normally. She has nowhere to go.
20. The applicant provided photos of a ceremony and a letter. This stated that marriage certificates do not have any value so she married in a temple, which is more important. They married in the temple keeping god as proof besides my family consent.

21. The delegate's decision provided the applicant's migration history. The applicant arrived in Australia [in] June 2009 holding a Class TU Subclass 572 visa, valid until [date] August 2011. [In] June 2011 she applied for a Class VC Subclass 485 visa however, withdrew this application [in] September 2011. The applicant was granted a Bridging Visa A in association with her Subclass 485 application however, this visa ceased [in] October 2011. Between [date] October 2011 and [date] April 2013 the applicant resided unlawfully in Australia. [In] April 2013 she applied for a Protection (Class XA) visa and was granted an associated Bridging Visa C. The applicant has not departed Australia since her initial arrival in 2009.

22. At interview, the following further information was provided. Her husband's name is [name deleted] and she married him in a Hindu temple in Kathmandu around 2009. He is originally from India and she met him in Kathmandu around 2006. She is no longer in contact with her husband, she was last in contact in 2011. He has said she could settle with another man. She has been to India before with her husband, as he comes from [Kashmir]. His family did not accept her. She cannot relocate within Nepal, she cannot support herself financially, there are no job opportunities. She is aware that she does not need a visa to enter India, but cannot live there. She could only have lived in India if her husband had accepted her

23. The delegate did not consider the applicant's claims for protection. The delegate considered that as a citizen of Nepal, the applicant had a right to enter and reside in India, and thus the issue of s.36(3) of the *Migration Act* was relevant. The delegate stated

I have also considered whether the applicant has an existing and legally enforceable right to reside in India under the Treaty of Peace and Friendship (No. 1302) (India/Nepal 31 July 1950). Article Seven of this treaty states that:

The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other, the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature:

While the right of Nepalese nationals to reside in India is not explicitly provided for in the domestic law of India, a right to residence, in the form of liberty, permission and privilege, are expressed in the Treaty of Peace and Friendship. The advice of Dr VD Sharma (Legal Division, Ministry of External Affairs), indicates that the provisions of the Treaty are implemented as a matter of course and in the case of more general treaties, such as the Treaty of Peace and Friendship, the practice is for the conditions of the treaty to be met by India without the passage of the domestic legislation. India views the treaty as valid and insists on full compliance with it.

24. DFAT had also recently advised 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.

25. The delegate found that, consistent with *SZGXX v Minister for Immigration and Citizenship* [2008] FCA 1891, the applicant has a legally enforceable right to enter and reside in India. The delegate also considered that the applicant would not be excluded from entering India.

26. The delegate determined that:

Based on the information before me, I do not believe Sections 36(4), 36(5) and 36(5A) apply in this case. While I have made no finding as to whether the applicant has a well-founded fear of persecution or is at real risk of suffering significant harm in Nepal, there is no country information that suggests India would return a Nepalese national with a well-founded fear of persecution or with substantial grounds for believing they are at real risk of suffering significant harm, to Nepal. Additionally, the applicant does not appear to have any personal characteristics that would increase the likelihood of her being deported. Therefore, I find that section 36(3) of the Act applies to the applicant.

27. The Tribunal received a letter from the applicant. This stated that India and Nepal are not a safe place for women seeking refuge for religious or social reasons, given she had married a Muslim as a Hindu. India is a religious country, and is very conservative. There is religious violence in India between Hindus and Muslims. India is a human jungle, there is no safe place for her. She could be a victim of anything, religious violence, riots, terrorist attack, gang rape and administrative problems created by corrupt police or officials. She would not be able to survive in India. She would go through social discrimination, mental torture, insecurity and possible danger of being persecuted. Women are girls are killed every day because of religious and social reasons. She has mental depression and no confidence. She would harm herself if she returned to India or Nepal.

FINDINGS AND REASONS

Country of nationality

28. The applicant claims to be a citizen of Nepal and has consistently claimed this. She has provided documentary evidence to the Tribunal in the form of a copy of a passport issued by Nepal, with the applicant's name, date and place of birth shown. The Tribunal finds that the applicant is a citizen of Nepal, that Nepal is the applicant's country of nationality for the purposes of the Refugees Convention, and that Nepal is his receiving country for the purposes of complementary protection.

Third country protection

29. The Tribunal discussed with the applicant the Treaty of Peace and Friendship between Nepal and India, which provides Nepali and Indian citizens the legally enforceable right to reside in the territory of the other country with the same *privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature*.
30. This is evidence that to suggest that the claimant has the right to enter and reside in a third country for the purposes of s.36(3) of the Act. However, given the findings that the Tribunal has come to in relation to her protection claims in her home country, Nepal, the right to enter and reside in a safe third country is not relevant to the Tribunal's decision.

Credibility

31. The Tribunal discussed the applicant's family, employment, and education history with the applicant at the hearing. The applicant's protection visa application was vague and unclear on a number of issues, for instance with regard to her previous addresses the applicant has stated '[City 1]', 'since birth to [a certain age]', then specified

‘Kathmandu’ with no dates.¹ With respect to her education the applicant stated [named schools], Kathmandu, with no dates provided.² Regarding employment history the applicant stated ‘Employee in a [workplace]³ and ‘I worked in [a certain] job, I don’t know the date I started and I left’⁴.

32. Some further information about the applicant’s education was provided in her Form 80, she did her ‘School Leaving Certificate in [year] to [year] at [name deleted]’ and ‘Senior Secondary at [name deleted] between [year] and [year]’⁵.
33. At the hearing the applicant disclosed that she had left her [family home] when she was [age] and went to Kathmandu for further studies. She would return occasionally to [her family home] and stay one week, it was about 45 minutes by plane from [her family home] to Kathmandu. The applicant stated that she was studying [at] a people’s college. The Tribunal determined that, given the applicant was born in [stated year], this was around [year]. The applicant agreed with this. The applicant stated that around [a stated age] she started work in a [workplace] and worked there for a long time. She worked there in various positions, but left the job in 2007 as Maoists were causing problems as union members so she left. From that time until she left for Australia she lived on her savings, she had been paid well previously. The Tribunal asked the applicant about what she did between 1994 and around 2000, when she started at the [workplace]. The applicant was evasive, she said she studied for some time, but could not account for her activities over those years. The Tribunal asked the applicant about her family situation. The applicant stated her [sibling] is [employed] and lives [overseas]. The applicant stated that her father had worked [in] a hospital, assisting doctors, but was now retired.
34. At the hearing the Tribunal put information to the applicant pursuant to s424aa of the Migration that contradicted her account as stated above. This information came from her Student Visa application. The Tribunal noted that the applicant had provided a letter from [a school in] Kathmandu, stating that the applicant had worked as a [teacher] from August [date] 1993 to January [date] 1996.⁶ The applicant provided a letter from [another school] stating that the applicant had worked as a [English teacher] from April [date] 1996 to September [date] 1999.⁷ The Tribunal noted a letter from the [workplace], Kathmandu, which stated that the applicant had various responsibilities from November [date] 1999 till date, including as a guest relation executive from July [date] 2005 till date, with a date of December [date] 2008 on the letter.⁸ The Tribunal also noted documentary evidence provided by the applicant that her father ran [a shop], and a letter from the [City 1] Municipality Office dated December [date] 2008 that the income from the store provided [number] Nepali Rupees as an annual income. The Tribunal also pointed out that her parents provided an affidavit of support from parents dated [in] December 2008. This stated that they have income, that they have taken money out to support the applicant in her studies, and that they will finance the applicant’s expenses in Australia.⁹

¹ Q35 of 866C

² Q37 of 866C

³ Q38 of 866C

⁴ Q41 of 866C

⁵ Q49 of Form 80, Folio 60 of DIBP file

⁶ Folio 42 of the Student file

⁷ Folio 41 of the Student file

⁸ Folio 40 of the Student file

⁹ Folio 75 of the Student file

35. The Tribunal explained that this information significantly contradicted the evidence of the applicant as presented in her protection application and as provided to the Tribunal. It contradicted her evidence regarding her employment, including the failure to disclose her teaching experience, and the claim made in the hearing that she was forced to leave her job in the [workplace] in 2007 due to issues with Maoist employees. It was a significant discrepancy regarding her parent's employment. The Tribunal also explained it contradicted the applicant's claim that society did not accept her relationship with a Muslim man given she continued in her work until lodging her student visa application without it being an issue, and that she was not marginalised by society. It also was a contradiction of her claim that her parents and family had rejected her, given that they had provided the financial support as of December 2008.
36. The applicant chose to respond directly at the hearing. The applicant stated that she worked as a teacher for the certificates. She did not provide any dates. She stated that her father did work at a hospital at one time, that the work at the shop was a private sideline. The Tribunal noted that this was the income, along with rent on a property owned by her mother, that was disclosed by the applicant. In relation to working at the [workplace] until at least December 2008, and not leaving in 2007, the applicant stated that she could have got her dates mixed up. In relation to her family, the applicant stated that her family did not know of the relationship.
37. The Tribunal also noted that the applicant had not provided any information about being in a relationship in her student visa application. The Tribunal noted that in the student visa application there are some significant absences of information. Regarding the question about marital status, the applicant had marked never married, which was accurate. However the applicant also did not mark engaged or de facto, despite claiming to have been in a relationship since 2006. The applicant made no mention of any relationship in this student application. There is also the fact that the applicant applied for a student visa prior entering marriage. The visa application is acknowledged by a letter from the department [in] December 2008, folio 78 of the student visa application file. The applicant proceeded to have dealings with the Department in relation to the application, including providing medical information in April 2009, and financial information in April 2009. The applicant still did not mention that she was in a relationship, and did not mention that she was married. The Tribunal noted that this lack of information contradicts evidence that the applicant was in a serious relationship or was married to a Muslim man. The supposed marriage in 2009 occurred in the circumstance whereby the applicant was already making preparation to leave Nepal, including lodging the application, going through with medical checks and providing further financial details. This led the Tribunal to query the genuineness of the relationship.
38. The applicant initially stated that her passport said she was single so this is what she included in the application. The Tribunal reviewed the applicant's passport at the hearing and showed that it made no mention of marital status. Neither did the extract of the applicant's expired passport that had been provided by the applicant to the department.¹⁰ The applicant then stated that all her documents stated she was single, her family did not know of the relationship, she kept it all hidden. She said she had applied as a single person but she had discussed taking her husband to Australia as a dependent. The applicant stated her husband was studying [in] Kathmandu.

¹⁰ At 53-55 of DIBP file

39. The Tribunal is extremely concerned by the information of the applicant. It is vague, disjointed, and the applicant has provided contradictory information about her past history. It is not a question of missed dates, she completely avoided mentioning 6 years of employment as a teacher, and her evidence regarding her father's occupation completely wrong. The Tribunal considers that the applicant has completely fabricated the claim that Maoist union members forced her to leave her employment at the [workplace] in 2007, given that the applicant had previously provided a letter stating she worked at the [workplace] until December 2008. The Tribunal considers that the applicant remained working until at least that time and was never forced out of her position by any Maoist activity at the [workplace].

Relationship with a Muslim

40. The applicant's claim for protection is primarily due to her claimed relationship with a Muslim man. The applicant claimed she met him in the [workplace] where she worked around 2007 or 2008, he was studying [in] Kathmandu, he was from [India]. The Tribunal asked if she met him privately, in his or her home. The applicant said no, she would meet him in public places like restaurants and cafes. The applicant also stated that they met in public because nobody knew he was a Muslim. The applicant stated he was a strict Muslim, he would pray daily. The applicant was in the relationship for between 2 ½ to 3 years, when they decided to get married. The applicant stated that they married in a Hindu temple because it was the easiest place to get married, it provided some evidence of the commitment to each other. The applicant was unclear as to the formality of the marriage, later in the hearing she stated that according to Hindu religion they were not married. The applicant stated that other marriage ceremonies would have required her to return to her home town to get married. The applicant stated that she did not tell her family about the relationship until after she had got married. Some of her friends also knew he was a Muslim. Her family were not happy with her choice to have a relationship and 'marry' a Muslim.
41. The applicant stated that she came to Australia and she discussed with her husband the potential for him to join her. The applicant's husband asked her to find out if he could do further [studies] in Australia. However after around a year in Australia the relationship foundered, sometime around June or July 2010. The applicant stated that her husband advised her that if she could find a better guy in Australia, go ahead. His family was not supportive of the relationship and he did not want to remain in Kathmandu. The applicant considered the relationship over at that point. She has not kept up contact with her husband since then.
42. The Tribunal noted that there were a number of issues that indicated that the applicant's husband was not a strict Muslim as claimed. He went to the [workplace]; he had an ongoing public relationship with a non-Muslim, and attended a Hindu temple to marry the applicant. These were not actions of a devout Muslim. The applicant conceded that he was not devout, but that [his family] were devout and would not accept her.
43. The Tribunal questioned the applicant at length regarding her fear of being harmed by family or friends in Nepal due to the relationship. The Tribunal noted the relationship was now over and had been for some time. The applicant confirmed that she had never received any threats from her family or friends due to the relationship. The applicant stated that she feared that nobody will accept her if she returned to Nepal, this would be a form of mental torture in that her family would not want her around. The applicant

stated that she was suffering depression because of this experience, and wanted to stay in Australia where she could create a life for herself. She noted that she was now [a stated age], half her life had passed. The Tribunal asked if she was receiving treatment for depression, the applicant stated she was not.

44. The Tribunal asked who would have known that the applicant had been in a relationship with a Muslim. The applicant stated her family and her friends. The Tribunal noted that it was not well known she was in a relationship, her friends supported her at the time and it was not likely that her family would discuss her relationship broadly in the community or with other relatives. The applicant stated that most people did not know she had married, however she did not know what had been said in her absence.
45. The applicant stated that when she told her family the relationship was over, sometime in 2010, her family said it was her choice, 'whatever you want to face, you are responsible for it, you can't come and live with us. The applicant stated that this made her very upset. The applicant has not had contact with her parents since she told them she was separated from her husband.
46. The Tribunal notes that the applicant's evidence in relation to her family support has been contradictory. As detailed above, the applicant's family was supportive of the applicant in her visa application to come to Australia, including making significant financial contributions, documentary evidence of which was included up until April 2009, only a few months before she came to Australia. The applicant told her family of the relationship when she received the visa. The timing of this disclosure did not lead to any adverse outcome to the applicant while she was in Nepal and waiting to come to Australia. The applicant stated that it was later when she told of the relationship ending she was told that her family did not care any further about her, they would never accept her. It is therefore evident that the family contact remained despite her advising her family of the relationship, given that the applicant stated that it was when the relationship ended she stopped contact with her family.
47. The Tribunal noted that the applicant had resided away from her family for almost 20 years, given her experience of living and working in Kathmandu from the age of [age] to [age], and her subsequent five years in Australia. The applicant had been gainfully employed in professions of education and hospitality for a significant period of time, and had this experience available to her on return to Nepal. She had had regular and ongoing contact with her family, including visiting them, but she had created a life for herself without their involvement in her daily life. She had a relationship with a man while living in Kathmandu that she did not tell her family about, though the relationship was conducted in public in Kathmandu without any difficulty for the applicant. The applicant had been able to maintain her life in Kathmandu without the need for her family to be involved in a significant manner. Since she has been in Australia she has been out of contact with her family since telling them in mid 2010 that the relationship was over. In both instances, in Kathmandu and in Australia the applicant has shown that she has been able to live without her family being involved in her daily life. The Tribunal does not consider that the applicant will be unable to support herself in the community without her family support, as she has done so successfully for the vast majority of her adult life.

48. The Tribunal explained that it had to consider whether the applicant faced a real chance of serious harm or a real risk of significant harm arising out of her claims. The Tribunal noted that the applicant had conceded that she had never been threatened with harm because of the relationship, the harm she claimed to have suffered arose out of her own mental trauma and response to her perceived isolation from her family.
49. The applicant asked if harm could include mental torture. The Tribunal noted that it could, but in the circumstances of the applicant it was evident that the mental torture or anguish that the applicant claimed to be suffering from was self-inflicted, and not something her family had caused to occur.
50. Under s.91R(1)(b) of the Act, persecution must involve ‘serious harm’ to the person. It provides:
- For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
- ...
- (b) the persecution involves serious harm to the person ...
- ...
51. Subsection (2) sets out a non-exhaustive list of the type and level of harm that will meet the serious harm test. It lists the following as instances of ‘serious harm’:
- (a) a threat to the person’s life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person’s capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
52. These examples all involve physical harm, or economic hardship of a level which threatens the person’s capacity to subsist. However the Revised Explanatory Memorandum (EM) to the legislation which introduced s.91R¹¹ emphasised that the list is not exhaustive, and also that the serious harm test does not exclude serious mental harm, such as harm caused by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection.¹²
53. The Tribunal considers that the applicant does not face any of these examples of serious harm, nor any serious harm that could be construed as serious mental harm.

¹¹ *Migration Legislation Amendment Act (No. 6) 2001*.

¹² Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No.6) 2001 at [25]. In *NBCY v MIMIA* (2004) 83 ALD 518 Tamberlin J, at [25], held that both in principle and on authority ‘persecution’ in the sense of serious detriment or harm to a person could arise from a threat to a person’s family and those to whom the person is strongly attached by bonds of kinship, love, friendship or commitment. In *MIAC v SZQOT* [2012] FCAFC 141 (Marshall, Nicholas and Yates JJ, 12 October 2012) the majority expressed a view that the respondent’s claim of separation from his family as constituting persecution was not necessarily incapable of giving rise to protection obligations under the Convention, if there was some Convention basis for the separation such as widespread discrimination against couples on racial or religious grounds making it impossible for them to live together without fear of harassment (per Marshall J at [64], Yates J at [77]).

54. The Tribunal also noted that considerations as to whether a person will suffer significant harm included; 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. The Tribunal noted that she had not been subjected to degrading treatment or punishment by her family, friends or society in Nepal generally. The Tribunal noted that at most her family could be said to have disowned her, there was no ongoing threat and had never been a threat to harm the applicant from any person, family, friend or member of society in general because of her past relationship with a Muslim.
55. The Tribunal again notes that the applicant had created new opportunities for herself during her life, from her experience in Kathmandu to her coming to Australia which had led to her not being around her family for extended periods of time. The Tribunal considers that the mental anguish that the applicant stated that she feels was not caused by her family in any way.
56. The Tribunal considers that the applicant does not face either serious harm or significant harm on return to Nepal because of a relationship she has had with a Muslim man, and the subsequent lack of support from her family. The Tribunal considers that the applicant is sad and regretful due to the breakdown of her relationship with her family, but that the applicant does not face any risk of being harmed, physically or mentally, by her family, friends or society in general on return to Nepal.
57. The Tribunal finds that the applicant does not face a real chance of serious harm for a Convention reason. The Tribunal is not satisfied that the applicant has a well-founded fear of persecution for any Convention reason should she return to Nepal now or in the reasonably foreseeable future. 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).
58. The Tribunal finds that the applicant does not have a real risk of significant harm. 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).
59. 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

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

Stuart Webb
Member