

1317391 [2014] RRTA 251 (26 March 2014)

DECISION RECORD

RRT CASE NUMBER: 1317391
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: Ms Philippa McIntosh
DATE: 26 March 2014
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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.

INTRODUCTION

1. [The applicant] is a citizen of Nepal who has been in Australia since 2012. Her fears of returning to Nepal relate to threats because of education-related NGO work she undertook in the Terai region of Nepal.
2. Her application for a protection visa was refused by a delegate of the Minister for Immigration and Border Protection and she has applied to this Tribunal for review of that decision.
3. A summary of the relevant law is set out at Attachment A. I have taken account of the policy guidelines prepared by the Department of Immigration and Border Protection to the extent that they are relevant.

FINDINGS AND REASONS

The applicant's claims

4. The applicant, [told] told the Tribunal that since 1994 she had been living in Kathmandu in Nepal. She had divorced 31 years ago, and had gained a [qualification] in 1997.
5. After graduation she worked in a local NGO in the far west of Nepal, known as [a women's centre]. In 1999 she was employed by [Agency 1], an international NGO, as a "program officer". Her role was to inform women and girls in the eastern Terai region of Nepal about the benefits of education, and to advocate the benefits of literacy. She worked throughout the period of the Maoist insurgency in Nepal. She was threatened many times by members of the "underground Madhesi party" (which she clarified to the Tribunal was not a political party but a movement) but was passionate about her work and carried on with it.
6. She stated that she had travelled to [other countries] on an official visit in September 2009, and had visited [another country] on an official visit in April 2012.
7. Her son (her only child) is an Australian citizen and she came to Australia in November 2012 from Nepal to visit him and her daughter-in-law. The purpose was to live with them so that she did not have to return to Nepal. Before she left Nepal her son had applied to sponsor her for a Contributory Parent Visa (subclass 143), which had not yet been decided at the time of this decision.
8. In her claims to the Department she said that if she returned to Nepal she might be persecuted by the local indigenous people, the Madhesis. She also said that she would not be able to return to Nepal as there was nothing for her there. She was a single woman, had no house, had no family members and work constantly took her to dangerous areas. Although there was no current insurgency from the Maoists there were many underground parties such as the Madhesi movement, with whom she had had to deal. Her colleagues continued to tell her she should not come back and to leave the district and the programs.
9. She elaborated on these claims during an interview with the Minister's delegate [in] October 2013. She said that she had [siblings] in Nepal and that her father was living with [a sibling] in Kathmandu.

10. She had been delivering programs supporting women in the Terai region (which borders India) for the NGO. She was first threatened by Maoists and Madhesis in 2009 or 2010. Every time she went out into the field they would disturb her classes, ask for money and speak out against her and the programs she was delivering. As a result she was scared and could not go to the villages alone. She reported this situation to her employer's district administration office.
11. She continued to work in the same job for a further 2 to 3 years after the first threats. She was never harmed. However she was scared as she had received a lot of threats up to the time of her departure from the country. She was concerned that if she went back the same things would happen.
12. She said she left Nepal because, having been working for the NGO, she was tired and wanted to take a break, as well as wanting to see her son.
13. As to why she had waited over seven weeks after her Australian tourist visa was granted before departing from Nepal, she said she had wanted to complete a work project before travelling. In that period she did not go into the Terai area, working in the NGO's Kathmandu office and spending time with her father.
14. Of her fears for the future she said that people in the Terai had been asking when she would return. She had hoped to return to Nepal after three months in Australia but it remained unsafe. Therefore she left Australia and re-entered to stay for a further three months. However the situation in Nepal was the same or worse, and friends there told her that if she came back she would be in trouble.
15. She also confirmed that her son had applied for a Contributory Parent visa for her and that until that was granted she could remain in Nepal. However the situation there was not good so she had applied for a protection visa to enable her to stay in Australia until the above visa was granted. She said that going back to Nepal would be risky for her and that there was a lot of political activity there because of upcoming elections. (The Constituent Assembly elections due to be held on 19 November 2013).
16. As to why the Madhesis might want to harm her in future, she said that her work had involved encouraging the education of women and girls and opposing traditional practices such as child marriages. Some members of the community opposed her work and programmes she advocated.
17. During the Tribunal hearing the applicant provided further details.
18. She confirmed that she had been working for [Agency 1], an NGO, in the Terai region of Nepal for 15 years until 2012, and had been [an employee] specialising in the education and health of women and girls. In total she had been working for NGOs to the benefit of women and girls in Nepal for some 25 years. The applicant said she had married at [an early age], had had her only child [two years later], and had divorced long ago. After that she had dedicated herself to the community and had worked hard throughout her life.
19. For [Agency 1] she spent 15 to 20 days in the Terai every month. Her work area bordered India and because of local conditions there, being the hostility of some Madhesis, Moslems and Maoists towards the educating of women and girls, the applicant's problems with them were worse than those of her colleagues working in other areas of the Terai. She worked

closely with officers in the district and government education officials, and was the only project officer working close to the Indian border.

20. She said that when the harassment commenced in 2009 or 2010 the Maoists had declining influence and it was the Madhesis, who were “more like criminals”, who were the main source of her problems. In the area where she worked she often faced demands from them for financial “donations”, to which she never acceded. She also faced demands for her to employ her harassers’ people and relatives, disruptions to the smooth running of her NGO’s programs and her students being deterred from attending classes. At the time she decided to visit her son in Australia there was political unrest because of an upcoming election, and she was scared to stay there. She stayed in hotels when working near the border and in the latter stages, because of her concerns for her safety, a supervisor from the NGO would stay with her. She thought the situation would settle but it did not. At the time she left Nepal however she felt she just needed a break from the work and wanted to see her son who she had not seen for some years.
21. As to why the above problems commenced around 2009 and not before then, she said that law and order was poor. The country had just had elections and the Constitution was still not drafted. Some people in her area and across the border in India tried to take advantage of this situation. In addition her NGO, which was unaffiliated to any political party, channelled its funds to women’s groups. The culprits were aware of that and wanted the money. They were also jealous and did not want local people educated, because uneducated people were easier to influence. For that reason they threatened the classes by stopping the female students en route and telling them not to attend. They asked the applicant for personal donations, leaving notes saying “we’ll chase you away if you don’t give money”. Asked if they ever acted on this threat, she said that they brainwashed some of the female students, who came to classes threatening to beat the applicant up. The aim of all this harassment was to make her leave the area and to see the classes closed down. In the end some were closed down because of lack of attendance.
22. Since coming to Australia she had resigned from [Agency 1].
23. The applicant said that she had heard from colleagues in local NGOs in her area of the Terai that the people who harassed her before were still asking where she was. She speculated that perhaps they thought she was an easy target.
24. The applicant said that since her divorce she had lived in rented accommodation in Kathmandu when not working on her projects in the Terai. Occasionally she changed the accommodation because, for example, the landlord wanted to increase the rent or because the facilities were inadequate. She was never bothered in person in Kathmandu by the people who harassed her in the Terai. However she received calls on her mobile and telephone. The callers would ask when she was coming back, what programs were planned, and when would she be paying the money asked for.
25. She said that in late 2011, about a year before she left Nepal, she was told that if she went back to the border area they would kill her. Asked what they were hoping to achieve by threatening her, she said it was for money and to stop the NGO educating women and girls. She said her most recent visit to the Terai area was in mid-September 2012. Asked why she thought her harassers had never actually harmed her, she said it was because she had not gone to the Terai area during her last seven weeks in Nepal, instead working on a project at the NGO’s office in Kathmandu.

26. The applicant agreed that because she had now resigned from her employment with [Agency 1] she would not be returning to the Terai at all if she returned to Nepal. She said however that they had a good network and she still feared being killed.
27. She confirmed that she did not fear being harmed by anyone for any other reason in Nepal. However she referred to the fact that she had devoted her life to serving society and had lived alone. She had suffered mentally. If she returned to Nepal she would be sick with fear.
28. I told the applicant that it appeared her harassers had nothing to gain by threatening her in future. She had resigned from her employment and left the area as they had demanded. No one from the NGO had replaced her in the Terai. She also no longer had access to the NGO's money. In addition they had never harmed her in Kathmandu, so it appeared that if she returned there that would remain the case. In response she said she did not feel safe in Kathmandu. She said that they were angry she had not complied with their demands earlier, and she had heard from small local NGOs in the Terai that they were still searching for her there.
29. Invited to tell the Tribunal anything further she considered relevant, the applicant said that as a woman and a mother she had been through a lot and sacrificed a lot. She had tried to help deprived women in Nepal. She would love to live for the remainder of her life here without fear, with her only child.
30. The applicant's son, [name] gave brief oral evidence which related to the ongoing application for the Contributory Parent visa. I explained this was not a matter the Tribunal could consider. He said his mother had had a hard life.

Consideration of the claims

31. I am satisfied, and find, that the applicant is a national of Nepal and of no other country.
32. She gave her oral evidence in a frank and open manner. It was internally consistent. It is also consistent with evidence from other sources.
33. I accept that [Agency 1] exists and has been active in Nepal for decades¹. I accept that she was an employee of this international NGO.
34. The security situation in Nepal has reportedly improved significantly in relation to some crimes, such as killings. However other crimes remain at similar levels to the period of the civil war. In particular security in some districts of the Terai, Nepal's lowlands bordering India, remains poor.² These districts are listed by the Small Arms Survey as Banke, Dhanusa, Kailali, Morang and Sunsari.³ In the districts where security is poor, a high proportion of

¹ [Footnote deleted]

² Interdisciplinary Analysts and Safer World 2011, *A Safer Future? Tracking security improvements in an uncertain context*, September, p.ii,18, <http://www.saferworld.org.uk/downloads/pubdocs/A%20safer%20future%20revised%20reduced.pdf> Accessed 18 December 2012; Upreti B R & A 2012, *Conflict, Transition, and Challenges to Nepal's Peace Process*, Nepal Centre for Contemporary Research, January, p.16, <http://www.nccr.org.np/publication>, accessed 27 May 2013

³ Racovita, M *et al* 2013, *In Search of Lasting Security: An Assessment of Armed Violence in Nepal*, Small Arms Survey, May, pp.18, 35, <http://www.smallarmssurvey.org/fileadmin/docs/C-Special-reports/SAS-SR20-In-Search-of-Lasting-Security-NAVA.pdf>, accessed 22 May 2013

criminal activity is linked to armed gangs rather than Maoist groups.⁴ The US Department of State noted that in 2011 “[p]olice were unable to fully provide law and order” in the Terai, where ethnically-based armed groups clashed and intimidated local populations, as well as each other.⁵ In 2013 it was reported that the paramilitary Armed Police Force had improved security in the Terai in recent years, resulting in a reduction in the number of armed gangs.⁶

35. I accept that the claimed events occurred - that is that for a period of up to three years the applicant was harassed for money while working in the border area of the Terai, and that efforts were made by members of local groups, including the Madhesi, to ensure her NGO’s work educating women and children was terminated. Those efforts took the form of threatening the applicant and pressuring the students.
36. Although the demands for money may have been motivated by nothing more than opportunism, I am satisfied that the essential and significant reasons for the harassment of the applicant appear to be her membership of a particular social group such as “educators of women and children” or “NGO workers assisting women and children”, or possibly, as her work was perceived to threaten the interests of other groups in the area, a political opinion imputed to her. Whether one or all of these comprise the reasons for the harm she experienced, I am satisfied that there was a Convention reason for the harm she experienced..
37. As to the applicant’s circumstances if she returns to Nepal, I have first considered whether she has a well-founded fear of being persecuted there for one of the reasons enumerated in the Refugees Convention.
38. The applicant’s circumstances if she returns to Nepal will differ considerably from those that existed in the past and that led her to leave the country.
39. I accept that since leaving Nepal she has resigned from her employment with [Agency 1]. She does not intend to seek re-employment or similar employment if she returns to Nepal. Therefore it appears that the motivating factors for the harm she previously experienced will no longer be present.
40. She confirmed, and I also accept, that she does not wish or intend to return to the border area where she was previously harassed in her capacity as [an officer] with the NGO.
41. I am satisfied that on return she will be living in Kathmandu, where she was based for many years without harm before her departure from Nepal.
42. As to whether there is a real chance she will be persecuted for a Convention reason in Kathmandu, under the above circumstances the chance appears remote that she will.
43. A significant reason for this is that no one ever tried to harm her in Kathmandu, despite the fact that she returned there to live every month throughout the three or so years in which she was being harassed in the Terai. She does not claim to have been in hiding there and her

⁴ International Crisis Group 2010, *Nepal’s Political Rites of Passage*, Asia Report N°194, 29 September, p.21 <http://www.crisisgroup.org/~media/Files/asia/south-asia/nepal/194%20Nepals%20Political%20Rites%20of%20Passage.pdf> Accessed 2 July 2013

⁵ US Department of State 2012, *Country Reports on Human Rights Practices 2011 – Nepal*, 24 May, Section 1a

⁶ Bogati, S et al 2013, *The Missing Middle; Examining the Armed Group Phenomenon in Nepal*, Small Arms Survey, May, p.11 <http://www.smallarmssurvey.org/fileadmin/docs/G-Issue-briefs/NAVA-IB1-Missing-Middle.pdf> Accessed 27 May 2013; Racovita, 2013, p.75

reasons for moving house from time to time did not relate to a fear of being located by her harassers.

44. In addition, I accept that she has been told by workers for other local NGOs in the border area that people are still looking for her there. Despite her claim that her harassers have a good network, there is no evidence at all that they have made any enquiries as to her whereabouts in Kathmandu.
45. In addition, while I accept that she was frightened by the harassment she faced in the course of her work, the fact is that, despite her never giving in to demands for money, continuing with her NGO program and having face-to-face contact with her harassers, no attempt was made to harm her.
46. Finally, the primary motivation in harassing her was to stop her educating women and children in the border area. Her harassers have achieved this, so that it is not apparent why they would continue to want to threaten or otherwise harass her.
47. For these reasons I am not persuaded that the people who harassed and threatened her in the past, and who may do this again if she returns to the Terai, would have any reason to harass or harm the applicant in the future in Kathmandu. I find the chance remote that they will.
48. The applicant's other reason for not wanting to return to Nepal relates to her wish not to live alone in Nepal but to live with her son in Australia, a matter which, as I told her, is understandable but is not relevant to the Tribunal's considerations in relation to the Refugees Convention or Complementary Protection.
49. Therefore I find that the applicant does not have a well-founded fear of being persecuted for a Convention reason in Nepal.
50. I have also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, which I find to be the "receiving country", there is a real risk that she will suffer significant harm.
51. As stated above I am not satisfied that the people who harassed and threatened the applicant in the past, and who may do this again if she returns to the Terai, would have any reason to harass or harm the applicant in the future in Kathmandu.
52. Therefore there is not a real risk that she will suffer significant harm at their hands.
53. As to her concern about living alone in Kathmandu, while I accept she may experience some personal hardship and loneliness under these circumstances, she does not claim that this will be "significant harm" as it is defined and I am satisfied it will not.
54. For the above reasons I find there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to Nepal, there is a real risk that the applicant will suffer significant harm.

CONCLUSIONS

55. 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 she does not satisfy the criterion set out in s.36(2)(a).

56. 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 she is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
57. 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 she does not satisfy the criterion in s.36(2).

DECISION

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

ATTACHMENT A

Relevant law

59. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.

Refugee criterion

60. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

61. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a 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.

62. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
63. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
- (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.
64. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:
- A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.
65. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:
- need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
66. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be

persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

67. Fourthly, the applicant must have a ‘well-founded’ fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.

68. A fear will be ‘well-founded’ if there is a ‘real chance’ that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be ‘well-founded’ in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

69. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. The Full Court of the Federal Court has held that the ‘real risk’ test imposes the same standard as the ‘real chance’ test applicable to the assessment of ‘well-founded fear’ in the context of the Refugees Convention as referred to above (see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] per Lander and Gordon JJ with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) agreed). ‘Significant harm’ for the purposes of the complementary protection criterion is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer ‘significant harm’ if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to ‘torture’ or to ‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.

Ministerial direction

70. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department - ‘PAM3: Refugee and humanitarian - Complementary Protection Guidelines’ and ‘PAM3: Refugee and humanitarian - Refugee Law Guidelines’ - to the extent that they are relevant to the decision under consideration.