

1312590 [2014] RRTA 309 (16 April 2014)

DECISION RECORD

RRT CASE NUMBER: 1312590
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: James Silva
DATE: 16 April 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.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. The applicant is a Nepalese woman in her early [age]. She arrived in Australia [in] December 2008, as the holder of a Student (Dependant) visa.
2. The applicant applied for protection [in] January 2013. She claimed that she is a member of the conservative Limbu ethnic group who married an upper caste Brahmin man, whom she accompanied to Australia. They are now separated. The applicant claimed to have experienced domestic violence at the hands of her husband, and to fear that he and his family, Maoists and criminal gangs will target her if she returns to Nepal. Her family have rejected her because of the inter-caste marriage, and the authorities will not protect her because they are inept and corrupt.
3. The delegate found that the applicant's marriage was contrived for the purpose of securing a Student (Dependant) visa, and, in any event, the Nepalese authorities were making efforts to reduce caste-based discrimination. He was not satisfied that the applicant met the requirements for refugee protection or complementary protection.
4. The issues before the Tribunal are:
 - The applicant's credibility and her need for protection
 - The relationship with [Mr A]
 - Alleged harm arising out of the relationship
 - Associated claims
 - Refugee protection
 - Complementary protection

MATERIALS BEFORE THE TRIBUNAL

5. The Tribunal has had regard to all the material before the Department and the Tribunal: see Appendix A. The Tribunal has also considered relevant law, a summary of which is at Appendix B.

BACKGROUND

6. The applicant is a woman in her early [age] from [Town 1], Taplejung District, in north-eastern Nepal. She claims to be a member of the Limbu ethnic group.
7. The applicant lived in [Town 1] and completed Year 10 in [year]. She continued her studies, to Year 12, in [City 2], living with a married sister there. In 2006, she went to Kathmandu where she started a course at [an institute] and lived in a women's hostel. The applicant said that she discontinued the course in mid-2007, after meeting her husband.
8. The applicant claims to have started a relationship with [Mr A] in early 2007. They allegedly married in a Hindu temple in mid-2007, and obtained a marriage certificate [in] 2008¹, for the purpose of proving their marriage in their application for a Student visa. [Mr A] obtained a Student visa, and the applicant was included as his dependant spouse. The applicant claimed

¹ The delegate's decision record, attached to the review application form, includes reference to this date.

that they arrived in Australia [in] December 2008, and lived together in [City 3] for about three months. Her husband then sent her to [Town 4], to work on a farm during the week. The relationship broke down in mid-2009, when the applicant's husband disappeared from their rented home in [City 2].

9. The applicant's parents and her siblings ([details of siblings], according to her evidence to the Tribunal) remain in Nepal. The applicant said that her father died in 2013 (see below). She 'tries' to contact her mother and siblings, particularly her sisters. Asked to explain this comment, she said that they take her calls and speak to her only briefly.
10. The applicant presented to the Department a death certificate for her father, who died [in] April 2013. She told the Tribunal that her sister sent this to her after her father died. Reminded of her previous evidence that she only had occasional, telephone contact with her family, the applicant then said that she arranged for the hospital to send her a copy of the death certificate by email.
11. The applicant holds a Nepalese passport issued [in] 2008. As noted above, she obtained a Student (Dependant) visa [in] December 2008, on the basis that she is the spouse of [Mr A].
12. The applicant's protection claims are, in summary:
 - She comes from a conservative Limbu family.
 - She met her husband, a Brahmin, in Kathmandu, through a school friend. They spent time together and drew closer. Back home in the village, the applicant's father beat her because he disapproved of the relationship. Both sets of parents opposed the relationship, because the applicant and her husband were from different castes. The applicant opposes the caste system.
 - The applicant fell pregnant, but concealed this from her parents and relatives, fearing their reaction. Her husband forced her to terminate the pregnancy, as a condition of him marrying her.
 - The applicant married. On learning about this, her father beat her. Her parents said that they would never accept her as a daughter. Her in-laws also did not accept her, because she comes from the Limbu caste. They never allowed her to stay in their home, although the applicant also claims that when she was in their home, she was not allowed to touch cooked food, as an 'untouchable woman'. She claims that her husband failed to convince them to accept her, and as a result, she suffered domestic violence.
 - The applicant's husband came to Australia to study, and she accompanied him. She felt unable to cope with the social problems and mistreatment that her inter-caste marriage caused.
 - Within the marriage, the applicant's husband was controlling, verbally abused her and treated her like a chattel. He blamed her for his problems (these are not specified), and threatened to harm her if she followed him (implicitly, back to Nepal).
 - She fears that her husband, his family, the Maoists and criminal gangs could harm, mistreat or kill her if she returns to Nepal. She feels that she is expected to tolerate her husband's domestic violence. Her family and relatives, having rejected her, will offer her no protection. Similarly, the authorities and police are corrupt, and do not protect people from domestic violence.
13. The applicant is unrepresented in this matter. She gave evidence through a Nepali/English interpreter at the hearing, although it was evident that she has a reasonably good grasp of English. The applicant spoke in a quiet yet confident manner.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

The applicant's credibility and her need for protection

15. The Tribunal does not consider it appropriate to take an overly stringent approach to questions of credibility but neither does it consider it appropriate to accept all claims uncritically.² The *Handbook on Procedures and Criteria for Determining Refugee Status*, suggests that it is “frequently necessary to give the applicant the benefit of the doubt... [but only after]... all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts”.³
16. The Tribunal has also taken into account the Tribunal's *Gender Guidelines*⁴ and other relevant *Guidances*⁵, in the conduct of the hearing and its assessment of the applicant's claims and evidence. These arise in particular because the applicant claims to be a member of a conservative caste, and to have been subject to a forced marriage and domestic violence, as well as the various expectations on her as a woman in Nepali society.
17. Overall, the Tribunal found the applicant to be a witness of low credibility. Much of her evidence was vague and evasive, and the Tribunal did not sense that she was genuinely engaged in trying to corroborate her claims or reconcile gaps and anomalies in her evidence.
18. Adding to the Tribunal's doubts is the significant delay between the applicant's arrival in Australia ([December] 2008) and her application for protection ([January] 2013), more than four years. In the Tribunal's view, this appears inconsistent with her claim that she and her husband left Nepal because they faced hostility from both their families, and from society at large, and that the applicant has intensified fears because her husband proved to be abusive and abandoned her. As Heerey J noted in *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347, it is legitimate to take into account an applicant's delay in lodging an application for a protection visa in assessing the genuineness, or at least the depth, of the applicant's claimed fear of persecution.
19. The applicant told the Tribunal that she was depressed when her husband left her, and she could not find anyone to give her the right advice. Eventually (in 2011), after she came to [City 5], a friend suggested that she apply for protection. The Tribunal noted that the applicant had made many other arrangements in Australia – travel, accommodation and work in [three states] – and wondered whether she had told anyone about her fears in relation to Nepal and her visa status. The applicant said that she had gone from [one state] to [another] as part of a group of workers, and then moved to [City 5] because she needed to do

² *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Beaumont J at 451; *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559 at 596; *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-70; *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9; see also *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241

³ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, Geneva, paragraphs 203 and 204.

⁴ Published 1 March 2012

⁵ In particular, the *Guidance on vulnerable persons* (1 June 2012) and the *Guidance on the assessment of credibility* (1 March 2012).

something to survive. She was unforthcoming, and the Tribunal did not press her on her exact movements and activities. She said that she had told some people about her problems, but not all, as she was afraid that people might take advantage of her situation (as an unaccompanied, divorced woman).

20. In the Tribunal's view, the applicant's claimed reasons for the delay were vague and unpersuasive. It is concerned that she lodged a protection visa application, not because she had a genuine fear of persecution or significant harm, but rather as a means of securing permanent residency in Australia.
21. Despite these concerns about the applicant's credibility generally, and the significant delay in seeking protection, the Tribunal now proceeds to assess her protection claims.

The relationship with [Mr A]

22. The Tribunal has significant concerns about the genuineness of the applicant's claimed relationship with [Mr A]. The Tribunal's consideration of the relationship follows.
23. *In Nepal*: The applicant recounted at the hearing that she met [Mr A] in early 2007. They became close, and started a relationship. Both families learned about the relationship, and were strongly opposed to it. The applicant fell pregnant about this time, and [Mr A] insisted on her having an abortion, as his family would not accept the couple having a child conceived before marriage. The Tribunal asked why, if both families were implacably opposed to the relationship (and any ensuing marriage), the applicant's husband cited his family's concerns as the reason why the applicant should terminate the pregnancy. The applicant explained that an unplanned pregnancy would simply be a complicating factor, and he indicated that this was his wish. In any event, the applicant claimed that she had an abortion. The couple married in a Hindu temple, in mid-2007. There were no witnesses, and the applicant had no documents, photographs or other supporting evidence of this occasion. The marriage was not registered at the time, and therefore had no legal effect.
24. The applicant said that the couple registered the marriage [in] 2008⁶ for the purpose of obtaining documentation to support their Australian Student visa application. [Mr A] made the arrangements, and some of his friends were present to vouch for the relationship.
25. She said that the couple felt under immense pressure from their families, and it was she who suggested that they go overseas together to live as husband and wife. The applicant said that her father had beaten her. Her in-laws abused her and would not let her prepare or touch their food when she was living there. However, she was notably vague about the couple's preparations for their travel abroad. For instance, when the Tribunal asked about the timing of [Mr A]'s IELTS English language test - a necessary and sometimes stressful part of the application process - she replied vaguely that his family pressured him and he did not share much information with her, as is often the case in Nepali culture. It is difficult to reconcile this with the applicant's claim that she and her husband were living together, independently of their parents, and that she had initiated the idea of going abroad to escape family pressure.
26. The applicant thought, somewhat uncertainly, that [Mr A]'s family might have paid for his fare to Australia and his study costs. Asked why she thought that they would fund his costs,

⁶ [2008], as noted in the delegate's decision record, which refers to documentation provided to support the applicant's Student visa application.

when this could have given him the chance to continue the relationship in defiance of their wishes, the applicant replied that she was not sure what arrangements were made, or what their thinking was. The applicant said that one of her sisters funded her travel. Again, the Tribunal is concerned that the applicant appears to have not enquired or even turned her mind to questions that are central to her protection claims – that is, the practical arrangements that a young couple who are planning to go abroad together in defiance of their parents’ wishes.

27. *In Australia:* The applicant said that, on arrival in [City 3] in late December 2008, the couple lived in [suburb] for three months. She named the street address. Around March 2009, [Mr A] ‘sent [her] to the farm’, namely for the purpose of grape-picking in [Town 4]. The applicant said that she went there regularly, returning on weekends to visit her husband and stay with him. This arrangement went on for another two or three months. The applicant said that she recalled catching a train from [City 3] Central Station, for a four hour trip, followed by a bus trip. She could not recall the departure times, the fares or other details, due to the passage of time. She said that she paid the fares herself. The Tribunal explored with her whether she had any other supporting evidence for such regular trips – such as receipts, used tickets or oral evidence from any work supervisor or colleagues. The applicant replied that she did not. The Tribunal is satisfied that the applicant made the trip from [City 3] at least once, but her vague recollections do not seem consistent with those of a person who made the trip every week or so, for a period of months.
28. The applicant said that she kept most of her belongings at home in [City 3]. The couple moved to another house after several months. The applicant recalled that it was a 3-bedroom house that they shared with other Nepalese, and that there was a side entrance, but she did not appear confident in describing any other features. She said that she already had an inkling that [Mr A] was planning for them to separate when he sent her to [Town 4], but this was confirmed later when she could no longer reach him at their home. She returned to [City 3], and waited outside the house until one of the flatmates let her in to collect her remaining items. She has not heard from [Mr A] since then, but believes through friends that he is in Nepal.
29. The Tribunal explored with the applicant whether she had any corroborative evidence to demonstrate that she and [Mr A] had lived together as man and wife in Nepal and Australia, for almost two years. It asked whether, for instance, there were any photographs, letters, emails, references in social media, or any other incidental material. The applicant replied in the negative each time, although she recalled that a mutual friend of hers and [Mr A]’s might have mentioned the relationship at some point. She did not provide further details, or suggest that the Tribunal make contact with this person.
30. In the Tribunal’s view, the evidence to support the relationship is minimal. The Tribunal has taken into account the applicant’s written and oral statements, mindful that there may be situations where social disapproval or relationship problems can leave one party with little tangible evidence. Nonetheless, it formed the view that the applicant was not genuinely engaged in trying to think of relevant evidence, suggesting that there is indeed none. Further observations add to the Tribunal’s doubts. Although the applicant mentioned that she had friends who had helped her find work and move around Australia, there are no witnesses to the relationship. Also, the applicant’s passing references to her travel costs – that her sister paid her fare to Australia, and that she (the applicant) paid for her trip(s) to [Town 4] – all suggest that she arranged these without any contribution from [Mr A]. Indeed, there is minimal evidence to suggest that the applicant and [Mr A] ever shared any expenses or

engaged in activities together. Even the applicant's references to their (claimed) shared accommodation in [City 3] were extremely vague.

31. The applicant presented a marriage certificate issued [in] 2008 in her application for a Student visa, and referred to this at the Tribunal hearing as evidence of their relationship. According to her evidence, the Nepalese authorities issued the certificate at [Mr A]'s request, based on information that he gave to the officials and which some of his friends (who had not been at the Hindu wedding) verified. [Mr A] paid a fee, and the officials issued the certificate without any further documentation or checks. Relevantly, the applicant confirmed that the certificate was issued for the purpose of helping her inclusion in [Mr A]'s Student visa application. The Tribunal places very little weight on this document as evidence that the applicant and [Mr A] were married or in a genuine relationship.
32. Against the backdrop of the Tribunal's already serious concerns about the applicant's credibility and her need for protection, these further doubts, taken as a whole, lead the Tribunal to reject the applicant's claim that she was in a relationship with [Mr A]. The Tribunal finds that the applicant was in a contrived relationship, the purpose of which was to enable her to travel to Australia on a Student (Dependant) visa.

Alleged harm arising out of the relationship

33. Having found that the applicant was not in a relationship (or marriage) with [Mr A], the Tribunal rejects all associated claims.
34. The Tribunal does not accept that the applicant suffered psychological or other pressure because she found herself in an inter-caste relationship that met with social disapproval; that her father beat her when he found out about the relationship, or later about their Hindu wedding or their marriage (neither of which occurred); that the applicant's and/or [Mr A]'s parents put them under pressure; that the applicant fell pregnant but was forced to have an abortion for fear of antagonising her and/or [Mr A]'s already-angry parents; that the applicant's and/or [Mr A]'s families rejected them after the marriage; that [Mr A]'s family allowed the applicant into their home but treated her in a discriminatory and demeaning way, involving domestic violence; or that the applicant left Nepal for any associated reasons.
35. The Tribunal also does not accept that the applicant was subject to domestic violence in Australia, including any verbal or physical abuse from [Mr A], or threats that he will harm her if she 'followed him' (presumably, back to Nepal). It also does not accept that the applicant's family has minimised contact with her, for instance, by keeping their telephone conversations short and giving her only scant information about her ailing mother.
36. The Tribunal finds, in addition to the concerns outlined above, several indicators that reinforce the above adverse findings. Although the applicant claimed that she 'tried' to contact her family, yet they reject her, it was apparent that she still has contact with at least a sister – who helped fund her travel to Australia and who helped obtain her father's death certificate. Although she emphasised that she comes from a conservative Limbu family, the applicant gave little insight as to why they allowed her to walk out of a (claimed) arranged marriage, or how she managed to study [a course] in Kathmandu.

Associated claims

37. The applicant is unrepresented in this matter. In addition to her main protection claim, which the Tribunal has dismissed above, she mentioned a number of associated matters which the Tribunal addresses below, for the sake of completeness:
- a) Her claimed opposition to the caste system;
 - b) Her status as a woman from ‘a conservative Limbu family’;
 - c) Her claimed first, forced marriage;
 - d) A woman in a male-dominated society; and
 - e) Having ‘nowhere to go’.
38. The applicant mentioned these only as an adjunct to her main claim, in passing. Given its adverse view of the applicant’s credibility, the Tribunal is not prepared to accept at face value that any of these claims give rise to a genuine need for protection.
39. The applicant wrote in her statement of claims that she does not believe in the caste system. The Tribunal accepts that the applicant resents the caste system, particularly taking into account that the indigenous Limbu people of eastern Nepal have played a secondary role to the Brahmins and Chhetris, the highest castes in Nepal, who have dominated power in Nepal. The International Crisis Group identified the applicant’s home area of Taplejung as one in which there are communal tensions between the Limbu on the one hand, and the Brahmins and Chhetris on the other.⁷ However, the fact that the applicant’s father worked as a local government official before retiring, and the family’s circumstances as a whole, suggest that they do not suffer great disadvantages due to their caste or ethnicity. Furthermore, country information in the delegate’s decision record indicates that strict caste rules and arranged marriages are on the decline in Nepal, and that the Nepalese authorities are taking measures to discourage caste-based discrimination. Most relevantly, the applicant only raised concerns about the caste system in connection with the now-rejected relationship with and marriage to [Mr A], and the practical consequences this allegedly caused. The Tribunal is not satisfied that the applicant has a political opinion opposed to the caste system that has in the past, or that will in the reasonably foreseeable future, motivate her to speak out against or act in defiance of the caste system.
40. The Tribunal accepts that the applicant is a Limbu, taking into account her place of origin and in the absence of any contrary evidence. However, the applicant has not expressly claimed, and there is nothing in her circumstances (including her tertiary education and her independent lifestyle in Kathmandu), or her father’s previous employment as a government official, to indicate that she has experienced or is at risk of experiencing serious harm as a result of any discriminatory attitudes.
41. The applicant claims to be from a conservative Limbu family, and, by implication, therefore to be subject to strict social demands and scrutiny. At the very end of the hearing, she claimed that she could face difficulties if she returns to Nepal after five years abroad, because it is a very conservative society (and also because she is now twice-divorced). The Tribunal notes that the applicant has not lived in her home village since 2003, and it views with great scepticism that she will return there. Furthermore, the Tribunal finds very little evidence to

⁷ International Crisis Group 2011, *Nepal: Identity Politics and Federalism*, Crisis Group Asia Report N°199, 13 January, p.15

support the applicant's assertion that her family are extremely conservative – for instance, her father was a government official, she studied in [City 2], and later did [course] in Kathmandu, and had at least the support of a sister in looking to pursue an independent future in Australia. While the Tribunal accepts that the applicant's family may be relatively conservative, particularly if measured against her experiences in Australia, it is not satisfied on the available evidence that her remaining relatives (her ailing mother or her siblings) are in a position to impose social or other constraints upon her, such as forced marriage.

42. The applicant told the delegate and, in somewhat more detail, the Tribunal, that she was forcibly married off when she was about [age] years old, hence in around 1998. There was no mention of this in her original statement, and no documentation or supporting evidence of either the 'marriage' or the 'divorce'. The applicant claimed that her first husband was abusive. After a year or so with him, she moved back to her parents' home, and the couple divorced in around 2000. At the Department interview, the applicant said that this experience left her depressed. She told the Tribunal that she felt unlucky to have been in two abusive relationships, and to face the prospect of returning to Nepal as a twice-divorced woman. The applicant did not claim, and there is nothing to suggest, that she faces any direct risk of persecutory harm or significant harm as a result of any such first marriage.
43. The Tribunal does not accept that there was any such first, 'forced marriage', given its adverse view of the applicant's credibility, the omission of this claim in the original statement and the lack of any supporting documentation of either the 'marriage' or the 'divorce'.
44. The Tribunal has considered the possibility that the applicant was, nonetheless, in a traditional, arranged marriage; that she may have co-habited with this man for a short period (or perhaps not at all); and that she returned to her family when it did not work out. The applicant claimed this left her depressed, but there is no medical or other evidence to support this claim. The applicant walked away from the relationship, and continued living with her family in their village. There appears to have been no appreciable impact on the applicant's education (she claimed the relationship lasted [for two years]), her social standing or her ability to study in [City 2] and later Kathmandu. The Tribunal does not accept that there was any 'forced marriage' that caused the applicant to suffer serious harm or significant harm, or that gives her a profile as a 'divorced woman' or similar.
45. Looking to the future, the Tribunal further finds that the passage of some 14 years since the separation; the applicant's own education, travel experiences and independent nature; and the death of her (allegedly) conservative father all indicate that there is negligible chance of having any adverse consequences from any earlier relationship that she entered.
46. In her original statement, the applicant wrote that she wants to defend her freedom as a woman, and that there is no value on her life in a male-dominated society. These statements arose in the context of her now-rejected claims that her family, [Mr A]'s family, criminals and society at large (including the Maoists) will target her because of her defiant, but ultimately failed, relationship with [Mr A]. The Tribunal accepts that discrimination against women exists in Nepalese society, but is not satisfied that the applicant has in the past experienced persecution or significant harm, or that she has been outspoken in favour of her own rights, or women's rights in general. The Tribunal rejects the applicant's claim that there is 'no value on her life' as a woman. It also does not accept that she has in the past, or that she faces a real chance in the future, of experiencing discrimination or mistreatment amounting to persecution or significant harm, for any related reason.

47. The applicant referred several times in the hearing that she will have ‘nowhere to go’ if she returns to Nepal. The Tribunal does not accept that her family has rejected her, for reasons of the (now-rejected) relationship, her stay in Australia or for any other reason. It is unclear whether she will return to her home village, where she has not lived since 2003, or whether she will explore further study or employment options in [City 2], Kathmandu or elsewhere in Nepal, as she has with the past. The Tribunal finds that the applicant’s sister (and other relatives) provided some assistance in the past, for instance, helping to arrange accommodation and travel costs, and it is satisfied that they will continue to do so until the applicant finds her own way. The Tribunal does not accept that the applicant has ‘nowhere to go’ in Nepal. The applicant has shown resourcefulness in finding work and accommodation, and making travel arrangements in Australia. The Tribunal is not satisfied that the process of settling back into life in Nepal involves serious harm amounting to persecution, or significant harm. It is also not satisfied that the applicant, as a Limbu woman who may have co-habited (had an informal marriage with a local man) many years ago, faces a real chance of discrimination in accommodation, employment or other aspects of life that would result in serious harm amounting to persecution.

Refugee protection

48. The Tribunal has considered the applicant’s claims individually and cumulatively. It finds that she left Nepal for reasons unrelated to those set out in her protection claims. It does not accept that she was in an inter-caste marriage that met with hostility from her and her husband’s family, or society at large; that it proved to be an abusive marriage (in Australia); or that she has either a genuine or well-founded fear of persecution from her husband, her or his family’s, criminals, Maoists or society at large.
49. The Tribunal has considered the ancillary claims that the applicant presented, mainly made in passing.
50. The Tribunal accepts that the applicant is a woman from a lower-caste Limbu family, which may have been conservative, and that she may have been forced into a short-lived local ‘marriage’ when she was young. The Tribunal does not accept that these circumstances, or any combination of them, give rise to a real chance of serious harm amounting to persecution, now or in the reasonably foreseeable future, if the applicant returns to Nepal.

Complementary protection

51. The applicant did not present any additional claims or evidence that could form the basis for eligibility for complementary protection.
52. The Tribunal has found above that the applicant was not in a genuine relationship or marriage with [Mr A], and it has rejected all associated claims of past and future harm. It accepts that she is a woman from the Limbu ethnic group and caste, and that she may have been in a traditional arranged ‘marriage’ when she was [age] years old. However, having regard to her personal and family circumstances, the Tribunal does not accept that the applicant suffered any significant harm as defined by s.36(2A) and s.5(1) of the *Act*, or that there is the prospect of her suffering such harm if she goes back to Nepal.
53. The Tribunal is therefore not satisfied that the available information provides a basis for finding there are substantial grounds to believe that, as a necessary and foreseeable

consequence of the applicant's being removed from Australia to Nepal, there is a real risk that she will suffer significant harm in terms of s.36(2)(aa) of the Act.

CONCLUSIONS

54. 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).
55. 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).
56. 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

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

James Silva
Member

APPENDIX A: RELEVANT MATERIAL

The Tribunal has had regard to relevant material from the following:

- The completed protection visa application form and accompanying papers. Attached to the form is a partial photocopy of the applicant's Nepalese passport. The applicant later submitted a detailed statement of her protection claims.
- The Department file includes case notes relating to the Student (and Student (Dependant)) visa grants. These indicate, among other things, that the student's (the applicant's husband's) mother and brother offered financial support for the visa grant.
- The Department file also contains a copy of a death certificate for [name], aged 63, who died in [Town 1 in] April 2013. The applicant claimed that this was her father's death certificate.
- The Tribunal has listened to the recording of the Department interview, held [in] June 2013.
- The delegate's decision record of [August] 2013 includes some country information about inter-caste marriages in Nepal.
- The review application contains no new claims or information, but has attached to it a copy of the delegate's decision.
- The applicant attended a Tribunal hearing on 15 April 2014, conducted with the assistance of an interpreter in the Nepalese/English languages.

APPENDIX B: RELEVANT LAW

The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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

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).

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

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').

'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.

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

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.