

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZJSS & ANOR v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1495

MIGRATION – RRT decision – Nepali teacher claiming history of persecution by Maoists – Tribunal found safe relocation possible in Kathmandu – failure to address all elements in claimed history of persecution before assessing risks – jurisdictional error found – matter remitted.

Migration Act 1958 (Cth), ss.474(1), 476

Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 630

Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323

NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1

SZATV v Minister for Immigration & Citizenship [2007] HCA 40

SZCME v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 932

SZEIV v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1798

SZENJ v Minister for Immigration & Citizenship [2007] FCA 734

SZFDV v Minister for Immigration & Citizenship [2007] HCA 41

SZHUG v Minister for Immigration & Anor [2007] FMCA 1010

Syan v Refugee Review Tribunal & Minister for Immigration & Ethnic Affairs (1995) 61 FCR 284

First Applicant: SZJSS

Second Applicant: SZLFG

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: REFUGEE REVIEW TRIBUNAL

File Number: SYG3453 of 2006

Judgment of: Smith FM

Hearing date: 15 August 2007

Delivered at: Sydney

Delivered on: 15 August 2007

REPRESENTATION

Counsel for the Applicant: Mr J Young

Solicitors for the Applicant: Simon Diab & Associates

Counsel for the First Respondent: Ms T Wong

Solicitors for the Respondents: DLA Phillips Fox

ORDERS

- (1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 19 October 2006 in matter 060643540.
- (2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 3 July 2006.
- (3) The first respondent pay the applicants' costs in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG3453 of 2006

SZJSS

First Applicant

SZLFG

Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application filed on 22 November 2006, which has been set down for a final hearing under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Refugee Review Tribunal dated 10 October 2006 and handed down on 19 October 2006. The Tribunal affirmed a decision of a delegate made on 3 July 2006, refusing to grant a protection visa to the applicant.
2. Under s.476 the Court has “*the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution*”, but its powers are confined by s.474(1) so that I do not have power to remit the matter to the Tribunal unless I am satisfied

that the Tribunal's decision was affected by jurisdictional error. I do not have power myself to decide whether the applicant's claimed history should be accepted, nor whether he qualifies for a protection visa or any other permission to stay in Australia.

3. The visa application and the review application to the Tribunal were made by two persons, who are a husband and wife. However, the wife was omitted as an applicant to the Court. It appeared to me that the wife should properly have been joined as an applicant, and I made an order to that effect at the hearing. However, as did the Tribunal I shall refer to the applicant husband as "the applicant", since his were the principal claims upon which their fear of returning to Nepal were based.
4. The applicants arrived in Australia on visitors' visas in February 2006, and applied for protection visas on 5 April 2006 assisted by a person who was not a migration agent. The application form was completed very tersely. In answer to the question: "*why did you leave that country?*", the applicant said: "*I left my country to visit my sister & her family. As I was planning to run away somewhere out from my country from the fear of both Maoists and Royal Nepalese Army and police*". He also indicated that he had occupied the position of a teacher at a secondary school in a village in a district of Nepal. He presented corroboration of this to the Department and to the Tribunal by way of letters from the headmaster, which showed that he had been given leave, and later had been dismissed from his employment because of his failure to return after arriving in Australia.
5. In a typed "personal statement" signed by the applicant, he referred to his career as a teacher, in which he had taken up his position as a permanent teacher at the higher secondary school from 1990, and was working there until he left his home town. He said he needed to supplement his income by starting a small business with his wife, being a retail shop selling agricultural seeds and medicines. He then referred to the political situation in Nepal, and referred to the establishment of a multi-party democratic system in 1990. He said:

I was also actively involved in that pro-democratic committee from the teacher's union and participated in many activities according to the decision and program designed by that

committee. The contribution and roles of teachers were highly appreciated in history to restore democracy during that movement.

6. He referred to the rise of the Maoist Party, pursuing violent insurgency against the democratic government of Nepal and its perceived supporters. He said:

*Although this revolutionary group started their activities from the very remote district of Nepal like **Rukum and Rolpa**, their activities started to affect the normal life of allover within the first couple of years, my home town ([district]) could not be the exception. **They started to say that they were doing the war and it will be ended when their bullet will win the democratic system.** It was really terrible scenario in the country when we see the rebels passing by in their own army dress with lots of weapons. They were making their target to the government assets, army and police in their early days but it gradually changed and they started to give unnecessary troubles to public. Moreover, schools became their easy target where they could show their activities, training and wanted to involve people in their group using nice words in first stage and other physical fear after that. Apart from that, they started to collect donation which became mandatory around the middle of 2002, to the teacher and finally they put rule saying all teachers had to pay money equivalent of one days wages each month and gradually they increased and made a week worth of wages per month. So these days teachers from [the applicant's] district as well as other remote districts are paying one fourth amount of their wages and half amount from the bonus payment that teachers would get during **Dusherra festival** (one of the great festival of Nepal) to the Maoist revolutionary group which I did till the end of my days in Nepal. On the other hand it was really high mental pressure because most of their programs were held in school even though they launched their **first Maoist [the applicant's] district government** from our school in 2000.*

*As they knew I was a teacher who has faith in democratic system and values and also an **active member of human rights group (Amnesty International Nepal Group [number])**, they gave me lots of mental torture involving in their programs saying that they were giving **“revolutionary education teaching style”** as a training package to the teachers. They took me many times in their program forcefully. Some of those programs were in the forest of my own district and some time around the other remote villages where they kept me some time over night and other times*

for up to 5 to 7 days. I had to listen them and participate in their programs otherwise they would threaten me to harm physically and on the other side my absence in the school was noted by army and police and they started looking me on the suspicious ground as if I was involved in terrorist activities (or supporting Maoist). There was more mental pressure to my kids and wife as they did not know where and why Maoist took me and when they were going to release me if they did. Because there were so many cases like this where they forcefully took teachers and killed them if they didn't agree what the rebels wanted. According to the report from INSEC, more than 141 teachers have been killed since 1999. Among which 84 from Maoists and 57 from government army. Similarly the condition of 156 teachers is still unknown after they were kidnapped by Maoists. This indicates the schools became a working field and targeted place for both Royal army and Maoist army which has been elaborated in the report of Asian – Centre for Human Rights, 2005.

I was paying mandatory donation from my job as I have mentioned above. But they also asked me to register our retail shop which my wife was running under their registration scheme. As this shop was registered according to his majesty's government of Nepal, we had to visit the government offices to pay tax. But Maoists interpreted that I might have been working for the royal government or army being their messenger. And when army were patrolling the village used to ask me if I paid any donation to Maoist or not. In the same night Maoist came to my house and asked why army came and what did they ask me? Is there any way I was helping them or not, the situation was so panicking which is hard to describe in words here. Finally I started to pay double tax of my retail shop one for the Maoist government and next for the royal government. It was the beginning. Later, I had to pay fix sum of donations to Maoists apart from the regular tax. They used to decide that amount by their imaginations without founding from any basis of calculation that I was earning from the shop. This amount ranged from 10 thousand Nepali rupees to 100 thousand Nepali rupees before I left Nepal. As there was less presence of royal army and police in the village the Maoist activities increased day by day. They started to use my house as their shelter and my wife has so much of bad experience with them like they used abuse verbally and ask her to cook food for troops of as many as twenty or more people. As I have mentioned above, she was running a retail shop in addition to her regular duties for being mother of three. Life was really hard and terrible when there was no certainty until when we needed to keep on paying to Maoists. Even more complicated was the thought if

royal army found any receipts or information that we were paying to Maoists which was very hard to keep in top secret.

There was no organization working who could give protection of life because it looks like it will be infinite problem and everybody was in fear. These sorts of things made myself and my wife feel immediate danger for our lives which made us to decide to leave the village in the hope of saving our lives. We admitted our three daughters in one of the private schools as boarder students, left the shop unattended and came to Kathmandu but Kathmandu was not our final point (destination). As staying in Kathmandu can be more dangerous for us from the Maoist as well as the government side, then the question raised where after Kathmandu? Well India was an easy answer for everyone but again we know from the past events, Maoists are now running all the activities from India. Therefore, our lives would not be protected in India either. Once we left the village there was no chance of going back again because it will be big issue for Maoist as well as royal army. We were frequently in touch with my sister and sister in law in Sydney, Australia. Until this time, there was no plan to come to Sydney in this short time because of the immigration and visa process. But it could be our luck or the almighty might have listened to our prayers, my sister was blessed by twins and we applied for the visa in that scenario to support sister and brother in law to look after the twins and help them. Some how, we got visa and came to Australia in Feb [date], 2006.

(emphasis in original)

7. This history of personal harassment by Maoists was given credibility by country information which was notorious, and which was also before the Tribunal. It contained a number of significant elements, including:
 - i) the applicant was a high school teacher who had been employed for many years, and had become a known proponent of pro-democracy political movements;
 - ii) he was personally targeted by the Maoists for re-education, involving his forcible abduction on several occasions, and a requirement that he should appear to adopt Maoist policies;
 - iii) he was required to make mandatory donations from his salary to the Maoists over a protracted period;

- iv) he was also known to the Maoists as the owner of a shop, and was required in that capacity to pay a “double tax” arbitrarily fixed by the Maoists;
 - v) the Maoists had started to occupy his house and to demand the services of his wife as a cook; and
 - vi) as a result of all the above forcible involvement in Maoist activities, he and his wife feared repercussions from the Nepalese authorities on suspicion of being Maoist supporters.
8. The applicant’s claims contained a clear statement of fear of persecution in both the applicant’s home town and Kathmandu. Although this was not further explained, he was clearly suggesting that the Maoists had influence of varying degrees throughout Nepal, and the country information which was before the Tribunal contained some support for that view.
9. When refusing the application, the delegate made a finding that the applicant could relocate in India, and find effective protection there. These were not conclusions which the present Tribunal addressed or adopted, and their legal and factual foundations do not need to be addressed by me. The delegate also referred to the applicant’s claim that Kathmandu could be “*more dangerous for us from the Maoists as well as the government side*”. He said that this was unexplained, and said that he was not satisfied that the applicant had “demonstrated” a well-founded fear of persecution in Nepal for any Convention reason.
10. On appeal, the applicant was assisted by his present solicitors. However, they do not appear to have been very active in presenting his case, and no representative attended with the applicant when he attended a hearing of the Tribunal on 18 September 2006.
11. The applicant presented to the Tribunal a number of documents, including one from his headmaster, and some general information suggesting continuing activities by the Maoists in Nepal, notwithstanding recent efforts by other parties to arrive at a peaceful co-existence with the Maoists and to include them in government. This material included opinions from respectable sources that the Maoists

may have been involving themselves in peace negotiations and government with an intention to subvert it at a later time.

12. In its statement of reasons, the Tribunal did not set out any summary of the evidence given at the hearing. It said merely:

On 18 September 2006, the applicant provided evidence and submissions at a hearing before the Tribunal. The applicant wife did not attend that hearing. To the extent that I found that evidence and submissions material, I have included same in my below Findings and Reasons.

13. Under the heading “*Findings and Reasons*”, the Tribunal accepted that the applicants were nationals of Nepal, and then provided discussion under two headings: “*Relocation - whether it is safe?*” and “*Relocation - whether it is reasonable?*”. Nowhere did the Tribunal address the claimed past history of the applicant in Nepal which had led to his departure from his hometown and from his country, so as to consider which of its elements should be accepted as true, and the extent to which they affected the future risk to the applicant of persecution for a Convention reason. As I shall indicate, I consider that the Tribunal thought that its addressing of the issue of relocation within Nepal did not require it to make findings on these matters.

14. Among numerous grounds of review set out in an amended application filed at the hearing, the applicant’s counsel now relies upon the ground:

E. The Second Respondent made jurisdictional error in relation to its finding that the Applicant could safely relocate to Kathmandu by making such finding without considering the nature and extent of the Applicant’s claims cumulatively and in total as to why he feared persecution in Nepal.

15. As I shall explain, I consider that this ground has been made out, and requires the setting aside of the Tribunal’s decision.

16. At the start of its discussion on whether relocation in Kathmandu would be “safe”, the Tribunal noted how it had conducted the hearing. It said:

The Tribunal has set out the applicant’s material written evidence in its above Claims and Evidence. However, rather than question

the applicant about his written claims, the Tribunal simply asked the applicant to tell it in his own words, why he feared returning to Nepal. The Tribunal then questioned the applicant about those oral claims in the course of the Tribunal hearing.

17. In answer to the Tribunal's general question, the applicant narrated an immediate incident which had caused his departure from his town. This was when he was abducted by the Maoists some five months before his departure, and was mistreated and forcibly retrained. The Tribunal referred to country information confirming that such incidents were occurring in relation to teachers during 2005. It appears to have accepted that it happened to the applicant.
18. The applicant told the Tribunal that two days after he was released he spoke to his cousin, who was a Nepalese army soldier, about his detention. He then, twelve or fifteen days after his release, travelled to Kathmandu where he resided at various friends and relations before leaving Nepal with his wife for Australia. He told the Tribunal "*that his personal safety could not be guaranteed in his home village; and neither had the Nepalese army acted on the information the applicant had provided*". The Tribunal said: "*when asked again, the applicant confirmed this was the reason he feared he would be persecuted by Maoists should he return to Nepal*".
19. The Tribunal referred to no other evidence about his past history being given by the applicant, nor to any questions being asked of him by the Tribunal about earlier events. It said:

This was the principal (if not sole reason), the applicant put at the Tribunal hearing to fear returning to Nepal. The Tribunal understands it need not make an applicant's case for them but his claims at hearing did not reflect those claims he had made in writing. For instance, the applicant's claims in writing included that he was taken 'many times in their program forcefully'; and that the Maoists 'started to use [the applicant's] house as their shelter and [his] wife has so much of bad experience with them'. That said, given the applicant's reference to only one alleged period of detention by the Maoists, whatever dealings he may have had with them on other occasions, based on his lack of any detailed evidence about them, and given the Tribunal's ultimate finding he can safely relocate, the Tribunal intends to only accept those claims it clarified with him (and he pursued) at the Tribunal hearing.

20. The reasoning process revealed in this paragraph is not well expressed but, in my opinion, an understanding of it is critical to understanding whether the Tribunal performed its statutory role of reviewing the refugee claims which had been brought to it on appeal from the delegate's decision. In particular, the Tribunal's last sentence needs to be "unbundled" to understand why the Tribunal said that it "*intends to only accept those claims it clarified with him (and he pursued) at the Tribunal hearing*".
21. It is clear that the Tribunal sought to explain why it did not feel it necessary to make any findings about many significant elements in the applicant's claimed history, which were contained in his written statement. In fact, at no point in its "*Findings and Reasons*" did it address most of the particular elements in the original statement which I have itemised above. What is less clear is why the Tribunal thought that its jurisdictional obligation to review the delegate's decision in relation to the applicant's refugee claims did not require it to assess the truth and significance of all of these elements. *Prima facie*, it was obliged to consider them, and a failure to do so would reveal jurisdictional error.
22. The starting point for considering the approach taken by the Tribunal is an established obligation to address a refugee claimant's past history which is claimed to have revealed persecution for a Convention reason. This task ordinarily precedes, and is essential to, an assessment of the future risk of persecution if the claimant returns to his home country. As was said by the High Court in a joint judgment of six justices in *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575:

Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events. In the present case, for example, the Tribunal correctly relied on

what it found had happened to Mr Guo and others to make a finding that he was not “differentially at risk for a Convention reason.” Without making findings about the policies of the Chinese authorities and the past relationship of Mr Guo with those authorities, the Tribunal would have had no rational basis from which it could assess whether there was a real chance that he might be persecuted for a Convention reason if he were returned to the PRC.

23. Based upon that obligation on a refugee decision-maker, there is a principle which was recently summarised in *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1, that a Tribunal is required in the exercise of its jurisdiction to “deal with claims expressly articulated by the applicant”, and with unarticulated claims which “clearly arise from the materials before it” (See *NABE* at [60]). Whether a Tribunal has performed the required assessment of these claims requires an exercise of construction by a court, both of the material which was before a Tribunal to identify the claims which were required to be addressed, and also of the Tribunal’s reasoning to see whether it has addressed those claims and all elements in them.
24. Counsel for the Minister submitted that the present Tribunal’s explanatory paragraph, which I have quoted above at [19], indicates that it understood that the applicant had withdrawn, or abandoned, or had not pressed, those elements in his history of Maoist harassment which he did not repeat to the Tribunal, when invited in general terms to explain why he feared returning to Nepal.
25. However, I do not accept this submission. I would not understand from the Tribunal’s description of the hearing that the applicant did abandon any parts of his claimed history, nor that the Tribunal thought that he had withdrawn them as a true account of his relevant and complete history of harassment by Maoists. In my opinion, all that the applicant is shown to have done at the hearing, is to identify his immediate reasons for fleeing from Nepal. Manifestly, in my opinion, this would not have encompassed all of the reasons arising from his past history for his claiming a well-founded fear of returning.
26. A conclusion that parts of an original claim have been abandoned might easily be reached where an applicant makes inconsistent

statements at a Tribunal hearing, so as to expressly or implicitly retreat from claims earlier made. But this was not the situation in the present case. Rather, on the Tribunal's description of the hearing, the Tribunal thought it sufficient to ask one broadly expressed question, and then to treat the applicant's response as providing the only element of history which it needed to address. The Tribunal did not state, nor imply, that it concluded that the applicant had withdrawn all other elements in his claimed history of persecution.

27. In my opinion, the fact that the applicant responded to its opening question by referring only to the immediate events leading to his departure from Nepal did not allow it to treat the other elements in the history as not being made, and as not requiring consideration. As I said in a recent case, *SZHUG v Minister for Immigration & Anor* [2007] FMCA 1010 at [29]:

29. *The procedures followed by the Tribunal at a hearing have been described as "inquisitorial", and in a situation where the Tribunal is obliged itself to ask questions to explore the claims which had been brought on a review before it, that is an appropriate description. However, this procedure has the consequence that many, if not most, applicants who are not assisted at a hearing by a professional representative may not perceive a need to repeat or embellish claims which they are aware have already been presented to the Department, and which they believe are before the Tribunal. An applicant's passive responsiveness to questioning by the Tribunal which did not explore all the claims made to the Department cannot, without more, be taken by a Tribunal as amounting to an abandonment of the claims which were not addressed. I do not accept that, on the evidence before me, there was any basis for the Tribunal to have concluded or assumed that the applicant had withdrawn or abandoned his claim that he suffered police harassment which was significantly attributable to racial prejudice as well as his anti-government political opinions.*

28. In the present case, it is understandable that the applicant might have thought that he was being asked to recount the most immediate incident leading to his departure from his home town and Nepal. I cannot read the Tribunal's description of the hearing as allowing it to ignore other relevant parts of the applicant's history which might also explain the particular risks which might face him at the hands of Maoists if he

returned to Nepal. I am not persuaded that it was open to the present Tribunal to conclude that the applicant did not rely upon the whole of the history presented with his visa application. I would not arrive at the same conclusions as did Bennett J in *SZEIV v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1798 at [27]-[34].

29. An alternative, and inconsistent, submission of counsel for the Minister was that the critical paragraph reveals the Tribunal actually addressing all the other elements of the applicant's claimed history, and concluding that they were not true, because of the failure of the applicant to refer to them at the hearing, and because of "*his lack of any detailed evidence about them*".
30. However, I would not read the Tribunal as arriving at that conclusion. The applicant's claimed long history of harassment by Maoists in his home town before his departure had *prima facie* cogency and consistency with the country information. Although aspects of it were "not detailed" in the original statement, they were claims with intrinsic credibility in the context of the general situation in Nepal, and required express attention by a Tribunal. They did not receive that attention in the Tribunal's reasoning, and in my opinion an inference should be drawn in this case that the Tribunal thought that it did not need to give those elements any express attention, rather than that it implicitly addressed them globally and found them untrue (cf. *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69], and [75], and *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630 at [47]).
31. I am therefore led to accept the third interpretation of the Tribunal's critical paragraph which was submitted by counsel for the Minister. This is that the Tribunal thought that "*given the Tribunal's ultimate finding he can safely relocate*", the Tribunal thought that it was not required as a matter of law to address the elements in the applicant's claimed history which he had not expressly referred to, or been questioned about, at the Tribunal's hearing.
32. In the context of the other points which I have made above, such a construction of the critical paragraph provides the proper

understanding of the reason for the Tribunal referring to its relocation finding, when it stated why it “*intends to only accept those claims it clarified with him*”. This reading is also confirmed by the structure of the Tribunal’s reasoning under two headings, which addressed only two perceived issues as to relocation in Kathmandu.

33. On this interpretation of the reasoning followed by the Tribunal, the issue in the case becomes whether, as a matter of law, it was open to the Tribunal not to make findings on important elements in the history which had been presented, before performing an assessment of the risk that the applicant would face from Maoists in all parts of Nepal including Kathmandu.
34. Counsel for the Minister cited two cases where, in the context of a period of persecution of Sikhs in the Punjab, the Federal Court upheld decisions by the Tribunal which “assumed” the truth of a history of local persecution, while finding that no obligations under the Refugees Convention arose due to a reasonable ability on the claimant’s part to relocate within India (see *Syan v Refugee Review Tribunal & Minister for Immigration & Ethnic Affairs* (1995) 61 FCR 284 at 287-288 and *SZENJ v Minister for Immigration & Citizenship* [2007] FCA 734 at [28]-[29]).
35. I accept, with respect, that in the circumstances set out in those judgments, it may be sufficient for a Tribunal to make an assumption as to the truth of a history of persecution which was localised in an applicant’s country of nationality, without making positive findings as to the truth of that history. However, neither of the cited judgments suggests that as a matter of general principle this is permissible in all cases involving an issue of internal relocation.
36. In many circumstances it is not possible for a Tribunal properly to address a refugee claim by turning straight to a question of whether an applicant could live safely in another part of his country, without having first assessed the truth of the history of persecution which he claimed to have suffered in his usual places of residence, the likelihood of its recurrence, and the risks arising from any recurrence (cf. *SZCME v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 932 at [17]-[19], *SZATV v Minister for Immigration & Citizenship* [2007] HCA 40 at [26] and *SZFDV v Minister for*

Immigration & Citizenship [2007] HCA 41 at [15]). An assessment of an applicant's history of persecution is therefore usually essential before consideration of issues of relocation to avoid a well-founded fear of persecution.

37. In the present case, I do not accept that it was open, as a matter of law, to the Tribunal to withhold its judgment on significant parts of the applicant's claimed history of persecution by Maoists, by turning straight to an issue of safe relocation in Kathmandu. The risks facing the applicant in Kathmandu in the future could only be properly assessed by making clear findings as to his past relationship with the Maoists. This was an inherent part of the refugee claims which were before the Tribunal.
38. Moreover, the applicant expressly claimed that his personal background was relevant to whether he faced a heightened risk in Kathmandu, in response to questions by the Tribunal which put to him that he could live in Kathmandu as safely as his brothers who were living there. According to the Tribunal, he responded by pointing to personal factors in his past history. He pointed out that "*his brothers were not teachers*" and had not "*followed Maoist directions*", that he had left his home village without advising anyone, and that "*he believed he may be suspected of betraying the Maoists*". This evidence clearly pointed to personal factors in the applicant's history which were claimed to affect the risk of his residing in Kathmandu. The Tribunal could not assess this claim by ignoring an assessment of his claimed past relationships and interactions with the Maoists. However, as I have indicated, nowhere did the Tribunal make findings addressing that history, as a foundation for its assessment of the risk facing the applicant in Kathmandu.
39. In her fourth alternative submission, counsel for the Minister sought to find such findings by implication. She submitted that the Tribunal in fact accepted or made assumptions as to the truth of the whole of the applicant's history, notwithstanding its earlier statement that it "*intends to only accept*" limited parts of it. She submitted that this could be identified in a passage in the Tribunal's reasons, where it referred to a cease fire commencing in April 2006:

Secondly, the Tribunal refers to the cease fire commencing in April 2006. The country information considered has suggested the cease fire is still fragile. However it was extended after its first three months; the abuses feared by the applicant (including extortion and consequent harm), appear to be principally continuing in some villages and not the capital; and both the government and the guerrillas have recently formally sought the assistance of the United Nations in Nepal's peace process. Thus the Tribunal is not satisfied that local Maoists in remote rural areas (similar to the one where the applicant claimed to have resided), would be able or willing to trace persons (to Kathmandu) merely for leaving without advising them; or for not paying extortion demands, as was claimed by the applicant. The Tribunal is thus satisfied that neither the applicant nor his family, would have a well founded fear of persecution in Kathmandu by the Maoists, should they relocate there on return.

(citations of country information omitted)

40. However, I cannot find in this paragraph a clear assumption made by the Tribunal as to the truth of the whole history presented by the applicant, and an adoption of that history as the foundation of its assessment of the applicant's personal risk at the hands of Maoists. In its terms, the paragraph does not purport to do that. At most, in this part of its discussion the Tribunal made limited assumptions as to whether "*local Maoists ... would be able or willing to trace persons to Kathmandu*" for the limited reasons that it refers to. But the applicant's claimed relationship with Maoists was more extensive and particular than the Tribunal was assuming in making the finding recorded in this paragraph. The applicant's claims raised an issue whether he was at risk not only from the local Maoists in his former town, but also at risk from other members of the Maoist party throughout Nepal by reason of his past history and relationships and dealings with that party. They also raised an issue whether he would be at risk anywhere in Nepal at the hands of government authorities as a result of his past associations with Maoists.
41. I am not satisfied that, contrary to its disclaimer, the Tribunal in fact found or assumed the truth of the whole of the applicant's claimed history when assessing his risk of persecution in Kathmandu in the future.

42. For the above reasons, I am satisfied that a ground of review argued before me has been made out. It is therefore not necessary for me to address other grounds which are found in the amended application and counsel's written and oral submissions.
43. No ground for refusing relief has been suggested on behalf of the Minister, and I consider that the applicant has made out an entitlement to writs of mandamus and certiorari.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 13 September 2007