

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76285**

**AT AUCKLAND**

**Before:** M L Robins (Member)

**Counsel for the Appellant:** E D Patchett

**Appearing for Department of Labour:** No Appearance

**Date of Hearing:** 11, 12 November 2008

**Date of Decision:** 26 June 2009

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**DECISION**

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[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellant, a citizen of the Federal Democratic Republic of Nepal.

[2] Essentially, the appellant's claim is that he is at risk of serious harm in Nepal at the hands of former Maoist militants. He has had frequent clashes with Maoists over the years, and now that they are in government he believes they have not only the intention but the means to harm him.

**THE APPELLANT'S CASE**

[3] This is a summary of the appellant's case as presented to the Authority. It is followed by the Authority's assessment of his credibility.

[4] The appellant is a 35 year old man from Kathmandu. His parents, brother, wife and daughter still live in Kathmandu.

[5] The appellant is of the Niwari caste. The Niwari are an ancient, indigenous people who are typically very wealthy. They are, invariably, supporters of the Nepalese monarchy. The appellant's family owns six houses in Kathmandu city and the appellant, personally, owns rural land outside Kathmandu.

[6] In the early 1990s, when the appellant was a student, he joined the Rastriya Prajatantra Party (National Democrat Party of Nepal, usually known as the RPP). The RPP is closely linked to Nepal's royal family.

[7] From late 1993 until mid-1995 the appellant studied full-time for a Bachelor of Commerce degree. He then began working in a computer sales and service company, continuing his studies on a part-time basis. In 1996 Maoist militants, primarily members of the Young Communists League ("YCL"), began an insurgency. Ultimately, the appellant had to abandon his studies and his job – indeed he had to leave Nepal – because of an incident in November 1997, involving the YCL.

[8] In 1997, the appellant's family was living upstairs in one of the family's houses. In September 1997, the appellant rented out the ground level flat of this house to four students. The students stopped paying rent and were disturbing other tenants who lived in the house. In November 1997, the appellant asked them to pay the outstanding rent. The tenants refused and made threats of violence against him.

[9] The appellant called the police who raided the students' flat the following day. The police discovered bomb-making equipment, and documents which indicated that they were YCL members. All four students were taken into custody. Later there were rumours that they had "disappeared". Around the same time, the Commander-in-Chief of the YCL in that area, DD, was arrested. There were rumours that he was killed in police custody.

[10] Two days after the students were arrested, the appellant began to receive telephone threats from YCL members. They blamed the appellant for the disappearance of their comrades and the death of DD. The appellant asked the police to protect him but they said they could not protect him.

[11] The appellant and his family believed that his life was in danger so they arranged his escape from Nepal. In November 1997, he stopped attending his university classes and resigned from his job. The family moved out of the house

and into another of their properties where they still live today. In January 1998, the appellant went to London and began studying information technology. In February 1998 and August 1998 he was awarded various certificates (which were produced to the Authority). The YCL continued to telephone the appellant's family, saying they intended to kill the appellant.

[12] In early 1999, the appellant returned to Kathmandu to marry his wife. Everyone was concerned that he might be targeted by the YCL if he returned to Kathmandu but they considered they could protect him if his stay was short. A discreet marriage ceremony was held with only immediate family members present. He stayed in Nepal for one month before returning to London. His wife moved into the appellant's family home where she still lives today.

[13] The appellant continued studying in London from 2000 to 2002 but he did not pass any more exams because he was anxious about the safety of his family, and was very homesick. His family continued to support him financially.

[14] In late 2002, the appellant's family told him that he need not worry about them anymore. The appellant, buoyed by this news and believing that Germany's computer courses were much better than those available in the United Kingdom, enrolled in a German language course in Dusseldorf. He intended to take the two year German language course first, followed by a three or four year information technology course but, after six months of studying the German language, the appellant, having received more good news about the improving security situation in Nepal, decided to return to Kathmandu.

[15] Back in Kathmandu from late 2003, the appellant deliberately kept a low profile so as to avoid being spotted by the YCL. Until early 2005 he rarely left the house except to attend the occasional RPP meeting. At this time, King Gyanendra had suspended parliament and Nepal was governed by a cabinet holding office by Royal appointment. In February 2005, the King assumed direct rule of the country (notwithstanding that at least half the rural areas were under *de facto* Maoist control). The King's assumption of direct rule, according to Ms Patchett, lulled pro-monarchists such as the appellant, into a false sense of security.

[16] In early 2005, the appellant attended an RPP meeting at which he told the RPP leadership he wanted to increase his RPP involvement. There were two reasons for his risky decision. First, he believed in the RPP and second, he had decided to go into business. It was widely known that members of the RPP found

it easier to secure government contracts without having to resort to bribery. The appellant began to attend RPP meetings, organise public gatherings to promote the RPP and to visit public places with RPP party members.

[17] The appellant and three acquaintances became directors in a company that imported, sold and serviced computers and computer parts. The company – called ABC Company Ltd – commenced business in Kathmandu city. It employed up to 25 employees. While the sales and service team often worked away from the office, the appellant and another of the four directors, AA, spent most of their time in the office. The appellant did not tell his business partners that he was an RPP member and he was unaware whether any of them were associated with the RPP.

[18] In late 2005, the YCL returned to the house they had briefly occupied in 1997. They forced the tenants out and took over the house, which they set up as their YCL headquarters. There were often 200 to 300 YCL people at the house. The appellant went to the house on several occasions to reason with them. He wanted them to either move out or to pay rent if they were going to stay. Unfortunately, every time he went there, the YCL members were not there.

[19] Over the next few years, the appellant's business became more profitable because it was winning government contracts, partly through the appellant's RPP connections. The appellant continued his RPP activities.

[20] In 2006 the Maoists declared a ceasefire and in January 2008, after months of widespread demand, a national election for a constituent assembly was announced for April 2008.

[21] In the months leading up to the election (essentially January to April 2008), the appellant engaged in significant political activity. He became a close-proximity body guard to Colonel Thapa, the leader of one of two RPP factions called RPP-Nepal (or, now, RPP-N). He was one of several body guards who surrounded Mr Thapa during public meetings and street demonstrations. The appellant also organised RPP meetings and he would, for example, go from door to door telling people about RPP policies and encouraging them to attend the next RPP rally. He mobilised a group of 15 to 20 RPP youths and went with them on RPP rallies.

[22] In February 2008, the appellant decided to challenge the YCL who had been occupying his family's property since late 2005. He arrived at the house,

accompanied by his brother BB and BB's wife, CC, intending to persuade the YCL to pay rent. A YCL meeting was taking place. The appellant told the assembled group "If you want to occupy these premises you must pay rent". The YCL members became very angry. They reminded the appellant that he had taken the house from them in 1997. They accused him of being responsible for the disappearance of the four students and the death of DD and said he must pay for that. They said they had no intention of either leaving or paying rent. In the confrontation that followed, they pushed CC. She fell down and broke her leg. The appellant and BB carried her to a taxi and took her to hospital where she stayed for 10 days. A hospital discharge summary indicates that CC was admitted on X February 2008.

[23] Shortly after this incident, the appellant began to receive telephone threats from the YCL, for example "We have decided to kill you". The appellant believed the threats were genuine and that the YCL had the power to carry them out.

[24] The appellant continued to attend and organise RPP rallies and meetings, including a very big meeting on or about 1 April 2008 (about ten days before the election which was held on 10 April 2008). It was at this meeting that he noticed AA in the crowd and wondered if he was an RPP member. He had never previously seen AA at an RPP meeting.

[25] In late March or early April 2008 (approximately four to six weeks after CC was injured), the appellant was still receiving threats from the YCL. He was frightened and, at the next RPP meeting, he told the party leadership about the threats. He noticed that AA was also at this meeting. This confirmed for him that AA was a member of the RPP, a suspicion he had first formed when he saw him at the earlier RPP gathering. At the meeting, AA told the RPP leadership of his own problems with the YCL although the appellant was not (and is not) aware of what those problems are.

[26] The RPP believed that the appellant and AA were in a very dangerous situation and that they should leave Nepal at once to save their lives. The RPP set about obtaining visa application forms for various countries such as the United States of America, Australia and New Zealand. The appellant signed whatever visa documents were put in front of him by the RPP without reading or understanding them. It was not until he arrived at Kathmandu International Airport and was given his travel documents that the appellant realised he was destined for New Zealand.

[27] The telephone threats continued right up until the time the appellant left Nepal with AA, in the first week of April 2008. They arrived in New Zealand on 8 April 2008, two days before the election in Nepal. The result of the election (not known until after the appellant arrived in New Zealand) was that the Maoists won a higher number of seats than any other political party and the Maoist leader, Prachanda (“the Fierce One”) was appointed Nepal’s first Maoist Prime Minister.

[28] Since his arrival in New Zealand, the appellant has often spoken to his family on the telephone. They have told him they have been receiving an increasing number of telephone threats from the YCL who demand to know the appellant’s whereabouts. At the time of the hearing before the Authority, the family were receiving such threats almost every day. In addition, YCL members often stand in front of the family home and “wander about here and there”. On approximately six occasions, they asked for the appellant. The appellant said his family members cannot live in peace because the YCL threatened they would take over another of the family’s homes. The appellant believes the reason for all these threats is revenge for the 1997 arrests and also to make sure the appellant does not return to Nepal. He thinks it is likely the YCL know he is outside Nepal but they don’t know exactly where he is.

[29] With Nepal now lawfully under Maoist control, the appellant believes he is at risk of reprisal from these former Maoist militants who have a score to settle.

## **Documents**

[30] The following documents were tendered:

- (a) A handwritten letter from the appellant’s wife to the appellant dated 21 July 2008, stating that the family was receiving telephone threats every day from the Maoists. The threats were to the effect that if the caller met the appellant he would kill him. The wife advised the appellant to remain in New Zealand “for a few years”.
- (b) A handwritten notice issued by the Kathmandu Headquarters of the Communist Party of Nepal (Maoist) dated X April 2008. It announces the decision of the Party’s meeting on X April 2008 to warn the appellant that if he fails to stop following the old government and fails to stop spying, the Party “will be forced to take physical action”. The notice is stated to be

written by the Secretary of the Party, although the name of the signatory is only a *nom-de-guerre*.

- (c) An undated 'Membership Receipt' issued by RPP-Nepal. It is signed by Colonel Thapa and also by the appellant under the words "I accept the membership of RPP-Nepal and I fully agree with the Constitution of the Party". This document had been prepared when the appellant was studying in the United Kingdom. Because he was overseas, it had remained in a drawer at RPP Headquarters until it was given to the appellant in 2005.
- (d) A Wall Certificate issued on 10 April 2008 by the Assistant General Secretary/President of RPP-Nepal, Central Office, Kathmandu, in appreciation of the appellant's support of the party.
- (e) Six certificates issued to the appellant in February 2000 and August 2000 by The City and Guilds of London Institute.
- (f) Two certificates issued to the appellant by Tribhuvan University (Kathmandu) relating to his study before he went to the United Kingdom.
- (g) A hospital discharge summary for CC showing an admission date of X February 2008 and a discharge date of X March 2008.
- (h) A photograph of CC standing with her leg in plaster and on crutches.
- (i) Three photographs of the appellant on RPP marches in Nepal; three of the appellant sightseeing in London, and one photograph of him with his wife.
- (j) The appellant's passport issued in Berlin.
- (k) The appellant's passport issued in Kathmandu.

### **Counsel's submissions**

[31] Ms Patchett provided brief written submissions before the hearing. She addressed the Authority orally at the end of the hearing and then filed comprehensive and helpful written submissions 14 days after the hearing. All of these submissions, and the country information attached, have been considered.

## **THE ISSUES**

[32] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[33] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

## **ASSESSMENT OF THE APPELLANT'S CASE**

### **Credibility**

[34] Before considering those issues, it is necessary to address the question of credibility. For reasons which follow, the Authority found the appellant to be an unreliable witness.

[35] The appellant claimed he was so frightened by the YCL's threats in late 1997 that he was forced to escape from Nepal to the United Kingdom. He claimed that in the first three years after his escape, his family received numerous threats that the YCL would kill him. He was so anxious about his family's safety that he could not study. Yet, despite his alleged fear, the appellant returned to Nepal in early 1999 to marry his wife. His explanation, that his family thought he would be safe, is not accepted.

[36] The appellant claimed that after his return to Kathmandu in late 2003, he was so frightened of the YCL that he hid in his home for the next 18 months. He said he knew during this time that the YCL were trying to gather information about him. If this evidence were true, then his evidence that he ventured out of hiding only to attend RPP meetings is not believable because this was the very activity



that was likely to bring him to the attention of the YCL. His professed fear is also inconsistent with his evidence that, when he emerged from hiding in 2005, he immediately promised and delivered the RPP increased and public support.

[37] The appellant's principal reason for actively supporting the RPP in 2005 was so he could use his RPP credentials to secure lucrative government contracts for his fledgling business. Partly as a result of his RPP support, the company did indeed do well. In these circumstances, it is not believable that the appellant would keep his RPP involvement secret from his directors and, in particular, from AA with whom he worked day by day and who, as it turned out, was also an RPP member.

[38] The appellant and AA were each members of the RPP in Kathmandu. They contemporaneously sought and were given assistance by the RPP, and they travelled to New Zealand together. Notwithstanding these close connections, the appellant asserts he was not aware of AA's RPP involvement until a few weeks before they left Nepal and he is still not aware of AA's political activity.

[39] Like the appellant, AA also applied for refugee status in New Zealand. His appeal was declined by a different panel of the Authority (*Refugee Appeal No 76281* (9 April 2009)). Like this appellant, AA claimed to know nothing of his friend's political activity. This panel of the Authority agrees, in relation to the appellant, with the Authority's finding in AA's appeal that this pretence was just a "device to forestall questions which might compromise each other's refugee claims".

[40] The appellant claimed that the Membership Receipt, issued by "RPP-Nepal", was prepared when he was in the United Kingdom; that is, before late 2003. But the "RPP-Nepal" party did not come into existence until July 2006. Back in 2003, the RPP was called, simply, the "RPP" and any Membership Receipt issued at that time would have reflected that. It was not until early 2006, that a faction, led by Colonel Thapa, split off from the RPP. For several months, the original RPP was called "RPP (Rana)" and the splinter faction was called "RPP (Thapa)". In July 2006, the Nepalese Election Committee ruled that the faction led by Pashupati Shamsher Jung Bahadur Rana could claim the original party name "RPP". It was only after this ruling that Thapa established "RPP-Nepal".

[41] The Authority put this inconsistency to the appellant. He initially insisted that the Election Committee ruled that Thapa's faction was the official RPP party.

Then he claimed that the Membership Receipt was not given to him until 2006 and that he had only assumed it was lying around for years in a drawer. He suggested that maybe Thapa's group knew he was interested in the Thapa RPP faction and reissued the Membership Receipt in their new name "RPP-Nepal" – based on an old RPP receipt found lying in a drawer in the RPP office. These explanations are not accepted. The Authority finds that the Membership Receipt is not a genuine document.

[42] At the Authority, the appellant asserted that the YCL commenced its occupation of the appellant's house in late 2005. This was inconsistent with his repeated claim throughout his RSB application that the occupation was commenced in late 2006. When the inconsistency was put to him, the appellant said that whatever he was telling the Authority was correct. If "late 2005" is correct, this means that the YCL "peacefully" occupied the house for more than two years before the appellant arrived on X February 2008 to insist that rent be paid. It is clear that the date of the confrontation is X February because that is the date that CC was admitted to hospital.

[43] The Authority asked the appellant why he waited for more than two years to challenge the YCL on the rent issue, and why he chose to do so during the politically tense lead-up to the election on 10 April. His explanation was that he had visited the house many times previously but did not find a YCL member there. Given his evidence that the YCL used the house as their headquarters and that there were often 200 to 300 people there, this explanation is not accepted.

[44] The appellant asserted that the first time he heard about New Zealand as a possible destination for him was when the RPP leadership presented him with a number of visa application documents for countries including New Zealand. The appellant's evidence was that he did not tell the RPP about the YCL threats against him until four to six weeks after the threats began. The threats began after [the date of the confrontation], so the RPP meeting at which the appellant claims he first heard the suggestion of a New Zealand visa cannot have taken place until late March at the earliest.

[45] This evidence is inconsistent with certain documents on the appellant's file. The first relevant document is an email dated X February 2008 from a New Zealand wine producer to the New Zealand Immigration Service. The wine producer explains that two Nepalese men (the appellant and AA) from ABC Company Ltd had approached the New Zealand wine producer with a view to

discussing the importation of wine from New Zealand to Nepal. The men had sought the wine producer's assistance to obtain visas for them to "visit NZ to establish the relationship". The second relevant document is a report written for Immigration New Zealand by an official of the New Zealand government. This official claimed to have visited ABC Company Ltd in Nepal on X February and to have met both the appellant and AA at the company's premises.

[46] These two documents contradict the appellant's claim that the first time he heard of New Zealand as a destination for him was when the RPP suggested New Zealand in late March 2008. They also contradict the appellant's assertion that the RPP was responsible for preparing the visa application documents, when those documents were clearly based on the company's alleged intention to import wine. The documents further contradict the appellant's claim that he escaped from Nepal because of threats received in the weeks after the day his sister-in-law was admitted to hospital. Both the email and the official's visit to the company pre-date the sister-in-law's admission to hospital on X February 2008.

[47] The Authority put this evidence to the appellant. His initial response was to deny any knowledge of how or why the New Zealand wine producer's letter was written, or why the official visited his company in Nepal. He said he left all such arrangements to the RPP. Subsequently, he admitted that he and AA had arranged the NZ official's visit and he asserted that they were genuinely intending to import New Zealand information technology products.

[48] The Authority concludes that the appellant's account of the confrontation on X February 2008, the YCL threats that followed and the RPP's arranging of his departure, is untrue.

[49] The appellant provided three photographs of a protest scene. He explained that all three photographs were taken on the day before the election. The appellant and AA are both very prominent in the photos. They were among eight or ten RPP supporters walking or standing beside a man bedecked in orange garlands. The appellant identified the garlanded man as Colonel Thapa and he explained that they were guarding him. Colonel Thapa would, by his appearance and dress, be instantly recognisable. His supporters would, by association, be instantly identifiable as RPP supporters. The appellant's very public appearance with the famous Colonel Thapa would obviously have put him at great risk of being identified by the YCL. This at a time when the appellant asserts he was so frightened of the YCL that he had sought RPP assistance to arrange his escape

overseas. In these circumstances, the appellant's explanation that "I had to fulfil my party responsibility" is not accepted.

[50] The appellant asserts that the YCL has made hundreds of threats against him over the years, and daily threats against him to his family since he left Nepal in April 2008. The simple fact is, however, that none of these threats have been carried out. The YCL has never forced its way into the appellant's family home to search for him or to capture him. The YCL did not search for him, nor try to capture him, at his well known business in central Kathmandu city where he spent most of his working hours from 2005 to 2008. Nor did they accost him on the street as he went about his daily life. It is not believable that the YCL would spend so many years in such a pointless and ineffective campaign if they were seriously intending to harm the appellant.

[51] For his part, the appellant did not – despite the threats – take any material steps to minimise his profile or to avoid detection by the YSL. Indeed, he asserts that he adopted a very public profile in the politically charged weeks before the national election. For these reasons, the Authority does not accept as genuine the wife's letter of 21 July 2008 in which she stated that the family was receiving telephone threats every day from the Maoists. If the wife wrote it, then it was written for the sole purpose of bolstering the appellant's refugee claim.

[52] The above factors, taken cumulatively, lead the Authority to conclude that the appellant's claim to have had past difficulties with the Maoists in Nepal is untruthful. All that is accepted is that he is the co-owner of a small business in Kathmandu and, based on the photographs he submitted, that he has had some involvement with the RPP-N in the lead up to the elections in April 2008.

[53] It is against these findings that the Authority will consider the two issues posed above.

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Nepal?**

[53] Persecution is defined in refugee law as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection. See J C Hathaway, *The Law of Refugee Status* (Butterworths, Ontario, 1991) pp104-108, as adopted in *Refugee Appeal No 2039/93* (12 February 1996) at p15.

[54] The Authority, in AA's appeal, reached the same findings as those reached by the Authority in this appeal. Given the material similarity of the relevant findings, the Authority adopts paragraphs [42] to [45] of *Refugee Appeal No 76281* (9 April 2009) which read as follows:

"[42] Since the Maoists came to power in what are described by observers as credible elections in April 2008 (see, for example, the United States Department of State's *Country Reports on Human Rights Practices: Nepal* (February 2009)), there have been various social and political difficulties in progressing the country from civil war to a multiparty democracy. Much of the country information is concerned with, for example:

- (a) the difficulty in integrating former Maoist insurgents into the armed forces (which have remained in their barracks);
- (b) India's concern that its former ally, Nepal, may renege on the 1950 Treaty of Peace and Friendship, as part of a re-alignment with China; and
- (c) criticism of the YCL for continuing sporadic acts of violence. Two young persons were, for example, arbitrarily killed by the YCL in 2008 on the grounds that they were thieves – murders for which no-one has been brought to account.

[43] In spite of these difficulties, the country information is virtually silent as to any serious reprisals against the supporters of opposition political parties, or against persons of any social class, ethnic group or occupation. Nepal has been monitored extensively by international human rights observers in the relevant period and there is no doubt that, had such abuses occurred, they would have been extensively recorded. They have not.

[44] The website of the South Asia Terrorism Portal ([www.satp.org](http://www.satp.org)) a private monitor which, in its own words "creates the database and analytic context for research and analysis of all extremist movements in the region", gives a day-by-day account of 'incidents' involving the YCL in Nepal throughout 2008. Of the 70 incidents noted, only two involved the RPP Nepal – an incident on 26 March 2008 in which an RPP Nepal cadre was one of a group of six members of different political parties kidnapped by the YCL to intimidate voters, and an incident on 28 March 2008 in which stones were thrown by YCL supporters to disrupt an RPP Nepal election meeting in the Pokhara district. Significantly, both incidents happened in the run-up to the April 2008 elections. There is no mention of any incidents against RPP Nepal supporters or members since the elections.

[45] As a pro-monarchist, right-wing businessman, the appellant's diffidence about the success of the Maoists in the April 2008 elections is not hard to comprehend. But the Maoists appear committed to the democratic process, at least for the foreseeable future (see "Prachanda's first interview as Nepal PM", *BBC News* 3 September 2008), and there is simply nothing to indicate that a person having the characteristics of the appellant is at risk of serious harm."

[55] Since the publication of *Refugee Appeal No 76281* there have been some significant events, triggered by the resignation on 4 May 2009 of the Maoist Prime Minister Dahal after his efforts to dismiss the army chief were blocked by President Yadav (see, 'Nepal's political crisis intensifies', 2009, *Jane's Intelligence Digest*, 6 May). There was a deterioration in the security situation across the country during negotiations for a new coalition government, but no reported incidents involving the RPP-N. (See for example, 'NHRC for stepped up security amid fears of

Maoists' violence', 2009, Press Trust of India, 16 May (EPIC General OneFile). On 17 May 2009, RPP-N announced its support of the newly formed government, although it remains in opposition (see, 'RPP-N supports UML leadership', 2009, Kantipur Report, 18 May <http://www.kantipuronline.com/kolnews.php?nid=194838> and '7 parties to stay in opposition', 2009, Kantipur Report, 27 May <http://www.kantipuronline.com/kolnews.php?nid=196298> (both accessed 2 June 2009).

[53] Having considered the facts as found, in light of the country information, the Authority is satisfied that the appellant does not have a well-founded fear of being persecuted in Nepal.

### **CONCLUSION**

[54] For the above reasons, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"M L Robins"

M L Robins  
Member