

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

**REFUGEE APPEAL NO 75946**

**REFUGEE APPEAL NO 75947**

**AT AUCKLAND**

<b><u>Before:</u></b>	R J Towle (Member)
<b><u>Counsel for the Appellant:</u></b>	A Joseph
<b><u>Appearing for INZ:</u></b>	No Appearance
<b><u>Dates of Hearing:</u></b>	6 and 7 November 2006
<b><u>Date of Decision:</u></b>	2 March 2007

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**DECISION**

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[1] These are appeals against a decision of a refugee status officer of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ) declining refugee status to the appellants, who are both nationals of Nepal.

[2] The appellants, a married couple, claim that if they return to Nepal they will face serious harm from both Maoist separatists and the Nepalese security forces. The determinative issues in the appeals are questions of both credibility and the well-foundedness of their claim.

**INTRODUCTION**

[3] The appellants arrived in New Zealand on 9 April 2006 and lodged applications for refugee status on 1 May 2006. They were interviewed by the RSB on 29 and 30 May and 7 June 2006 and their claims were rejected by the RSB in decisions dated 7 September 2006. The appellants lodged appeals against those decisions on 14 September 2006.

## **THE APPELLANTS' CASE**

### **The first appellant**

[4] The first appellant, the husband, was born and raised in XX, in Nepal. His childhood and school years are of no relevance to this claim. On leaving school, in 1988, the first appellant enrolled at university. In 1990, democracy was established in Nepal and the appellant was attracted to the new wave of enthusiasm when a multi-party political system was discussed on the campus for the first time.

[5] The following year, the first appellant became active in college politics and joined the All Nepal National Free Students' Union (ANNFSU) which was inspired by communist ideology. The ANNFSU was the student wing of the Communist Party of Nepal which, at that time, was in coalition with the Marxist Leninist Party (the coalition was called "CPN-UML").

[6] The first appellant's involvement in student politics was relatively minor and he continued his activities to integrate new students into the campus life, particularly those who had come from rural areas.

[7] In 1993 the appellant graduated from university with a Bachelor of Science degree but, at that time, did not have any particular career path in mind. Instead he joined the main CPN-UML coalition and was involved in activities on behalf of the coalition at his local level for the next two years.

[8] In 1995, he found employment with an international pharmaceutical company. Although it was based in Kathmandu, the appellant was appointed as the principal salesman for the whole country. For the next four years the first appellant travelled widely around the country, particularly to the rural regions, where he promoted and sold orders for the pharmaceutical company's products to doctors and hospitals. The company specialised in a broad range of medicines, including antibiotics and intravenous lines.

[9] Between 1995 and 1999, the first appellant established excellent connections with the distributors of pharmaceutical products and with the many hospitals and medical practitioners around the country. He was "on the road" approximately 15 days out of each month.

[10] From time to time the CPN-UML asked him to carry the minutes of their meetings to other parts of the country and he also attended CPN-UML meetings during this period.

[11] In 1998 the CPN-UML split into the CPN-Marxist and CPN-Marxist-Leninist parties. The first appellant did not see any significant difference between the ideologies and policies of the two parties. He remained somewhat neutral and anticipated that at some point they would rejoin in a coalition.

[12] By late 1999 the first appellant had become frustrated by the lack of career opportunities in his company and found alternative work with another pharmaceutical company which specialised in intravenous infusions and antibiotics. It was also based in Kathmandu and the appellant was again appointed as a national salesman. As with his previous employment, he travelled approximately two weeks out of each month widely in the western and eastern areas of the country.

[13] During this period the activities of the Maoist separatists became increasingly violent and this, in turn, attracted a reciprocal response from the security forces. The first appellant was frequently stopped at checkpoints during his business trips and asked to produce identification. Because he was carrying medicines he was of particular interest to the authorities at these checkpoints.

#### Problems with the Maoists separatists

[14] In March 2000, the appellant was working in the western part of Nepal when he was given a note from Maoist separatists through an intermediary. They were clearly aware of his job and the potential this offered as a source of essential medical supplies for their militia. The note asked him to provide them with certain medical supplies when he next came to the region. The note did not contain any direct threats but was couched in such a way that the first appellant knew that he would encounter difficulties if he refused. On his return to Kathmandu the appellant was told by the company's despatch office that unknown persons had asked for him and he prepared a package of medical supplies for his next trip to the region.

[15] In May 2000, during his next sales trips to the region, he was contacted by Maoists and instructed to hand over the package of medicines that he had

prepared. The first appellant was unable to warn the police or security forces because this would have immediately aroused suspicions about his own activities and involvement with the Maoists.

[16] The first appellant returned to the same region in mid-2000. He met several Maoists at a local hospital and gave them a box of medicines that he had prepared, again on their express instructions.

[17] That evening, as he was returning by motorcycle to a town where he was staying, he was intercepted by a police unit who forced him off the road. He was attacked by a number of policemen with sticks. He was punched, abused, beaten severely and left on the roadside.

[18] Fortunately, a van stopped not long afterwards and the occupants took the first appellant to the local hospital. His right leg had been severely injured and he needed urgent hospital treatment. The local police visited him in hospital but he was too scared to tell them the truth of the incident because this would have attracted their suspicions about his own involvement with the Maoists.

[19] Because of the severity of his injuries, the first appellant was flown to Kathmandu where he underwent three operations at a main hospital. He remained severely incapacitated for the following month and was unable to work.

[20] Although his employer allowed him some time to recuperate, the appellant felt that his career options were again limited and he decided to use this period of rest and recuperation to find alternative employment.

[21] At the end of 2000, the first appellant was employed as the national salesman for another large international pharmaceutical company. Using the distribution contacts that he had established in his work as a salesman for the two other companies, the appellant quickly became a very successful and respected member of the company.

[22] Unfortunately, the first appellant's renown also came to the attention of the Maoist separatists. He was well known to them because of his work with the previous companies and the medicines he had supplied them earlier that year. Somehow they obtained his mobile telephone number and contacted him again. In the same vague and menacing tone, they instructed him to provide medicines to them whenever he was travelling to that part of the country.

[23] The first appellant supplied medicines to the Maoists on one occasion in late 2001 and on at least five occasions in 2002. Although the first appellant's new employer specialised in a particular kind of pharmaceuticals, he was also able to obtain samples such as pain killers and antibiotics from friends and others working in other similar pharmaceutical companies. In this way, the packages that he prepared and delivered to the Maoists contained a broad range of medical products that were evidently of great importance to them.

[24] The first appellant married the second appellant in mid-2002 and they lived in the suburb of AA in Kathmandu.

[25] The pattern of contact with the Maoists continued through 2003, during which period the first appellant supplied them with pharmaceutical packages on at least five occasions.

[26] The first appellant was frequently stopped at checkpoints during these sales trips. On each occasion the officers at the security checkpoints detained him for longer than other passengers on the bus and subjected him to more rigorous questioning and searching. They were suspicious of the fact that he travelled so widely and was carrying medical supplies but because he did not carry anything that incriminated him or linked him to the Maoists he was always released without undue difficulties during this period.

[27] In late 2003, the army and armed police established checkpoints near AA in Kathmandu. The first appellant was frequently stopped and questioned about what he was doing and where he was going with medical products. The first and second appellants were frightened by this constant harassment and intimidation from the security forces and decided to move house to another part of the city, YY, as it was further away from the regular checkpoints.

[28] After a brief period of tranquillity, the police found out where the first appellant was living and began to visit his home regularly. They warned him that he was under suspicion because of the nature of his work and that he should be very careful about his activities in future. They told him that he should give up his work and find some other employment.

[29] Notwithstanding the threats from the police and armed forces, the first appellant continued to receive regular telephone calls from the Maoists. They did

not threaten him overtly but he was left with the clear impression that if he did not maintain the steady supply of medicines to them during his sales visits that he would be regarded as “pro-military” and suffer serious consequences.

[30] In early 2005, the first and second appellants, having again become concerned about the frequent visits by the police and armed forces, decided to move to another part of town. Again, after a brief period of peace and quiet, the authorities became aware of his new location and the harassment and intimidation continued unabated.

[31] The first appellant found himself caught between the threats from the Maoists on the one hand and the constant harassment and intimidation from the security forces on the other. He felt he had no option but to continue supplying medicines to the Maoists, albeit with extreme caution.

[32] Throughout 2005, the police and army maintained their regular visits to the house and their harassment and searches at checkpoints around the city. During the first appellant’s frequent trips to the countryside, he was also under suspicion.

[33] Despite this very stressful and dangerous predicament, the first appellant’s sales record with the pharmaceutical company was impressive. He expanded the company’s business throughout the country and received special “performance” awards for his sales in 2003, 2004 and 2005. He travelled to India to receive his awards and, as a Nepalese citizen, he did not need a passport to cross the border to India on these occasions.

[34] In February 2006, the appellant was invited to Sri Lanka to receive a sales award from the company. He applied for and was issued with a genuine Nepalese passport and travelled to the ceremony. While he was there he was informed that he and others had been nominated for an international award that would be given at a ceremony in Auckland, New Zealand, in April 2006. The offer of a trip to New Zealand was extended to his wife. The company agreed to make all the travel arrangements on their behalf and to secure the required visas from INZ.

[35] On his return from Sri Lanka, the first appellant found that the political situation was deteriorating in Nepal. In mid-March the opposition parties, including the Maoists, were planning a four-day strike which would cripple the country. The forces loyal to the King were becoming increasingly aggressive towards anyone

who was suspected of opposing him and the appellant realised these developments could be disruptive to their plans to travel to New Zealand.

[36] The first appellant went to the CPN-UML office, where he was warned by senior colleagues that his name was on a list of people who the army and police had identified for extra-judicial execution. The first appellant was warned that during the strike he should be extremely careful as the police and armed forces were likely to increase their brutal suppression of any opposition groups.

[37] In late March 2006, the first and second appellants were at home when security forces came to the house. They entered without permission and ransacked the rooms, throwing papers around and searching the room where medical supplies were normally stored. The security forces accused the first appellant of involvement with the Maoists and stated that this time he would “suffer the consequences”. The incident was terrifying for both the appellants and left them deeply shaken.

[38] Several days later, when the second appellant was at home alone, a number of security officers came to the house. They pushed their way into the house and verbally abused and assaulted her. They again searched the house looking for papers and other evidence that might incriminate the first appellant with the Maoists. They found nothing and left.

[39] These two incidents, and the impending strike, caused the appellants to re-evaluate their options. They realised that it would be unwise to remain in Kathmandu while they waited for the company’s agent in India to finalise their travel arrangements and get their New Zealand visitors’ visas. They packed up all their belongings and travelled overland from Kathmandu to Delhi on 4 April 2006.

[40] En route, the first appellant checked his emails and discovered that there was a minor problem with the issue of his visitor’s visa to New Zealand. He received a draft letter from the company that he was required to send to the New Zealand Embassy in Delhi in order to satisfy their concerns about the bona fides of his travel.

[41] On their arrival in Delhi, the first and second appellants met with the company’s agent who had arranged the travel. He gave them their Nepalese

passports with New Zealand visas endorsed. They then flew to Kolkata using their own passports and from there travelled on to New Zealand.

[42] The first and second appellants attended the regional award presentations for the pharmaceutical company in Auckland in April 2006 but then decided that their predicament was too dangerous in Nepal and that they should remain in New Zealand until the situation had improved.

[43] Despite the improved situation in Nepal, following the King's capitulation to the political parties, the first appellant is concerned that if he were to return, the security forces would still harbour suspicions against him for his involvement with the Maoists. Despite the apparent improvements in Nepal in recent months, the Maoists still have the capacity and ability to reach him in Kathmandu. Even if he were to change the nature of his work, they would still harass and intimidate him because he is well known to them. Likewise, the security forces would not believe that he had completely given up his contacts with the Maoists and he would remain at risk of serious harm.

### **The second appellant**

[44] The second appellant received a nursing qualification in India and returned to Nepal in 2002. Shortly afterwards, she met and married the first appellant. She confirmed the various incidents that occurred at the family home between 2003 and the time of their departure in April 2006.

[45] During the many visits of the security forces to her home, she was terrified, particularly when her husband was out. She was confused as to which branch of the security forces the officers represented but recalls that they all carried weapons and were aggressive and vulgar towards her.

[46] Their various attempts to avoid the attention of the authorities were unsuccessful, even though they moved on two occasions to different locations in Kathmandu.

[47] The second appellant is concerned that if she were to return to Nepal the pattern of harassment, intimidation and violence against her and her husband would continue. She has no confidence that the recent changes in Nepal will put an end to the problems that they faced before their departure.



Other evidence

[48] The first appellant produced the following evidence:

- (a) A letter from the CPN-UML party secretary attesting to the first appellant's active membership since 1993;
- (b) A set of medical records confirming the nature of his injury and treatment in 2000;
- (c) Award certificates from the international pharmaceutical company in 2003, 2004 and 2005, an award certificate in Auckland, 2006, and a letter of promotion dated November 2005;
- (d) Various documents relating to his visitor's visa application, including supporting documentation from his employer, his financial situation, and his travel arrangements; and
- (e) Submissions by counsel dated 31 October, 22 November and 1 December 2006. Counsel has also enclosed a bundle of country information with each of set of submissions. The Authority also provided counsel with country information documents and invited counsel's submissions thereon.

[49] Counsel for the appellants submits:

- (a) That the appellants claim is credible overall and that "they should be given the benefit of any doubts";
- (b) That, notwithstanding the positive changes following the peace deal signed between the coalition government and the Maoists, the appellants are still at risk;
- (c) That, even if the first appellant were to change his occupation, he would still be targeted by the Maoists as he is known to have provided medicines to them and, because of his connections with the medical industry, he is a 'known person for contributions and other services' (para 25 submissions 22 November 2006);

- (d) That the signing of the peace deal does not mean the situation in Nepal will stabilise. The peace agreement is in its infancy and there is no guarantee that the armed forces of either side will adhere to its terms. The appellants will be at risk of persecution from the government agencies due to the unstable situation in Nepal;
- (e) That, a number of news articles indicate that the Maoists are continuing their violent activities, including the kidnapping and recruitment of people into their illegal army and coerced donations to their cause;
- (f) That the risk of persecution from the security forces will continue irrespective of whether the first appellant continues in the same line of employment because of the profile and association he has already established with the Maoists; and
- (g) That as the wife of someone so associated, the second appellant is also at risk of persecution from both the Maoists and the government agencies.

## **THE ISSUES**

[50] 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."

[51] 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

[52] Before assessing the well-foundedness of the appellants' claims, it is necessary to establish whether their claims are credible. The Authority finds that, for the most part, the appellants' evidence was spontaneous, forthright and compelling.

[53] It accepts that, between 2000 and early 2006, the first appellant was a successful and valued salesman in the pharmaceutical industry, that he travelled widely around Nepal, and was a regular recipient of 'achievers' awards from his most recent employer. It accepts that, in the course of this work, he came into contact with health providers (hospitals, doctors and other dispensers of medicines) in many parts of the country, including rural areas that were under the control of, or which had been infiltrated by, active Maoist militia groups.

[54] The Authority also accepts that, in this period, the first appellant was approached frequently by Maoist groups and was compelled to provide them with medical supplies that were evidently of considerable value to them.

[55] In particular, the Authority accepts as plausible the first appellant's claim that he cooperated with the Maoists in this extended period, not out of his own volition or any sympathy to their cause, but because he and his wife were subjected to credible and thinly-veiled threats to their safety if he did not comply with their persistent demands.

[56] The Authority also accepts as plausible the first appellant's evidence that during the course of his sales work around the country and in Kathmandu he was subjected to frequent searches by armed police and the military, both at checkpoints and at his own home. His peripatetic profession marked him for particular attention from the authorities who suspected, rightly, that he was providing the Maoists with medical supplies during his many trips to 'Maoist-controlled' areas.

[57] In this context, the Authority accepts that in 2000 the first appellant was the victim of a particularly brutal beating by the authorities that has left him with

permanent scarring and a disability to his leg. Authentic medical records were produced to support this finding.

[58] The appellants' claims that these searches – which intensified during the constitutional crisis after King Gyanendra took control of the government in early 2005 and continued until their departure in April 2006, involved harassment, invasion of the appellants' privacy at home and damage to their personal possessions – are also accepted as credible.

[59] Although the Authority has some reservations about the circumstances of the appellants' escape to India in April 2006 – particularly their contact with INZ in Delhi to resolve difficulties with their New Zealand visas – it accepts that they were obliged to cross the land border with India because of strike action that was paralysing Kathmandu at the time and because their Nepalese passports were with the company's agents in India.

[60] At the time of the appellants' departure from Nepal in April 2006, the constitutional crisis in Nepal had not been resolved and Maoist factions and the Nepali armed forces were still engaged in their long-standing conflict. Had the appellants' claims been considered at that time, the Authority would have concluded that each of them was at risk of serious harm – amounting to persecution – from both the Maoist rebels and the Nepali authorities.

[61] However, the determination of refugee status is a forward-looking process to assess whether, as at the date of adjudication, a claimant faces a real chance of being persecuted if returned in the future. In the present appeals, the Authority must consider the effect, if any, of recent and positive changes that have taken place in Nepal on their risk of being persecuted.

## **Country information**

### Key developments prior to the appellants' departure in April 2006

[62] In December 2005, the Seven Party Alliance (SPA) signed a 12-point understanding with the Maoists. Within the framework of that understanding, Maoists committed themselves to multiparty democracy and freedom of speech. The SPA, for their part, accepted the Maoist demand for elections to a Constituent Assembly; Human Rights Watch (HRW) *World Report: Nepal* (2007).

[63] At the beginning of 2006, the situation intensified as the SPA launched agitation programmes around the country. A series of waves of arrests of opposition leaders were conducted. The agitations reached a peak around the municipal elections of 8 February which were boycotted by the SPA and the Maoists. In total, official figures claimed a participation of about 21 per cent. Opposition sources questioned those claims. The SPA called for a four-day nationwide general strike between 5 and 9 April 2006. The Maoists called for a ceasefire in the Kathmandu valley. The general strike saw numerous protests. A curfew was announced by the government on 8 April 2006, with reported orders to shoot protestors on sight. Despite this, small, disorganised protests continued; HRW (2007).

[64] On 9 April 2006, the SPA announced that it intended to continue its protests indefinitely and called for a tax boycott. Protests continued in the following days, with crowds increasing to sizes estimated at 100,000 to 200,000 in Kathmandu, more than 10 per cent of the city's population. On 21 April 2006, opposition sources claimed that about half a million people took part in the protests in Kathmandu. More conservative estimates refer to 300,000 people. Later the same evening, King Gyanendra announced that he would return political power to the people and called for elections to be held as soon as possible; HRW (2007).

#### Key developments in Nepal since April 2006

[65] The human rights situation improved markedly after April 2006, when 19 days of widespread public demonstrations, dubbed the Jana Andolan or people's movement, ended King Gyanendra's year-long usurpation of all authority and created conditions conducive to a ceasefire in the brutal civil war between government forces and the CPN-M; HRW (2007).

[66] On 27 April 2006, the CPN-M responded to demands by Girija Prasad Koirala and announced a unilateral three-month truce in the Nepal Civil War. In addition, on 1 May 2006, Bhattarai announced that "if the elections [to a Constituent Assembly] are free and fair, one has to respect the result of the elections. Then of course we will abide by the verdict of the people". This was seen as a large step forward as it showed the first signs of Maoist acceptance of the democratic process.

[67] On 2 May 2006, Koirala announced the new government cabinet, which included himself and three other ministers from the Nepali Congress: K P Sharma Oli from CPN(UML), Gopal Man Shrestha from Nepali Congress (Democratic) and Prabhu Narayan Chaudhari from the United Left Front. This was followed on 12 May 2006 by the arrest of four ministers from the ousted royalist government and an investigation into alleged human rights violations by the army during the General Strike.

[68] The most dramatic move of the post-Loktantra Andolan government came on 18 May 2006, when the Parliament unanimously voted to strip the King of many of his powers. The bill included putting 90,000 troops in the hands of the parliament; placing a tax on the royal family and its assets; ending the Raj Parishad, a royal advisory council; eliminating royal references from army and government titles; and declaring Nepal a secular country, not a Hindu Kingdom.

[69] The bill overrides the 1990 Constitution, written up following the Jana Andolan, and has been described as a Nepalese Magna Carta. According to Prime Minister Koirala, "This proclamation represents the feelings of all the people." However, although it will immediately come into force, the bill is seen as provisional until a new constitution can be drawn up.

[70] With both parties declaring a ceasefire by the beginning of May 2006, civilian casualties directly caused by the conflict dramatically declined, as did human rights abuses such as extrajudicial execution, arbitrary detention, and torture. The removal of restrictions imposed by King Gyanendra after seizing power on 1 February 2005, also significantly improved the ability of the Nepalese to exercise freedom of speech and association.

[71] The HRW World Report: Nepal 2007 concluded that:

"Notwithstanding the hope and jubilation following the Jana Andolan and the resulting peace process, many Nepalese continue to voice concerns about the country's human rights and political situation. Human rights activists complained that the peace agreement did not create any effective monitoring or implementation mechanisms to address violations by both sides. The issue was particularly relevant because both warring parties, and particularly the Maoists, regularly violated the letter and spirit of the ceasefire code of conduct they had signed on 26 May 2006. Despite changes in leadership, the Nepali Army failed to cooperate with investigations into the fate of hundreds of "disappeared" Nepalese and the government failed to properly investigate or prosecute a single case of extrajudicial execution, "disappearances", and torture."

[72] According to a report by the United Nations Office of the Coordinator for Humanitarian Affairs (OCHA) of 18 July 2006:

“The installation of a new government and subsequent developments has resulted in some improvements in the human rights situation, particularly with regard to freedom of assembly and expression. Several hundred detainees suspected of involvement in the CPN-M and held under Terrorist and Disruptive Activities Ordinance (TADO) have been released, including juveniles, and there has been a sharp reduction of detention in army barracks. The Government has announced the repeal of several pieces of legislation, which curtailed human rights, including the Media Ordinance.”

[73] Despite the peace initiatives being undertaken, there were continued reports of violations of the 25-point ceasefire code of conduct: “Nepal ceasefire monitoring committee says violations on ‘both sides’” *BBC Monitoring International Reports* (21 September 2006). The article reports findings of the National Cease-fire Monitoring Committee that:

“The government and [CPN-M] have failed to respect the 25 point cease-fire code of conduct ... both sides do not appear to be serious in [its] implementation ... soldiers of the Nepal Army and the People’s Liberation Army were often seen roaming around public places wearing combat dress and carrying weapons. With regards to the Maoists, the committee says they continue to forcibly extort money from people and have refused to return people’s [possessions] which they have seized illegally.”

[74] Reports by the Monitoring Committee in October 2006 disclose an upsurge in complaints over compliance with the 25-point code of conduct by both sides but principally the CPN-M. In “Ceasefire violations by Maoists increasing: Committee” *PTI-The Press Trust of India Ltd* (23 October 2006) it is stated:

“Of the 1300 complaints received by the monitoring committee over the past six months, 75 per cent were linked to the Maoists ... Most of the complaints are related to extortion, abduction, torture, seizure of property, display of arms in public places and parading of armed groups.”

[75] The situation for internally displaced persons (IDPs) within Nepal by the decade-long conflict also remained uncertain, despite the progress in the peace initiatives in the course of 2006. In a report entitled “*Nepal: IDP return still a trickle despite ceasefire*” (16 October 2006), the Internal Displacement Monitoring Centre (IDMC) reported that:

“Nearly six months after nationwide protests forced the king to end 14 months of absolute rule and the Maoists rebels called a ceasefire, only a few thousand people have reportedly returned to their homes, the majority of the internally displaced persons (IDPs) preferring to wait for better security guarantees and more assistance to make the journey home. Although no reliable figures exist, it is estimated that up to 200,000 people have been internally displaced in Nepal by ten years of war, which has claimed more than 13,000 lives and affected all districts of the country. Caught between two evils, abuses by the Maoists and repression by

the security forces, most people have also fled the general deterioration of the socio-economic conditions in the countryside and sought refuge in district headquarters or in the main urban centres. The war has also thrown hundreds of thousands of people onto the road to India – a traditional migration route for Nepalese.

A 12-point agreement signed in November 2005 between the CPN-Maoist and the Seven Party Alliance had already encouraged some timid return movements of IDPs to their homes. The ending of the armed conflict and repeated commitments by the rebels to respect the rights of IDPs paved the way for more returns, in particular in the eastern and mid-western regions. However, continued human rights abuses by the Maoists, including killings, abductions and torture, have so far prevented larger-scale return movements. These are also hampered by the absence of government representatives at the village level, these having been displaced themselves, as well as by the lack of a government return plan.” (emphasis added)

[76] On 21 November 2006, the CPN-M and the SPA signed an historic peace agreement that was greeted with relief and widespread approval by the civilian population and the international community.

[77] Under the terms of this peace agreement the CPN-M agreed to confine their fighters to camps supervised by the United Nations and their weapons stored in sealed containers. This also cleared the way for the former rebels to join the existing SPA in an interim government operating under an interim constitution, and in which the CPN-M would have 73 out of 330 seats. The peace agreement also addressed thorny issues such as impunity for past human rights violations and divesting the monarchy of all but its ceremonial powers and authority; “Maoists Sign Peace Deal in Nepal” *New York Times* (22 November 2006); “US, UN welcome Nepal Peace accord” *IRNA* (24 November 2006) <http://www.irna.ir/en/news/view/menu-235/0611221881165707.htm>; “Jubilation over Nepal peace pact” *BBC News* (22 November 2006).

### The Maoists

[78] A report by the Office of the United Nations High Commissioner for Human Rights (OHCHR), issued in September 2006, noted commitments by the Maoist central committee to abide by the terms of a 12-point Letter of Understanding between the CPN-M and the SPA signed in November 2005; their Statement of Commitment to Human Rights and Humanitarian Principles of 17 April 2006; and the terms and conditions of a 25-point Ceasefire Code of Conduct signed by the CPN-M and the Government of Nepal on 15 May 2006.



[79] In particular these commitments were intended to promote accountability for beatings, abductions and other violent acts against the civilian population; to secure the safe return of all IDPs; and to ensure that all donations are voluntary; [http://nepal.ohchr.org/resources/Documents/english/reports/InvestigationReports/2006\\_09\\_25\\_Human%20Rights%20Abuses%20by%20the%20CPN-M.pdf](http://nepal.ohchr.org/resources/Documents/english/reports/InvestigationReports/2006_09_25_Human%20Rights%20Abuses%20by%20the%20CPN-M.pdf).

[80] Notwithstanding these commitments, the OHCHR report noted that serious violations of human rights continued and that there was impunity and lack of accountability for those who had committed serious violations in the past. The OHCHR documented a number of cases to support its concerns relating to ill-treatment, killings and deaths of abducted persons (p2 and 5); alleged suicides after abductions (p3); use of 'People's courts' to carry out summary justice without due process of law (p4); violations against children (p5-6); and extortion and 'voluntary donations' (p7).

[81] Despite the special directive that all donations should be voluntary, OHCHR received reports in August 2006 that:

"... members of the CPN-M are taking "taxes" or "donations" from local communities, government officials, NGOs, schools, business people and teachers throughout the country ...and the modalities of "voluntary donations" vary greatly from region to region and district to district, and in some cases, rates have been negotiated. It has also witnessed some instances where "donations" were collected. OHCHR is particularly concerned when individuals are threatened if they refuse to pay the requested sum of money or when individuals are abducted to force them to pay. In the Western Region, OHCHR received various reports of the CPN-M threatening government staff and development workers with abduction in Parbat, Baglung and Myagdi Districts if they refused to pay a "tax," though in other districts of the regions "donation" collections appear to have diminished. In cases where there is no explicit threat and individuals appear to comply and pay without question, the threat is often implicit. For many people, refusing to pay is not an option, given the patterns of abuses in other cases where individuals have been threatened or abducted."

[82] In a press release issued on 1 November 2006, OHCHR expressed concern that "law enforcement" activities by the CPN had intensified recently, especially in the Kathmandu valley, and "which have resulted in serious abuses of human rights". These activities have included illegal detention, incommunicado in hidden locations, and ill-treatment including torture and beatings; <http://nepal.ohchr.org/resources/Documents/English/pressreleases/NOV2006/>.

[83] The OHCHR's report to the General Assembly, 22 September 2006, 61<sup>st</sup> session, A/6/374, (para 78-80) concluded that, although the government and

CPN-M had recognised that human rights were core elements to the peace process:

“The current improvements remain fragile and any setback to the peace process risks a negative and potentially devastating impact on the human rights situation ... Many challenges remain, a major one being the issue of law enforcement and the administration of justice. The current weakness (and in many places absence) of law enforcement agencies, their limited capacity or will to maintain law and order and to protect the civilian population from violence, limited Government support and the resistance of CPN-M, will facilitate the emergence of elements who wish to undermine the peace process unless these problems are urgently addressed. The strengthening of law enforcement and justice capacity will be essential to ensuring that the electoral process for a Constituent Assembly, from its early stages, can be organized without fear, intimidation or more serious abuses. ... Holding those responsible for violence and for human rights violations to account, thereby effectively ending the current climate of impunity at the level of the state and by CPN-M must be a priority.”

[84] By the end of 2006, it was clear that positive and significant developments had taken place to create conditions for a sustainable peace and that the first, albeit tentative, steps were being taken to address the legacy of Nepal’s violent past. Nonetheless, impunity for past human rights violations remained an issue that none of the protagonists to the conflict appeared determined to address.

[85] Moreover, and despite efforts by the central committee and senior leadership of the CPN-M to curb the excesses of its cadres and cells at the local and provincial levels, it is apparent that violations of human rights in breach of the peace accords persist. The violations relate, principally, to intimidation, extortion (through ‘taxes’ or coerced donations), abductions, forced recruitments and ‘kangaroo courts’; “Maoist excesses continue; intensified recruitment drive” *Nepal News.com* (16 November 2006); “No let up in Maoist extortion, abduction” *Kantipur.com* (25 November 2006); “Maoists continue recruitment drive; parents protest the move: Report” *Nepal News.com* (20 November 2006) “Maoist excesses on; students abducted, tortured” *Nepal News.com* (29 November 2006); and “Maoist kidnap family members, torch house” *Nepal News.com* (19 February 2007).

#### The Nepalese law enforcement agencies and Army

[86] On 1 December 2006, OHCHR noted its concern about violent demonstrations which took place at that time in the Kathmandu valley, in the context of student protests, and the excessive use of force by police in

responding to the violence. <http://nepal.ohchr.org/resources/Documents/English/pressreleases/DEC2006/200>

[87] On 4 February 2007, OHCHR again noted its concern that security forces had used lethal force during a curfew in Birgunj, Parsa District, which resulted in life-threatening injuries after police fired at a crowd. It was stated that “Sixteen deaths and a high number of serious injuries have been confirmed by OHCHR-Nepal since 19 January, many shot by police.” [http://nepal.ohchr.org/resources/Documents/English/pressreleases/FEB2007/2007\\_02\\_04\\_HCR\\_lethal\\_E.pdf](http://nepal.ohchr.org/resources/Documents/English/pressreleases/FEB2007/2007_02_04_HCR_lethal_E.pdf).

[88] Although most of the peace initiatives have been directed at rehabilitating the CPN-M, there are ominous stirrings from some of Nepal's minorities seeking greater representation in the interim government and better constitutional protection and autonomy within a federal state; “Nepal’s minorities raise the stakes” *BBC News* (12 February 2007); “Strike brings Kathmandu to a halt” *BBC News* (15 February 2007).

[89] On 7 February 2007, the United Nations High Commissioner for Human Rights expressed her concern over violence in the Terai District of Nepal where demonstrations by ethnic minority groups, Madhesi, were broken up by law enforcement agencies; [http://nepal.ohchr.org/resources/Documents/English/pressreleases/FEB2007/2007\\_02\\_07\\_HC\\_TeraiUnrest\\_E.pdf](http://nepal.ohchr.org/resources/Documents/English/pressreleases/FEB2007/2007_02_07_HC_TeraiUnrest_E.pdf). It was stated:

“HCHR staff had observed violence by protestors, as well as incidents of excessive use of force by the Armed Police Force and the Nepal Police. Lessons have not been learnt from the security forces’ handling of the April 2006 protests ... (and expressing her particular alarm) ...over reports of human rights defenders and journalists being threatened or obstructed from doing their work.”

[90] Under the interim constitution and peace accords, the political parties are preparing for the election of a constituent assembly in June 2007 which will decide Nepal’s future, including whether it will adopt a republican model or retain the present (albeit diluted) monarchy-based democratic system. It is difficult to predict the course of these elections and whether they will consolidate the country’s path towards peaceful democracy.

[91] There are indications of caution and scepticism from all sides. In “Maoist leader warns on Nepal poll” *BBC News* (13 February 2007) it is stated:

“The Maoists’ democratic credentials are still in doubt. The UN mission has expressed concern at reports of Maoists violently attacking gatherings of other

parties and of them seizing and interfering with lists of voters currently being drawn up. A businessman in Kathmandu told the BBC that 25 Maoists had forcibly entered his office compound, stuck posters of Prachanda all over the walls and threatened to bomb the building if he removed them. He said they had issued threats against him for not giving the Maoists money. Maoist leaders insist that the frequent requests for donations to their party are voluntary.”

[92] Similarly, a senior military commander in the Nepalese Army, General Dilip SJB Rana was quoted by *Nepali Times* on 4 February 2007 as saying:

“We are as close to violence as before. The Maoists will not break promises, take up arms, and go back to the jungle, but I do foresee violence in the near future. It is our responsibility to serve the Nepali people, which is why I direct the Nepal Army to stay prepared....If the constituent assembly elections were to be postponed or delayed, or if the results are not what the Maoists expect, they will take up arms again. If the situation in the *tarai* does not become normal soon, or if the Nepal Police and the Armed Police Force cannot contain the situation, it is possible the Nepal Army will be deployed again before more damage is done.”

[93] Whilst these comments do not necessarily reflect the views of the interim government, nor the Army as a whole, they do indicate some disquiet about the prospects of a peaceful political transition over the coming months.

#### Threats to medical and health workers

[94] The health sector in Nepal was deeply affected during the course of the insurgency and conflict. More than 40 health posts were completely destroyed between January 2002 and December 2004 and many others were rendered unusable. The situation for health workers (in the broad sense) was particularly difficult as they were caught between government directives not to treat Maoists without prior notification to security personnel and threats from Maoists who demanded treatment. “Health effects of Maoist insurgency in Nepal”, *The Lancet*, “28 November 2006” (Nexis).

[95] Over the past year, there have been a number of different kinds of attacks by Maoists on hospitals and health workers ranging from deliberate targeting, in the form of looting for medicines and kidnapping, to seemingly incidental attacks. “Nepal Maoists loot government medicine”, *Kantipur FM*, (12 March 2006) (Infotrac); “Nepal Maoists abduct health worker” *Nepal Samacharpatra* (13 April 2006) (Nexis); “Rights panel regrets Maoist destruction of Nepal hospital” *Radio Nepal* (26 April 2006) (Infotrac); “Indian doctor faces kidnap trauma in Nepal” *Indo-Asian News Service* (28 January 2007) (Nexis).

[96] Although threats and attacks by Maoists against people in the health sector have diminished since April 2006, Maoists cadres, particularly those suffering from untreated disabilities during the conflict, still demand medical supplies and treatment that the government has been unable or unwilling to provide through health posts in the outlying areas of the country. "Nepal Maoist "fighters" seek hospital treatment" *Kantipur* (12 July 2006) (Infotrac).

[97] Hospitals and health posts, which are attached to offices of the village development committees, have been particularly targeted. "Nepal Maoists use local hospital as "liaison office"" *Kantipur* (12 July 2006) (Infotrac); "Maoists, angry youths trash Nepal hospital" *eKantipur.com* (24 May 2006) (Infotrac).

[98] In December 2006, doctors called off a two-day strike over similar attacks following undertakings from the government that more security would be provided. "Nepal doctors strike in hospitals" *BBC News* (27 December 2006); and "Nepal doctors call off strike" *BBC News* (29 December 2006).

#### General conclusions

[99] It is clear from this country information that the general situation in Nepal has improved markedly since the appellants' departure in April 2006. To a significant and positive degree, the former Maoists are becoming rehabilitated into the mainstream of Nepal's democratic process. In principle, its leadership has renounced the strategy of violence to achieve its political objectives and the incidence of violence perpetrated by CPN-M around the country has reduced.

[100] It is also clear that the CPN-M is now an active participant in the interim government and that, to a significant extent, the leadership has tried to comply with many of the undertakings in the peace accord (and earlier agreements) most notably the cantonment of fighters and the surrendering of arms.

[101] The escalation of violence in Sri Lanka is a salutary warning of the challenges faced by countries emerging from long periods of conflict. In the case of Nepal, a long period of sustained peace and reconciliation is required if the legacy of more than 10 years of brutal and bloody conflict is to be resolved. Whilst country assessments are, overall, positive there is still a disturbing frequency of human rights abuses perpetrated by CPN-M cadres at the local level, including in the Kathmandu valley.

[102] Directives from the central committee of the CPN-M are consistent with the peace accords but are not always observed and implemented at the local level, particularly in more remote Maoist-held areas where the government has been unable, as yet, to establish any effective presence.

[103] On-going human rights abuses perpetrated by Maoists include intimidation, extortion (through 'taxes' or coerced donations), abductions, forced recruitments and 'kangaroo courts'.

[104] The political situation leading to the national elections later this year is more positive than a year ago but may involve further instability and violence, including by other minority groups that complain their interests have not been adequately represented under the current interim government.

[105] Impunity is a largely unresolved and volatile issue. Neither the Nepalese armed forces nor the Maoists have shown any genuine determination to hold their forces accountable for past violations and this can only fuel concern, among the civilian population (particularly IDPs), whether the main protagonists are committed fully to the path of multiparty democracy and accountability.

### **Well-foundedness of the appellants' claim**

#### Threat from the Maoists

[106] The Authority concludes that, despite the general positive developments assessed above, caution must still be exercised in assessing the risk to the appellants in a volatile period that is still less than a year since the 'palace capitulation' in April 2006.

[107] Prior to his departure from Nepal the first appellant had gained a reputation as a well-connected and successful salesman in the medico-pharmaceutical industry. For this reason he was co-opted, under threat of violence, to supply valuable medical supplies to the Maoists, and he was regarded as a threat to the authorities.

[108] Despite the positive changes in Nepal, country information indicates that health and medical workers are still the targets of serious threats and intimidation, particularly in the country's Maoist-dominated areas. This is due, no doubt in part,

to the pressing need for, and short supply of, medical supplies and the importance of health providers in the more remote parts of the country.

[109] In this context, the Authority finds that if the first appellant were to return to Nepal and resume his former work in the medical industry (including his visits around the country), it is reasonable to assume he will come to the attention of the CPN-M. His identification is made all the more likely given the widespread presence of the CPN-M throughout the country, including the Kathmandu valley and the capital city.

[110] In this eventuality, and despite the CPN-M leadership's efforts to eradicate anything other than voluntary donations to its political cause, there are sufficient examples of harassment, intimidation and coercion by Maoists for the Authority to conclude that the first appellant would be at risk serious of harm if he refused or otherwise failed to supply medical products in the way he had done before his departure.

[111] The Authority is satisfied that the first appellant's failure to comply with their demands could lead to any or all of the serious harm identified in paragraph [103] and that this would amount to persecution in terms of the 1951 Convention.

Could the first appellant avoid persecution by seeking alternative employment?

[112] The question would then arise whether the first appellant could be reasonably expected to avoid the risk of persecution from CPN-M cadres by pursuing some other form of work that was of no tangible interest to his would-be persecutors.

[113] Counsel has submitted that this question does not need to be answered because, even if the first appellant were to pursue an unrelated career, he is already so well known to many CPN-M cadres that he would still be targeted by them, both because of his known connections within the medical industry and for his past record of contributing to their cause. In short, the Maoists would not be persuaded by any protestations by the first appellant that he could no longer usefully assist them. Irrespective of his employment, he would be expected to reactivate his former contacts and influence in the industry to meet their demands.

[114] The Authority accepts this submission with some reservation. Given that positive changes in Nepal are recent and not yet irreversible, there is still a

residual risk – that reaches the level of a real chance – that some CPN-M cadres, who are not prepared to comply with the ‘party line’ on extortion and ‘voluntary donations’, would be undeterred by any protestations on his part that he could be of no further use to them. His connections and influence in the medical industry would still be of value to them even if he were no longer actively involved himself.

[115] For these reasons, the Authority concludes that there is a real chance that the first appellant would be persecuted by non-state agents if he were to return to Nepal. In reaching this conclusion, the Authority notes that CPN-M cadres operate freely throughout the country and that, where incidents of extortion, kidnappings and violence have occurred, the Nepalese authorities have often been unable to provide any effective protection to civilians who have been so targeted.

[116] As a dependent family member of the first appellant, the second appellant is at risk of similar forms of harm.

#### Exclusion under Article 1F of the 1951 Refugee Convention

[117] The Authority has also considered whether there are ‘serious reasons for considering’ that the first appellant, in supplying medicines to the Maoists, is excluded from refugee protection by virtue of Article 1F of the 1951 Refugee Convention. *Refugee Appeal No 72635* (6 September 2002) at [202]; and *Refugee Appeal No 1248* (31 July 1995) at pages 37-40.

[118] Country information indicates that members of the CPN-M have committed serious human rights violations against innocent civilians for more than a decade. It is clear that those who have shared in the common purpose of the CPN-M, whether by directly or indirectly supporting its aims, objectives, strategies and tactics, may in certain circumstances be excludable under Article 1F. *Ramirez v Canada (Minister of Employment and Immigration* [1992] 2FC306, 317-8 (FC:CA)

[119] It is clear that each case turns on its own particular facts. For the following reasons, the Authority is satisfied that in the present appeal the first appellant is not so excluded:

- (a) His political support was confined to the peaceful political platform of the CPN-Marxist and CPN-Marxist-Leninist parties and at no stage did he belong to, or support the aims, strategies and actions of, the



CPN-Maoists. His evidence that he abhorred the Maoists' tactics is accepted;

- (b) The first appellant's actions were coerced by serious and credible threats to his physical safety and that of his wife; and
- (c) The first appellant's actions – confined to supplying medicines for unknown beneficiaries and against his will – do not disclose any degree of complicity in, or sufficient nexus to, crimes that would be excludable under any of the limbs of Article 1F.

#### Threats from the armed forces (police and military)

[120] The incidence of human rights abuses against former Maoist supporters and sympathisers has reduced markedly since April 2006. In light of the country information assessed by the Authority, it concludes that there is no real chance that the first appellant would face persecution from the Nepalese authorities if he were to come to their attention either because of his profile prior to his departure in 2006 or, in the event that he is associated or linked with the CPN-M, in the future.

[121] In any event this is a moot question in light of the Authority's findings and conclusions above relating to the appellants' risk of harm from the CPN-M and the absence of effective state protection.

#### Summary of well-foundedness

[122] For these reasons, the Authority concludes that the two framed issues in paragraph [51] are answered in the affirmative in relation to each appeal. In the first appellant's claim, the convention ground is the political opinion imputed to him by the CNP-M. In the second appellant's claim the ground is her membership of a particular social group – the first appellant's family.

### **CONCLUSION**

[123] Each appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeals are allowed.

.....  
R J Towle  
Member