

**060539231 [2006] RRTA 177 (18 September 2006)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060539231

**DIMA REFERENCE(S):** CLF2006/40909

**COUNTRY OF REFERENCE:** Nepal

**TRIBUNAL MEMBER:** Samuel Blay

**DATE DECISION SIGNED:** 18 September 2006

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant is a national of the Kingdom of Nepal. He arrived in Australia and he subsequently applied to the Department of Immigration and Indigenous Affairs under the Migration Act 1958 (the Act) for a Protection (Class XA) Visa. The delegate of the Minister refused to grant a Protection Visa as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The applicant applied to this Tribunal for a review of that position.

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of 'refugee'**

Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

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

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The information and records relevant to this case are contained in Department File No. CLF2006/40909 and Tribunal File No. 060539231. The contents of these files may be summarised as follows:

In a Statutory Declaration that accompanied his primary application, the applicant, who is in his early 20's, claimed that he was born in an overseas country while his father was serving in the British Gurkha Army. He claimed further that his mother is a Christian and that this always created friction in the family between his father and his mother. He also claimed that while growing up, he did not take to Christianity very much. However, in 2002 he became a born-again Christian and was subsequently baptised. He started joining Christian groups in Nepal to do "Christian activities".

He also claimed that he was involved in a youth group which had formed a 'cell'. On one occasion, one member of the youth cell members was severely beaten during the night on his way home from doing 'gospel work'. The applicant further claimed that he and three other friends were attacked in the house of a local Christian where they had gathered on the Nepalese National Holiday. He claimed that when they were attacked, news spread in the community that they had come to convert Hindus to Christianity. He claimed that they were beaten severely and subsequently taken to the local police station where they were made to sign documents saying that they would not spread Christianity in the village. He also claimed that he and his colleagues were made to pay twenty thousand rupees to the police before they were released.

The applicant further claimed that while he and his colleagues were in another village preaching the Gospel, a group of Maoist rebels encountered them and accused them of preaching Christianity in the area under their command without the authority. He claimed that the Maoist commander ordered that they should be beaten. They were beaten severely and made to join the Maoist rebels with the intention of conscripting them into the Maoist ranks. He claimed further that they were subsequently taken to a village where he managed to escape in the night to get to his hometown. In the circumstances, he and his mother decided that it was better if he left the town altogether and sought refuge in another city.

He further claimed that whilst in another city he received information from his mother that Maoists had come to her house and presented her with a letter demanding that he should return to join their ranks else he would face punishment. He also said that his mother immediately burned the letter she received for fear that the Government security forces might discover such a letter on her. He concluded his statement by saying that he fears that on his return to Nepal, the Maoists forces will attack him and punish him for deserting their ranks. He said his friends had

been forced to become Maoists and he is worried about what would become of him and indeed, his mother.

### **Oral Testimony before the Tribunal**

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the Pastor of a local church. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages.

The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

At the hearing before the Tribunal, the applicant claimed that he attended school up to Year 12. He further claimed that after Year 12 he was not particularly keen on continuing with his education. By that time, he had become a born-again Christian and was very eager to engage in Christian fellowship work in his community. The Tribunal asked him what sort of activities he was engaged in, in terms of the Christian activities. He said that he and his colleagues used to hold fellowship activities from house to house and that their cell group would preach to Christians and to other villages wherever they went. He claimed that they used the villages as a medium for spreading the Word of God. He further claimed that there were about three hundred to four hundred people in his fellowship group and the church. However, there were only a few volunteers, numbering about six people. He claimed that the volunteers took the Gospel to the villages. The Tribunal asked him to explain exactly what they did. He said that they did many things “like showing films about Jesus Christ and other related religious activities”.

The Tribunal asked him if he belonged to a particular church. He said that he belonged to a particular church, which he named. The Tribunal then asked him who the head of the church is and whether the church had any elders. He said that the church has a number of elders and some deacons. However, the pastor passed away a while ago and has not been replaced.

The applicant spoke to his written statement and claimed that his mother is a Christian and attends church whenever she can. He claimed that he spoke to his mother last month but that he does not speak to her often. He further claimed that his mother is worried about the Maoists in her area and had closed her business.

The Tribunal also spoke to the applicant about the claims concerning the attacks by the Maoists and the villagers. He repeated the claims in his written statement concerning the dates and the times when he and his colleagues were attacked by the villagers and accused of proselyting in the village area. He also repeated his claims about his abduction by the Maoists. The Tribunal asked the applicant to explain the circumstances in which he was able to escape. He repeated the claims in his written testimony that he took advantage of the cover of darkness and escaped from his captives. The Tribunal then asked him how far the village where he was captured is from his home town. He claimed that it is about six to seven hours by car. The Tribunal then put it to him that given the vast distance between where he was abducted and where his home town is, it does not seem plausible that the Maoists would have come looking for him in his home town. He responded by saying that the Maoists have connections and links throughout Nepal and that his mother had told him that they had indeed come looking for him.

He further claimed that the mother had received a letter. The Tribunal then asked him about the letter he claimed the mother received. The Tribunal put it to him that his claim that his mother burnt the letter appears very convenient and not plausible. The Tribunal explained to the applicant that since the letter had indicated that he, the applicant, had escaped from the Maoists, it does not seem plausible that his mother would have become concerned enough with the letter so as to burn it to avoid the authorities from associating her with the Maoists. He responded by saying that in Nepal people simply do not want any evidence that connects them with the Maoists.

The Tribunal asked the applicant if he is indeed a Christian. He responded by saying that he is a Christian. The Tribunal then asked him to name his favourite passages from the Bible. He proceeded to name some verses from the Gospel according to Matthew and the Gospel according to John. However, he was not able to remember most of what he purported to say.

The Tribunal then asked the applicant if he has been attending church in Sydney. He responded by saying that he attends a particular church. He also said that a witness he has brought in is his local pastor in the church.

### **Testimony by the Witness**

In his testimony before the Tribunal, the Pastor claimed that he is the pastor for the local church of which the applicant is a member of the congregation. He told the Tribunal that the church is an indigenous church which first started in an overseas country . He also explained that there are similar indigenous churches in other parts of the world and that there is already a branch of such an indigenous church group in Nepal with plans to set up another one in the country. The Tribunal asked him if he knew the applicant. He responded by saying that he knows the applicant as a member of his congregation and that the applicant has been a member as have other relatives who live in Australia. He confirmed that the applicant is a Christian. He also said that he was not able to testify to the applicant's activities and claims in Nepal, however he is able to tell the Tribunal that when the applicant first came to join his congregation, it was evident that the applicant had an upbringing in, and knowledge of Christianity.

The witness also claimed that there is persecution of Christians in Nepal. The Tribunal then put it to him that if indeed his claim is correct, then it seems extraordinary that he is assisting with the establishment of another branch of the church in Nepal. He responded by saying that it is God's wish and God's expectation and demand on people to do so. He explained that it was not him asking people to set up the church. It is God's wish and he is simply lending a hand in setting up the church. The Tribunal then noted to him that contrary to his claim that there is persecution of Christians in Nepal, there is evidence today to suggest that the number of Christians in the country is growing. He responded by saying that Christianity has been known to grow exponentially during times of persecution.

The Tribunal noted to the witness that he has appeared before the Tribunal on several occasions to bear testimony in favour of Nepalese applicants. The Tribunal then put it to him that even though one may not suggest that he is adopting "a list" similar to the famous Schindler's list to assist Jews who were escaping from Nazi Germany, it would seem that he has developed a pattern of providing testimony for Nepalese Christian. The Tribunal asked him if there was ever an occasion in which he had refused to bear testimony to assist a Nepalese applicant claiming to fear persecution on the grounds of Christianity. He said he had refused on one occasion, but that on all other occasions when he had appeared before the Tribunal, he has only come to tell the truth.



The Tribunal also spoke to the pastor about the protocol of prayers adopted by his church. He explained that his church is a Pentecostal organisation and does not adopt the protocol of prayers one would ordinarily expect in the traditional church.

### *Christianity in Nepal*

Nepal is the world's only Hindu Kingdom. Serving in Mission (SIM) International reports that:

Churches indigenous to India worked in Nepal prior to any mission endeavors from Europe. Baptist missionary William Carey produced the Nepali New Testament in 1821. The Church of Scotland established a strong base among the Nepalis and Lepchas at Darjeeling in 1835. Over the next century, Darjeeling played a vital role in facilitating the birth and growth of the church in Nepal, Bhutan, and Assam. The first recorded Nepalis who began to follow Christ were some Kathmandu merchants in Lhasa, Tibet.

When *Gurkhas*, world-renowned Nepali soldiers, served in the British army in Malaysia, Singapore and elsewhere, many became Christians, and on their return to Nepal, moved back to remote areas. The church owes much of its origin to a Nepalese army officer, Prem Pradhan, who converted to Christianity in India and returned to Nepal in 1959. His evangelistic activity led to conversions and eight baptisms. Because this was illegal, both he and the converts were imprisoned for nearly five years. More conversions took place through Pradhan while he was in prison, and he continued to share the love and forgiveness of Jesus after his release.

Nepal is part of the Roman Catholic diocese of Patna in India. There were no Catholic parish priests or sisters, but 15 American Jesuit priests came in 1951 at the government's invitation to open a school.<sup>1</sup>

The Department of Foreign Affairs and Trade also reports that:

A. THE CONSTITUTION OF THE KINGDOM OF NEPAL, 1990 GUARANTEES RIGHT TO RELIGION AS ONE OF THE FUNDAMENTAL RIGHTS OF CITIZENS OF NEPAL. PART 3 SECTION 19 OF THE CONSTITUTION STATES QUOTE EVERY PERSON SHALL HAVE THE FREEDOM TO PROFESS AND PRACTISE HIS OWN RELIGION AS COMING DOWN TO HIM FROM PERENNIAL PAST HAVING DUE REGARD TO THE TRADITIONAL PRACTICES. PROVIDED THAT NO PERSON SHALL BE ENTITLED TO CONVERT ANOTHER PERSON FROM ONE RELIGION TO ANOTHER.

PRESENTLY, THERE IS NO RESTRICTION IN PRACTISING CHRISTIANITY IN NEPAL IF IT IS BEING FOLLOWED BY ONE'S SELF WILL, BUT CONVERTING ANOTHER IS PROHIBITED. THE NUMBER OF PEOPLE PRACTISING CHRISTIANITY IN THE COUNTRY IS INCREASING.

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<sup>1</sup> . <http://www.sim.org/country.asp?CID=68&fun=1>

B. BEING A HINDU KINGDOM, THE CONSTITUTION OF NEPAL HAS ASSIGNED A SPECIAL STATUS TO COW. COW IS DECLARED AS THE NATIONAL ANIMAL IN THE CONSTITUTION AND IS PROVIDED LEGAL PROTECTION. PART 5, SECTION 7 OF THE MULKI AIN, 1962 (NEPALESE CODE OF CONDUCT) DEALS WITH THE LEGAL PROVISIONS RELATING TO FOUR LEGGED ANIMALS.

RELEVANT ARTICLES OF THIS SECTION ARE TRANSLATED INTO ENGLISH, AS FOLLOWS:

ARTICLE 1

IT IS PROHIBITED TO KILL COW/OX, OR PERMIT ANOTHER TO KILL, OR TO ACT TO KILL OR EVEN TO TAKE TO FOREIGN COUNTRY WITH THE INTENTION TO KILL OR TO SELL.

ARTICLE 4

IF ANY PERSON RAISES ARMS OR OTHER MEANS TO KILL COW/OX INTENTIONALLY THE ONLOOKER SHALL PROHIBIT THE PERSON FROM KILLING. IN CASE THE INTENDING KILLER REFUSES, THE ONLOOKER WILL NOT BE LIABLE FOR PUNISHMENT IF HE KILLS THE INTENDING COW/OX KILLER. HOWEVER, KILLING PEOPLE IN OTHER CIRCUMSTANCES IS PROHIBITED. THE CONVICT SHALL BE CAPTURED AND HANDED OVER TO THE CONCERNED OFFICE.

ARTICLE 11

PERSON KILLING COW/OX INTENTIONALLY OR PERMITTING ANOTHER TO KILL SHALL BE IMPRISONED FOR 12 YEARS AND 6 YEARS, RESPECTIVELY.

ARTICLE 19

THE CASE AGAINST COW SLAUGHTER SHALL BE PETITIONED WITHIN SIX MONTHS. AFTER THE EXPIRY OF THIS TIME PERIOD THE CASE SHALL NOT BE ENTERTAINED.

C. IF POLICE WERE INVOLVED AT THE SCENE THEY USUALLY WILL ARREST THE COW KILLER AND TAKE HIM TO COURT FOR A COURT CASE. THE COURT SHALL THEN ISSUE THE ARREST WARRANT, AS IS THE PRACTICE WITH OTHER CRIMINAL CASES.<sup>2</sup>

There are more recent reports that support the views expressed by DFAT. In a report in 2000, Anil Stephen reporting for *Christian Today* wrote as follows:

It is Saturday in Nepal, and hundreds of people dressed in their best churchgoing clothes crowd together outside a large hall in the capital city of Katmandu.

Saluting each other with folded hands and saying "Jai Masih" (the Nepali expression for "Praise the Lord"), they take off their shoes, making their way inside to squat on a carpeted floor just before 10:30 a.m. Except for a handful of expatriates, the Nepali Isai Mandali (Gyaneshwor) Church is filled with first-generation Nepali Christians who have braved social and religious constraints to follow Jesus Christ. Every inch of space is taken

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<sup>2</sup> DFAT, Country Information Report No.19/97: *Nepal: Cow killing in Nepal* – CIS information request No.NPL3987, (from DFAT cable of 10 January 1997), 14 January. CISNET: Nepal CX21069

and those who are late reluctantly sit outside. At the first strains of a Nepali song, all 2,000 hands, young and old, lift in praise to God. This amazing sight brings tears to my eyes. Ten years ago an open church meeting of this nature would have been impossible.

...

From 15,000 in 1970 to an estimated 400,000 Christians today, Nepal has one of the fastest-growing Christian populations among the 3.6 billion people throughout Asia's 51 countries, according to scholars in Christian missions.

...

Since most Nepali congregations are the result of work by Nepalis themselves, Christians from Nepal are evangelists at heart. Nepali Christians—many of whom are illiterate—share the gospel frequently and informally, sometimes over a cup of hot tea. Crusade-style evangelism is unknown to them.<sup>3</sup>

## **FINDINGS AND REASONS**

The central claim of the applicant is that he is a Christian and that he faces persecution from Maoists rebels in Nepal for preaching in an area under their control without their consent, and he also faces persecution from Hindus in Nepal for preaching the Gospel. There are two fundamental elements in his claim. The first is that he faces persecution for his implied political opinion. The second is that he faces persecution because of his religious beliefs. His claims necessarily involve a threshold question of whether he is indeed a Christian.

### ***Is the Applicant a Christian?***

During the hearing, the applicant claimed that he was born a Christian and has always been a Christian. He told the Tribunal that indeed, while at school, he was more interested in pursuing Christianity and that his interest in Christianity became stronger when he was baptised. He also told the Tribunal that he had spent a lot of time doing Christian activities. The Tribunal notes that when asked to recite any sections of the Bible which he would normally use in preaching in Nepal to the communities he claimed to have visited, the applicant could not readily recite such

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<sup>3</sup> *The Church at the Top of the Mountain*,  
<http://www.christianitytoday.com/ct/2000/004/2.56.html>.

verses. The Tribunal however also notes that the applicant was able to name specific elements of the Bible one would normally expect of a Christian.

The Tribunal also regards it as important that the applicant's local pastor came to provide testimony to support the applicant's claims that he has been a Christian and that he still practises by going to church here in Sydney. On the evidence before the Tribunal, the Tribunal accepts that the applicant is a Christian. The Tribunal however notes that the issue is not so much whether the applicant is a Christian or not. The issue is, being a Christian, does the applicant face persecution in Nepal. The other issue is whether the applicant was threatened with conscription by Maoist rebels because he was involved in preaching Christianity in an area supposedly under their control and whether he remains of adverse interest to them.

#### ***Claims of fear of persecution by Maoists***

The applicant claimed that he and a group of friends were abducted and beaten up by Maoists rebels for preaching in an area without the authority of the local commander. He managed to escape and for that the Maoists are looking for him and are likely to subject him to punishment unless he goes to join their ranks. In support of his claims, the applicant alleged that the Maoists presented a letter to his mother but that his mother burnt the letter. As the Tribunal noted to the applicant in the course of the hearing, these claims are not plausible. The Tribunal accepts that given his Christian background and his claim that he was involved in Christian activities, it is probable that he may have been engaged in Christian activities in the villages. The Tribunal also accepts that it is probable that any such activities could have incurred the displeasure of Maoist commanders in the area. However, the Tribunal sees it as implausible that having escaped from the Maoists in an area some six to seven hours by road from his hometown, the Maoist rebels would have gone looking for the applicant simply because he managed to escape from them.

The applicant's written testimony claimed that the Maoist rebels were, and are still adversely interested in him because they fear that he might reveal information to the authorities. The applicant further claimed that the abduction of his group and escape were reported in the local newspaper and that the Maoists have accused him of being the person who leaked the news to the media. As the Tribunal noted to the applicant in the course of the hearing, Maoist abductions are commonplace in Nepal. It therefore seems implausible that the Maoists would be adversely interested in the applicant simply because somehow the media in the locality reported that some people have been abducted.

The Tribunal further notes that the applicant left his home town, and then travelled to another city. He was able to stay in the other city for some time before he left to come to Australia. In the Tribunal's opinion, the applicant could have stayed in the other city to avoid any difficulties with the Maoists if indeed he was being pursued as he claims. That he was able to stay in the other city until his departure to Australia suggests that he was not under any threat from the Maoists while in that city.

The Tribunal notes the applicant's explanation that the Maoist rebels have connections and network all over Nepal and that he would have been found if he had continued to live in the city. However, the Tribunal does not accept this explanation. In the Tribunal's opinion, the applicant's profile and background do not provide a plausible reason for the Maoist rebels to go to all that trouble to look for him all over Nepal as he claims.

The Tribunal is also mindful of the applicant's claims that the Maoist rebels wrote a letter and presented it to his mother asking for his return. As the Tribunal noted in the course of the hearing, this is not plausible. Given the security conditions in Nepal it does not seem plausible that the Maoist rebels would have written and presented a letter to the applicant's family asking that he comes to join them else he would be punished.

The Tribunal's conclusions about the implausibility of such a letter being written to the applicant's mother are reinforced by the fact that the applicant was not able to produce the letter itself but claimed that his mother burnt the letter. In the Tribunal's opinion, it does not make sense for the mother to burn a letter which claims that his son has done something which offends the Maoist rebels only because she feared that the authorities might associate her with the rebels. The evidence as presented by the applicant does not provide a credible basis for his claims. The Tribunal rejects them accordingly. The Tribunal is not satisfied on the evidence that the applicant is of adverse interest to the Maoist rebels.

### ***Persecution on Religious Grounds***

The applicant also claims that he fears persecution because of his religious beliefs. He claimed that he has was attacked once whilst preaching and that he fears that on his return to Nepal he would be attacked again and that in any case the laws of Nepal would prevent him from preaching the Gospel. During the hearing, the applicant claimed that he believes in the sharing

of his faith and that the proper thing to do as a Christian in his religion is to take to the road and spread the Gospel. He claimed that he is unable to do so in Nepal and will not be able to do so on his return to Nepal.

The Tribunal accepts that it is more probable than not that the applicant and his colleagues may have been attacked while preaching in Nepal. The Tribunal's view in this regard is based on independent country information that indicates that frequently Christians have been attacked for proselytising in the country. The Tribunal however notes that in several instances too, where Christians have been brought before the courts in Nepal for proselytising, such Christians have been acquitted where insufficient evidence has been found against them. The Tribunal notes that under the Nepalese Constitution it is an offence to proselytise. In one respect this could be described as a law of general application. However, the Tribunal is sympathetic to the view that the Nepalese Constitution's prohibition of proselytising in the country is unduly geared against Christians and any other religion that engages in proselytising as an element in its beliefs or faith. The Tribunal is mindful of the fact that in the Hindu religion which is the predominant religion in Nepal, the concept of proselytising is unknown. It therefore would seem to be the case that the provisions in the Constitution that prohibits proselytising is directed at those religions that permit proselytising. In this regard while the Constitutional provision has an element of a law of general obligation, it is unduly skewed towards particular religions in the community whilst exempting or not affecting the dominant religion in that community. The Tribunal is accordingly sympathetic to the view that Christians who insist on spreading or sharing their faith as an element of their religious practice run an unduly high risk in the community of being persecuted for their religious beliefs.

On this basis the Tribunal has come to the conclusion that there is merit in the applicant's claims that he faces persecution in Nepal on the grounds of his religious beliefs should he return to the country. Accordingly the Tribunal is satisfied that the applicant holds a well-founded fear of persecution should he return to the country.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

## **DECISION**

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's ID: PRMHSE