

1215633 [2012] RRTA 1083 (3 December 2012)

DECISION RECORD

RRT CASE NUMBER:	1215633
DIAC REFERENCE(S):	CLF2012/173631
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Giles Short
DATE:	3 December 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2012 refusing an application by the applicant for a Protection (Class XA) visa. The applicant, who is in immigration detention, was notified of the decision under cover of a letter [on the same date] and the application for review was lodged with the Tribunal [in] October 2012. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The applicant is a citizen of Nepal. He arrived in Australia in July 2007 and he applied for a Protection (Class XA) visa [in] September 2012.

RELEVANT LAW

3. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.’

Refugee criterion

4. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
5. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as 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, is unable or, owing to such fear, is unwilling to return to it.'
6. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.
7. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
8. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

9. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute 'persecution' for the purposes of the Convention, the threat of harm to a person:

'need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution' (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

10. Thirdly, the applicant must fear persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion' Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless 'that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution' It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
11. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'

12. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

13. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. 'Significant harm' for the purposes of that definition is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to

‘cruel or inhuman treatment or punishment’ or to ‘degrading treatment or punishment’. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are further defined in subsection 5(1) of the Act.

CLAIMS AND EVIDENCE

14. The Tribunal has before it the Department’s file CLF2012/173631 relating to the applicant. The applicant appeared before the Tribunal [in] November 2012 to give evidence and present arguments. The Tribunal was assisted by an interpreter in the Nepali and English languages although the applicant gave much of his evidence in English. The applicant was represented by [agent and agency deleted: s.431(2)], a solicitor and registered migration agent. [Agent deleted: s.431(2)] attended the hearing.

The applicant’s original application

15. The applicant is [age deleted: s.431(2)]. In his original application he said that he had completed one year of [Qualification 1] at a college in Nepal before coming to Australia in 2007 to study [qualification deleted: s.431(2)]. He said that from birth until he had left Nepal in 2007 he had lived at the same address in [suburb deleted: s.431(2)] in Kathmandu.
16. In a statement accompanying his application the applicant said that when he had been studying at the college in Kathmandu he had become involved in the Young Communist League (YCL). He said that he had helped them to distribute pamphlets and in ‘policing’ around Kathmandu. He said that he had borrowed 50,000 to 60,000 Nepalese rupees from the YCL but he had not been able to pay them back. He said that later he had realised that the YCL was harming the local people and taking money from them. He said that they had carried weapons and when he had found out that they had kidnapped a man for ransom he had wanted to leave the organisation.
17. The applicant said that he had confronted his friend who had been responsible for getting him involved and had told him that he wanted to leave but he said that his friend had insisted that he could not leave because he was familiar with the internal workings of the organisation. He said that other members of the organisation had started to threaten him. He said that because he had been scared of them and had wanted to continue his education and had not wanted ‘to take up arms’ he had decided to apply for a visa to leave the country. He said that after this he had stayed at home and had not travelled outside much except to organise his visa.
18. The applicant said that he feared that if he returned to Nepal they would find him, identify him and try to kill or torture him because they knew that he did not agree with them, that he had internal information and that he had refused to join their organisation. He said that the members of the YCL were more powerful now because of the political situation in Nepal and they would therefore be able to work with the authorities to find him and harm him. He said that the friend who had got him involved was angry with him because this friend felt that he had betrayed this friend.
19. The applicant said that the authorities could not protect him because the Maoists had their own system which could not be controlled by the government. He said that he could not move to another part of Nepal because the Maoists had a strong network and would be able to find him. He also said that as a member of the Newar community he would not be accepted by his family because he had had a child out of wedlock with someone outside the Newar caste.

20. The applicant said that he had ceased studying in Australia because he had run out of money. He said that he had gone to various towns in Queensland to earn money. He said that he had been scared that he would be sent back to Nepal because his visa had expired. He said that he had not known that he could apply for a protection visa. He said that he had met the mother of his child (whom he described as his fiancée) in July 2009 and that they had started a relationship soon after that. He said that they had had a child on [date deleted: s.431(2)]. Elsewhere in his application (in answer to question 6 on Part B and in Schedule A to Part C of the application form) he said that he had been convicted [in] August 2012 of [conviction deleted: s.431(2)] but he provided no further details.

The applicant's evidence at the Compliance Client Interview

21. At a compliance client interview [in] August 2012 the applicant is recorded as having said that he had never lived with the mother of his child 'because I cannot marry her and I cannot support her and she also does not know that I do not have a job'. He said that he was due to appear in court for [conviction deleted: s.431(2)]. Asked if there were any reasons why he could not return to Nepal he said that some people were looking for him because he had had a fight and he owed them money.

The applicant's evidence at the Departmental interview in relation to his application for a protection visa

22. The applicant was interviewed by the primary decision-maker in relation to his application [in] September 2012. The applicant said that he had become active in the YCL in 2005. The primary decision-maker put to him that the YCL had not been reactivated until November 2006. The applicant said that this had been the time when they had formed legally but they had been doing their activities before that. He said that a friend of his had encouraged him to become involved. He said that he had joined one seminar and he believed that he had been brainwashed. He said that from what he could remember they had talked about how they were going to act, how they were going to work and what they were trying to do. He said that nothing had particularly stuck in his mind.
23. The applicant said that he had only known the friend who had introduced him to the YCL for a year and a half and that this friend's name was [name deleted: s.431(2)]. He said that he had last been in contact with this friend before he had come to Australia. He said that this friend had been an active member of the YCL but he did not know for how long this friend had been a member. The applicant said that he had not known much about this organisation before he had attended the seminar because he did not really like politics. He said that he had known that Nepal had been suffering from the civil war. He said that he had chosen to join this organisation voluntarily after attending this seminar. He said that he had started working with them straight away.
24. The applicant said that he had formally joined the YCL. He said that after attending this seminar he had 'put my name in there' and had started working with the social group. He said that he had not been given any identification as a member of the YCL because he had not wanted to be recognised by his family as working for this organisation. He said that his father worked for another organisation and his father was very strict. He said that his father worked for the '[employer]' He said that he had never undergone any form of training with the YCL. He said that this had been why he had left the YCL, because they had asked him to hold arms. He said that he had been involved in the YCL for roughly one and a half years.

25. The applicant said that he had been involved in printing pamphlets for the YCL. He said that he had printed these out and had handed them to the local Nepalese people. He said that he had printed these pamphlets on computers but he then said that there had been a printing press. He said that this had been a local printing press where they had printed books. He said that there were a lot of small businesses like this. He said that besides distributing pamphlets he had gone to the community to make them aware and to give them education, telling them about the current situation and what role they would play if they were involved in the YCL. Asked to provide more detail the applicant said that by giving them education he meant saying what place they would hold if they got involved. He said that he had told them about the situation they were suffering and had said that if they got involved and helped they could found a new Nepal.
26. The applicant said that the government was corrupt and that everyone knew but no one raised their voice so this organisation was going for a local people's movement. He said that he had told people that this was why they were there and they were trying to help everyone in Nepal for a better future. He said that he had been making them aware of what the government had been doing and how corrupt it was. Asked what evidence there had been of corruption the applicant said that everybody knew. He said that the royal family had been executed and nobody could figure out what had happened. He said that a lot of people had been killed, everybody had raised their voice and then there had been a curfew and it had disappeared.
27. The primary decision-maker referred to the applicant's claim that his friend had told him that he could not leave because he had been familiar with the internal workings of the organisation. The applicant said that he had known their meeting places where they had organised their seminars and meetings. He agreed that the YCL had been operating openly at the time but he said that when it came to the Maoists and other big members you did not go openly. Apart from this he said that he had known the people who had worked for the YCL, voluntary and non-voluntary, because he had met a lot of people and he had known a few people from the government places who had been helping them.
28. The applicant said that he had been involved in demonstrations and protest rallies with the YCL a few times. Asked for some examples the applicant said that these had not really been rallies but 'running with their cars with their banners' He said that he had not been involved in any big demonstrations or protest rallies. He said that he had ended his involvement with the YCL at the end of 2006 'when they formed that terrorist group' He confirmed that he had not left Nepal until July 2007.
29. The applicant confirmed that he claimed that he had borrowed money from the YCL. He said that this had been for social activities, for pamphlets and for lunch for the members, whatever they had needed. The primary decision-maker put to the applicant that the YCL would have funded these activities so if they had given him money for these activities they would not have expected him to repay it. The applicant said that he had taken this money to do these activities but later on when he had chosen not to be a part of them then they had put this money on his personal fund, saying that he had used it. He said that the sum involved had been 50,000 to 70,000 Nepalese rupees.
30. The applicant said that they had started calling him on the telephone and had asked him why he was avoiding them. He said that they had been trying to encourage him and they had been asking why he had not come down there. He said that they had threatened him. The primary decision-maker put to the applicant that he had said in his application that he had lived at the same address in Nepal from birth until he had left Nepal. The applicant said that no one had

asked him. He said that they had probably been looking for him but he had hidden himself. He said that he had got his visa and he had run out of the country in two days.

31. Asked who he feared, the applicant said that he feared his former friend who had been an active member and who had encouraged him. He said that he felt that he had betrayed his friend by leaving the organisation. He said that he feared the YCL because he held a lot of information and they were looking for him. He said that there was still no peace treaty. The primary decision-maker noted that there had been no insurgency since 2005. He suggested that the YCL was not operating any more although the remnants of the YCL were engaged in kidnapping people for criminal purposes. The applicant suggested that what was really happening was not published in the newspapers.
32. The primary decision-maker referred to the fact that at the compliance client interview, when the applicant had been asked if there were any reasons why he could not return to Nepal, he had said that some people were looking for him because he had had a fight and he owed them money. The applicant said that this was wrong information. He said that he did not like the way the Department worked or the fact that they had said that he was a threat to the community.
33. The applicant said that to be accepted in the Newar community he had to marry within the community. He said that he had told his parents about the child. He said that his mother had been happy for him but his father had not been. He said that his father had been violent towards him and had made all the decisions for him. He said that he had wanted to study [subject deleted: s.431(2)] but his father had not let him. He said that the Newar community was not going to accept him. The primary decision-maker put to the applicant that being ostracised by his community did not amount to persecution. The applicant said that he no longer talked to his father but he still talked to his mother.
34. After a break to consult his representative the applicant said that the YCL was still active in big numbers in the western part of Nepal, 'the border side'. He said that the number of members was rising every day. He said that no one knew how many members of the YCL there were because they did not wear any formal dress to indicate that they were members of the YCL. He said that they had already challenged the whole nation with the government and the system running around openly with their weapons in the towns and they had no fear from anyone. He said that the government could not do anything.
35. The applicant's representative referred a report from the Carter Center released in 2011 which she said addressed the issue of whether youth wings of political parties were still active. She said that there was an acknowledgement that there had been a decrease since 2010 but that there had been reports of the YCL being involved in activities aimed at obtaining financial gain. She submitted that, even though it might not be apparent in the international media, the YCL might have gone underground. She submitted that the applicant would be 'vulnerable to the underground activities that still permeate in Nepal'.
36. The applicant said that the YCL had already been declared as a terrorist group because of what they had done. He said that they asked for money from people and they kidnapped people. He said that this was why he had not wanted to be a part of this organisation. The applicant's representative submitted that the applicant would be at risk of harm if he returned to Nepal because of the strong opinions he held about the YCL. She submitted that the YCL had power because it was part of the government structure and that someone who was a dissident would be at risk.

Submission to the Department

37. In a submission dated [in] September 2012 the applicant's representative quoted from the Carter Center report to which she had referred at the interview. The report said that most YCL members had been affiliated with the Maoist party prior to joining the YCL and that the Carter Center had met YCL members who were former PLA combatants.

The applicant's evidence at the hearing before me

38. At the hearing before me the applicant confirmed that he had been born in Kathmandu and that he had gone to school there. He said that he had completed Grade 12 at [college deleted: s.431(2)] in Kathmandu in 2004 and that he had then studied for [Qualification 1], also at [college deleted: s.431(2)]. He said that he had only completed two years of this qualification, from 2004 to 2006, because he had been in fear for his life. He said that after the middle of 2006 he had been in hiding. He confirmed that he had actually been living at his parents' house in [suburb deleted: s.431(2)] during this time. He said that his father worked at the [employer deleted: s.431(2)] in Kathmandu but that he did not know what his father did there.
39. The applicant confirmed that he had become involved in the YCL through a friend who had encouraged him to join this organisation. He said that this had been approximately in 2005. He said that he had known this friend for around two years before he had joined the YCL, just from the community, not from the college where he had been studying. He said that they had just gathered together with other friends in cafeterias or other places. He said that he had become a member of the YCL by which he said he meant that they had had his information. He said that they had not given him any identification card stating that he had been a member.
40. The applicant said that as a member of the YCL he had been involved in social work or social activities by which he said he meant he had been encouraging people and making them aware of what was happening inside the country and how they could help the YCL. He said that he had also been involved in distributing pamphlets. He said that he had just talked to local people in Kathmandu. He said that they would go to the community to distribute their pamphlets and they would let them know how they could help the YCL. He said that they had printed the pamphlets at a local printing business although sometimes they had used computers to print them. He said that the 'active members' of the YCL had written what was in the pamphlets.
41. I asked the applicant what the difference was between him and an 'active member'. The applicant said that the active members held all the activities and they let the members know what the members were going to do. He said that the members were just the workers. He said that the active members would give them information about what to say and how to encourage people and all the content in the booklets and pamphlets would be designed by them. He said that, once he and the other members had been given the pamphlets with all the instructions, they would go to the designated places in Kathmandu to distribute the pamphlets.
42. The applicant said that he had had meetings with the active members in meeting places in Kathmandu. He said that there were a few places which people did not know where these meetings had been arranged. He said that these were secret places which government people and the local people did not know about. He said that these were hiding places in the bush.

He said that there were a lot of hills next to the east side of Kathmandu and they had met on top of these hills. He said that the YCL was not a government organisation and around that time it had been fighting against the government so obviously they had had to hide to hold these meetings. You could not go into public areas and openly have a meeting.

43. I put to the applicant that he was telling me that he had been openly distributing pamphlets on behalf of the YCL. The applicant said that the active big leaders had come there to have meetings with them and they had been the most wanted people at that time. I put to the applicant that this was not making much sense to me: he was saying that he and the other members of the YCL had been able to work quite openly, distributing pamphlets and going around talking to people. The applicant said that he had not been doing any violence. He said that the people with whom he had been meeting had been the violent people. He said that he knew this because there had been information at that time about what they had done.
44. I asked the applicant if he had known that this had been a violent organisation when he had become involved. The applicant said that he had not known. I asked him why he had thought that he had been meeting with these people in the hills. The applicant said that he had wanted to do something. He said that he had been an 'active member on the social thing'. He repeated that he had been distributing pamphlets.
45. I indicated to the applicant that it was very important whether I believed that he was telling me the truth. I put to him that he was telling me on the one hand that he had been able to campaign quite openly on behalf of this organisation, handing out pamphlets, but that on the other hand the people who had been telling him where to take these pamphlets and who had given him the text of these pamphlets had been in hiding in the hills. The applicant said that these people had been the big bosses and that they had been wanted people. He said that the people had probably been looking for them because this organisation was against the government. He said that they had been trying to do something for the people and against the government.
46. I put to the applicant that this was what he had been saying he had been trying to do as well: he had said that he had been trying to do something for the people and against the government. However he had not been a wanted person. He was saying that he had been able to do this quite openly. I asked the applicant again why the police would have been looking for the people who had been giving him these pamphlets. The applicant said that these people had been the big members of the organisation. He said that when you started an organisation there were some people who were the head of the organisation. He said that there had been active members who had been the leaders and who had organised everything. He said that they had needed to be safe so that the organisation could still run.
47. I asked the applicant what the pamphlets had actually said. The applicant said that it had been information about what had been happening in Nepal. Pressed for further details he said that the pamphlets would basically highlight the situation which Nepal had been going through at that time. He said that they would encourage people in getting more awareness and say that everyone should be united in order to perform social activities. He said that the pamphlets had also provided information about the People's Movement, for example about organising rallies and participating in those kinds of activities.
48. The applicant said that he had attended rallies. He said that he had been with the YCL people in their cars, with their banners, just riding around in the capital. He confirmed that he claimed that even though the leaders of the organisation had had to hide in the hills the YCL

people had been riding around Kathmandu with their banners. He said that the leaders came from the Maoists and they had formed the YCL later on. He said that it was the youth generation for the Communists. He said that the leaders who came from the Maoists had been involved in the wars and probably in other crimes. He said that they had been called terrorists before they had started this organisation.

49. The applicant confirmed that when he said that he had attended rallies he meant that he had ridden around with YCL people in cars with their banners. He said that the pamphlets had contained information about where and when these rallies would be taking place. He said that they would go around in their cars distributing those pamphlets to people. He said that they would just throw the pamphlets on the street so that people could pick them up.
50. I asked the applicant what sort of rallies these pamphlets had been advertising. The applicant said that there had been many members like him who would go to different communities to distribute pamphlets and to try to make people aware of what was going on. I noted that he had told me that these pamphlets had been advertising rallies and I asked him again what sort of rallies these had been. The applicant said that they had been sometimes in front of the Royal Palace and sometimes in the main streets. He said that sometimes you would even have to block the main streets. I asked him if he had taken part in these rallies and he said that he had, a few times or one or two times.
51. I asked the applicant why he would only have taken part in these rallies once or twice if he had been involved in the YCL and he had been distributing pamphlets telling people about these rallies. The applicant said that he had been a part of this organisation but he had also had his own personal life too where he had been doing [Qualification 1]. He said that when he had been able to join them he had done so. I asked him if he was saying that he had had time to distribute pamphlets telling people about rallies but not to go to the actual rallies. The applicant said that he had distributed these things and he had joined them when he had been able but he had had his personal life where he had had to study and to be with his family too. He said that he had been working with them or for them but he had had to do things in his personal life as well.
52. I referred to the fact that the applicant had also said in the statement accompanying his original application that he had been involved in 'policing' around Kathmandu. The applicant said that this was not correct. He repeated that he had been involved in different kinds of social activities, distributing pamphlets and those sorts of things. He said (in contrast to his earlier evidence) that he had been an 'active member' of the YCL. He said that he had had a 'crew' who used to go around distributing those pamphlets to the people. He said that he had not been involved in violence and this had been why he had left the YCL.
53. I referred to the applicant's evidence that he had borrowed money from the YCL. The applicant said that this had been for the work which they had been doing, for printing and for looking after his crew. He said that later on when he had decided not to be a part of this organisation they had started asking for that money back. He confirmed that the sum involved had been 50,000 to 70,000 Nepalese rupees. I put to the applicant that this seemed a very large sum for things like printing pamphlets. The applicant said that it had not just been for shop printing but for fuel, food and looking after his crew. He said that whenever he had been short of money he had just asked them and they had given him money.
54. The applicant said that he had left the YCL at the end of 2006 but he had made up his mind to leave before this when they had asked him to hold arms and to go for training. I noted that

the applicant had told me earlier that he had ceased his studies in the middle of 2006 because he had been in fear for his life. The applicant said that when he had decided not to be a part of this organisation he had known that he might be threatened so he had just stopped studying and had started applying to study overseas. He said that during the second half of 2006 he had been hiding from the YCL but he had been very scared to tell them that he had been leaving. He said that he had stopped going to the meetings and working with them. He said that he had told them that he was busy but he had also stopped going to the college.

55. The applicant said it had been at the end of 2006 that he had actually told the friend who had encouraged him to join the YCL that he was leaving. He said that he had told this man and his friends that he had not joined the organisation to hold arms or to go for training or to ask for ransom: he had joined the organisation to help people. He said that he had met this friend on the street.
56. The applicant confirmed that he had continued living at his home until he had left Nepal in July 2007. He said that the YCL had threatened him after he had told them that he was leaving. He said that one time they had called him on the telephone and one time he had met them on the street. He said that the telephone call had also been at the end of 2006, but after he had told his friend whom he had met in the street that he was leaving. He said that he was not sure because they used different calendars. I invited him to tell me when this had been in the Nepalese calendar and he said that he would have to have a look because it was completely different.
57. The applicant said that in this telephone call they had told him that he had to come back, that he could not leave and that he had to go for the training. He repeated that he had been an 'active member' doing social work and he said that he held a lot of information which would probably make them fear that he could go against them. I put to the applicant that he had told me that the 'active members' were the more senior people who had given the members like him instructions. The applicant confirmed that he claimed that he had been an 'active member' but he then said that the 'active members' were the big leaders from the Maoists like Sagar whom they had called 'Comrade'. He said that this person had controlled the YCL at the time when he had been a member. He then said that these leaders were the 'big members' and that people like himself had been the active members on their part of the job.
58. I asked the applicant if they had said anything else in this telephone call. The applicant said that his friend who had encouraged him had just told him that he could not leave. He repeated that he had told them that he did not want to go for training or to handle weapons. I asked the applicant if any threats had been made and he said that no threats had been made at that time but the caller had been speaking to him very aggressively. He said that he had not received any telephone calls after this because he had just turned off his mobile phone. I asked him if he was saying that he had turned off his mobile phone for six months. The applicant said that he had not. He said that he did not know if they had called him again. When I queried this he claimed that he had turned off his mobile phone for six months.
59. The applicant said that later on, probably in 2007, around a month after the telephone call, when he had seen them on the street, this friend and another few people had had knives and they had been carrying guns although they had not shown him this openly. He said that they had hidden these under their shirts. He said that they had threatened him saying that he had to come back and that he had to pay all this money back. He said that although they had had knives and guns they had not attacked him. He said that they had told him that if he did not

come back they would come for him. I asked him if anything further had happened after this and he said that he had just been looking to come here as soon as possible.

60. I noted that he had said that they had told him that if he did not come back they would take some action and that he had stayed in Nepal for another six months but nothing had happened. The applicant said that he had hidden himself. He confirmed, however, that he had stayed at his parents' home.
61. I asked the applicant what his intention had been when he had come to Australia. He said that he had wanted to start a new life and he had been studying [qualification deleted: s.431(2)]. I asked him if he had been intending to return to Nepal after he had completed his studies. The applicant said that he had not been thinking about this because he had had to study and to work to pay his bills. He said that he had been glad that he had been out of the country to escape from these people. He confirmed that he had not really had a plan. He said that he had just wanted to finish his studies first.
62. I referred to the applicant's evidence that he had stopped studying because he had run out of money and I asked him if his father had not been paying for his studies. The applicant said that his father had paid for two semesters and for his ticket here and everything but after that he had stopped asking his father because they did not get along very well. I put to the applicant that he was saying that he had needed to stay out of Nepal because of these problems that he had had and that his father had paid for him to come and study here. I asked him why he would not have asked his father to pay for him to continue his studies. The applicant repeated that he had not wanted to ask his father for anything because they did not get on very well.
63. I noted that the applicant had said that he had come here to study and I asked him what he had been planning to do. The applicant said that in his holidays he had gone somewhere to work to try to save some money. He said that he had been hoping to save enough money to continue studying but he confirmed that he had not in fact resumed his studies. He confirmed that his student visa had expired in 2009 and he said that at that time he had not really known what he had been going to do. He said that he had not been able to go anywhere to seek help. He said that he had had too much trouble. He said that every place where he had gone he had got stuck with no money and no job.
64. The applicant said that after he had finished his second semester he had gone to [Location deleted: s.431(2)] to work fruit picking but after the season had ended he had had no job so he had got stuck over there for a while. He said that when he said that he had been stuck he did not mean that he had been unable to leave: he had had enough money to return to Brisbane but not to pay his tuition fees. I referred again to the fact that the applicant's student visa had expired and he had no longer been studying and I asked him what he had thought he had been going to do. The applicant said that he had just been surviving. He said that he had not had a choice and he had not known what to do.
65. I put to the applicant that he could have sought advice from someone. The applicant said that he had been scared to seek help. He said that if he could have he would have. I put to the applicant that he was much better placed than a lot of people to seek advice because he spoke English. The applicant said that he had been scared that if he told someone his personal things this person might do something to him. He said that he had could not tell people that his visa had expired. I put to the applicant that my difficulty was that it was not clear to me

what he had thought he had been going to do. The applicant repeated that he had not known and that he had not been able to seek help.

66. I put to the applicant that I did not understand why he had not been able to seek help. The applicant said that he had been scared to go back to Nepal. I put to him that this would have been a reason for him to have sought advice from someone with regard to how he could stay here. The applicant repeated that he had been very scared. He said that if he had told somebody that he had no visa they might have informed the Department about him.
67. I referred to the applicant's evidence that he would not be accepted by his family or the Newar community if he returned to Nepal because he had had a child out of wedlock with someone outside the Newar caste. I put to the applicant that this sort of social ostracism would not, without more, amount to persecution for the purposes of the Refugees Convention (see *Guitta Levy v Minister for Immigration and Multicultural Affairs*, unreported, Federal Court, Tamberlin J, 21 December 1998). The applicant said that he was from the Newar community and you had to marry from the same caste, the Newar caste, otherwise you were out of the community. He said that the mother of his child was not even Hindu. He said that this was how it went over there: it was a religious thing. If you married outside your caste they did not accept you.
68. I noted that, as I had explained at the beginning of the hearing, for the purposes of the Refugees Convention I had to look at whether he feared persecution involving 'serious harm' (as required by paragraph 91R(1)(b) of the Act) and for the purposes of complementary protection I had to look at whether there was a real risk that he would suffer significant harm (as defined in subsection 36(2A) of the Act). I put to him that the fact that his family and the community might not want anything to do with him would not of itself amount to persecution involving serious harm or to significant harm.
69. The applicant said that they might humiliate him, they might discriminate against him and they might torture him because he had broken his religion or his caste by having a child with someone not of his religion and not of his caste. He said that his father had been violent towards him before he had left Nepal and that his father used to decide everything for him. He said that when he had told his father that he had a child his father had not been very happy and had not wanted anything to do with him. He said that his father might hit him or bash him or torture him.
70. I referred to the applicant's evidence that he had become involved in the YCL in 2005 and that he had left at the end of 2006. I put to him that the information available to me indicated that the YCL had been inactive at that time (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011). The applicant referred to the fact that it had become 'legally active' in November 2006 but he said that they had been active and they had been doing their jobs all around Nepal.
71. I put to the applicant that the information available to me indicated that after the Maoists had launched their People's War in 1996 the members of the YCL had been recruited into the People's Liberation Army and the YCL had been made inactive. I put to him that after the party had joined the peace process and the People's Liberation Army had been required to stay in cantonments, the YCL had been reactivated in November 2006 and it had been composed of members of the People's Liberation Army whom the Maoists had not wanted to

stay in cantonments under the supervision of the United Nations Mission in Nepal or UNMIN (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011; International Crisis Group, *Nepal's Political Rites of Passage*, Asia Report No. 194, 29 September 2010, page 9).

72. The applicant repeated that the YCL had been active and they had been doing their things before November 2006. He said that he did not know if there was information or not but before November 2006 they had been there and they had asked for ransom. He said that there was information which told us that they had been doing their stuff openly even before they had been active. He said that he did not know if this had been legally or illegally. He said that it was true that they had been 'legally active' after November 2006 but he repeated that they had been doing their jobs before this too.
73. I put to the applicant that before this the Maoists had been conducting their People's War. I put to him that he was telling me that he had joined the YCL at a time when it had been inactive and this might make it difficult for me to believe his claims. It had only been reactivated in November 2006 which was around the time he said that he had left the YCL (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011). The applicant said that he had joined this organisation and he had done the job. He said that although the information told that they had become active in November 2006 they had been doing all these activities before that too. He said that there was information about what they had been doing before that.
74. I put to the applicant again that obviously the Maoists had been active before then because they had been conducting a People's War but the YCL had not been active and it was the YCL which he had said he had joined. I put to the applicant again that this made it very difficult to believe his evidence. The applicant repeated that it was true they had been active in November 2006 but that there was information which told you that they had been doing all this stuff but later on they had just reactivated. He said that it had been working before that too. He said that there was a lot of information which told us that the YCL had been doing their activities before that. He said that it did not matter whether they had been active or inactive. He said that they had been doing their activities everywhere.
75. I put to the applicant that I was not aware of any information that the YCL had been undertaking any activities between 1996 when it had been made inactive when the Maoists had started their People's War and November 2006 when the YCL had been reactivated because they had joined the peace process (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011). The applicant repeated that they had been doing all these activities and it did not matter if it had been reactivated in 2006. He said that probably it had not been reactivated for a long time but all these activities they had been doing had been from the YCL and there was a lot of information which told us that they had been doing all these activities from the YCL candidates and organisation before 2006. He said that it did not matter if it had been active or not. He said that there had been people who had joined, there had been classes, there had been threats, there had been torture and all these types of things. He said that this had been all over the news. I invited the applicant to produce evidence of this. He said that he would try to do so.

76. I put to the applicant that the Australian Embassy in Nepal had advised that it was not aware of any evidence that Maoist cadres had been physically harming former party members for changing their political affiliation and that it would consider this unlikely. It had said that many former Maoists had left the party and that there were widespread media reports of former Maoists openly criticising the party and declaring an end to their allegiance (Australian Department of Foreign Affairs and Trade (DFAT), 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243). I put to the applicant that this made it a little difficult for me to accept that he feared that he would be physically harmed because he had left the YCL.
77. The applicant referred to what the YCL had been doing after they had been reactivated in November 2006. He said that they were called a terrorist organisation, they were not a government organisation. He produced page 4 from an unidentified document which he said he had got from the internet - he did not know which site - which referred to extortion by the YCL: see folio 70 of the Tribunal's file 1215633. (The document in question is a report prepared by the United Nations Office of the High Commissioner for Human Rights (OHCHR) in Nepal in June 2007 on *Allegations of Human Rights Abuses by the Young Communist League*) I noted that at the top of the page which the applicant had produced it said that abuses by the YCL had begun to be reported in December 2006. The applicant said that this was probably not relevant because he had left this organisation but he was trying to explain what they had been doing all these years: all the ransom, all the threats to people and all these clashes. He repeated that this organisation was called a terrorist group and that they were still a non-government organisation. He said that he still feared for his life while this organisation was still running there and these people were there.
78. I put to the applicant that, as we had discussed, his big problem was that he claimed that he had been involved in the YCL before it had been reactivated in November 2006. I indicated that I accepted that the YCL had been active since November 2006 and that there was a lot of information about the abuses committed by this organisation. However he was claiming that he had been threatened by the YCL because he had left it at the end of 2006. I put to him again that the Australian Embassy in Nepal had said that it had not heard any reports of Maoists who had left Maoist organisations being threatened because they had left those organisations. It had said that there were plenty of reports of Maoists who had left and who had renounced their allegiance to those organisations (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243).
79. The applicant said that at that time he had not been able to seek the protection of the government because he had been a 'candidate' of the YCL. He repeated that the YCL had been forcing him to join the training and to hold arms. He repeated that the YCL had been doing all these activities around Nepal before November 2006. He said that the local news might tell me what they had been doing in that time period. I put to the applicant again that it was difficult to accept on the basis of the information to which I had referred (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243) that if he went back to Nepal now he would face any threat at all from the YCL or from any other part of the Maoist party because he had left the YCL. The applicant said that he had hidden from them and they had threatened him so he had run from his country and had come to Australia to start a new life. He said that there was still a chance that he could be identified and he referred to the fact that Nepal was not a big place. He said that they could find him.
80. I put to the applicant that what I was saying was that it was difficult to accept that there was any risk even if they found him or even if they knew exactly where he was. I put to him

again that the information available to me from the Australian Embassy in Nepal said that there were no reports of Maoists physically harming people who had left the party (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243). The applicant noted that he did not have any evidence that he had been in the YCL. I put to the applicant that what I was saying was that I did not think that there was a real chance or a real risk that he would be harmed because he had been in the YCL if he went back to Nepal now. The applicant said that there was local news that the YCL had been active in 2006 and that they had been torturing people. He said that there had been clashes before 2006. I put to the applicant again that there had been a People's War before 2006. The applicant said that the Maoists and the YCL were different organisations. He said that the Maoists from the bush had overthrown the government but the YCL had been all over the place. He said that it had started as a people's movement but they had started torturing and this had been the only reason he had left this organisation.

81. I put to the applicant in order to be clear that I had great difficulty in accepting that he had ever been a member of the YCL because he claimed that he had joined in 2005 and had left at the end of 2006 but as we had discussed the YCL had only been reactivated in November 2006 (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011). The applicant said that when he had joined in 2005 the YCL had still been active. He said that he understood that it had been reactivated in November 2006 but he had left the organisation because he had been fearing for his life. He said that at that point in time the YCL had been recognised as a terrorist organisation. He confirmed that he claimed that in 2006 the YCL had been called a terrorist organisation by the UN.
82. I put to the applicant that, as I had said, I also found it difficult to accept that, even if he had had some involvement with the YCL, he would be threatened by them if he went back to Nepal now (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243). The applicant said that when he had been involved in meetings with the members they had all been big leaders of the YCL. He said that he used to know people who were government members and also some agents who would pass information.
83. I put to the applicant that, as we had discussed, the Australian Embassy in Nepal had advised that it was not aware of any evidence that Maoist cadres had been physically harming former party members for changing their political affiliation and that it would consider this unlikely. It had said that many former Maoists had left the party and that there were widespread media reports of former Maoists openly criticising the party and declaring an end to their allegiance (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243). The applicant said that he had joined the organisation through his friend and when he had told his friend that he had left the organisation his friend had not been happy. He said that he still had to repay the amount that he had borrowed and he was still unable to do this.
84. I indicated to the applicant that I might not accept that he had in fact borrowed 50,000 to 70,000 Nepalese rupees from the YCL and that the YCL wanted him to pay this back. The applicant repeated that he had borrowed this money for the costs that were involved in distributing pamphlets and paying for those people in the crew who had been of assistance. He said that when he had told the YCL that he was leaving the organisation they had said that he had borrowed the money for himself and they had started threatening that he had to repay the money that he had taken.

85. I put to the applicant that I might also not accept that he faced a threat from his father, his family or the Newar community because he had had a child out of wedlock with someone outside the Newar caste. The applicant said that in the Newar community if you married someone from outside the caste and on top of that you had a child you were not allowed in the community. He said that in his case he had broken the norms of the religion by having a child without marriage and that girl was from outside his community. I put to the applicant that, as we had discussed, the fact that the community might not want anything to do with him did not amount to 'serious harm' or 'significant harm' The applicant said that he thought that he had already been discriminated against and that he feared that he would be humiliated once they identified the case. He said that most of the members of the Newar community in Kathmandu were related to each other in some way or other.
86. I asked the applicant what he meant when he said that he had already been discriminated against. The applicant said that in the Newar community there were different kinds of festivals and there was a sacred god but he was not allowed to go or to approach the sacred god. He said that his community had already rejected him and excluded him and they did not want to have any kind of relationship with him. I put to the applicant that it was difficult to accept that there was a real chance that he would be persecuted for one of the five Convention reasons if he went back to Nepal and that it was also difficult to accept that there was a real risk that he would suffer significant harm if he went back to Nepal. The applicant repeated that he had already been excluded from the community. He said that they would not treat him as somebody from the same community.
87. I gave the applicant time after the hearing to produce further evidence that the YCL had been active at the time when he had claimed he had joined it. The applicant said that his life had been very easy before he had joined this organisation and had left the country. He said that he had been looked after properly and he had been studying. He said that he had not had to worry about his bills. He said that he had had to leave everything because he had been under threat. He said that for the past three years he had had a really hard time. He asked why he should have had a hard time if he had not had a fear of going back to Nepal. He said that he had just been trying to survive and to look after his child.

Post-hearing submission

88. In a submission dated [in] November 2012 the applicant's representatives referred to information which they said they had been instructed by the applicant to provide to the Tribunal. They quoted a *Wikipedia* entry in relation to the YCL, highlighting references to the fact that there was no definite information as to the year in which the YCL had been created and to the fact that it had been reactivated in November 2006. They also quoted from the South Asia Terrorism Portal entry in relation to the YCL (which appears to be the source for the *Wikipedia* entry) which said that, once the Maoists had been proscribed, the YCL had also been forced to go underground, but that, after the April 2006 People's Movement and the subsequent over-ground role of the insurgents, the Maoists had decided to revive the YCL.
89. The applicant's representatives submitted that it was possible that the YCL had been active in 2005 as indicated by the applicant. They quoted from a press release issued by OHCHR-Nepal on 23 June 2007 in relation to the release of the report on YCL rights abuses a page from which the applicant had produced at the hearing. The paragraph which they quoted from the press release refers to reports of YCL and other Communist Party of Nepal-Maoist abuses having started to increase since mid-April 2007. The applicant's representatives also quoted from an unlawfully released US Embassy classified cable dated 22 December 2009

which refers to YCL criminal activity having increased ‘over the past six months’ (that is, during the second half of 2009).

90. The applicant’s representatives also quoted from the Human Rights Watch *World Report 2009* in relation to Nepal referring to the fact that both the Nepal Army and the Maoists were resisting accountability for human rights violations committed during the armed conflict between 1996 and 2006. The applicant’s representatives also referred to a quotation which they sourced to the *Nepal Monitor* but which in reality comes from the US State Department’s *Country Reports on Human Rights Practices for 2009* in relation to Nepal (released on 11 March 2010) the full text of which was reproduced by the *Nepal Monitor*. The passage refers to Maoist militias having engaged in arbitrary and unlawful use of lethal force and abduction.
91. The applicant’s representatives said that the applicant noted that there was a comprehensive list of activities by the Maoists available on the South Asia Terrorism Portal website. Finally they produced a copy of a press report dating from 17 January 2009 relating to a briefing given by the chief of UNMIN to the UN Security Council referring to actions taken by Maoist cadres which involved violence or threats of violence and to impunity for violations committed both during the conflict and after the conflict.

FINDINGS AND REASONS

92. I accept that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, ‘in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for’. However this should not lead to ‘an uncritical acceptance of any and all allegations made by suppliants’. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

‘Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another’ (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)
93. As the Full Court noted in that case, this statement of principle is subject to the qualification explained by the High Court in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ where they observed that:

‘in determining whether there is a real chance that an event will occur, or will occur for a particular reason, the degree of probability that similar events have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future.’
94. If, however, the Tribunal has ‘no real doubt’ that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. Furthermore, as the Full Court of the Federal Court (O’Connor, Branson and Marshall JJ) observed in *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9, there is no rule that a decision-maker concerned to evaluate the testimony of a person who claims to be a refugee in Australia may not reject an applicant’s testimony on credibility grounds unless there are no possible

explanations for any delay in the making of claims or for any evidentiary inconsistencies. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case.

95. In the present case, as I put to the applicant in the course of the hearing before me, I have difficulty in accepting that he was ever a member of the YCL as he claims. The integrity of the applicant's account depends upon him having been unaware of the true nature of the YCL at the time that he joined and only later having become aware that the YCL was engaged in activities such as extortion and kidnapping for ransom. However the applicant claimed at the hearing before me that he had had to meet the 'big leaders' on the tops of hills outside Kathmandu because they were violent people who were wanted by the authorities. Clearly if the applicant were telling the truth he can hardly have been unaware of the true nature of the organisation which he claims he joined.
96. Putting to one side the reference in the statement accompanying his original application to the involvement of the organisation in 'policing' around Kathmandu (which the applicant said at the hearing before me was not correct), the main activity in which the applicant claims he was engaged as a member of the YCL is distributing pamphlets. At the hearing before me he said that these pamphlets had advertised rallies. When I asked him about his own involvement in rallies he said that this had involved him in riding around Kathmandu with YCL people in their cars with their banners. However he said that the rallies which had been advertised in the pamphlets had been sometimes in front of the Royal Palace and sometimes in the main streets. Despite claiming that he had been distributing pamphlets advertising these rallies, however, the applicant said that he had only taken part in such rallies on a few occasions because he had had his personal life where he had had to study and to be with his family too. As I put to the applicant, it is difficult to accept that he had time to distribute pamphlets advertising these rallies but not to attend the rallies himself.
97. As I put to the applicant, the major problem which I have with his account is that he claims that he joined the YCL in 2005 and left at the end of 2006 but the information available to me indicates that the YCL was not active at this time and that it was only reactivated in November 2006. As I put to the applicant, the information available to me indicates that, after the Maoists launched their People's War in 1996, the members of the YCL were recruited into the People's Liberation Army and the YCL was made inactive. After the party joined the peace process and the People's Liberation Army was required to stay in cantonments, the YCL was reactivated in November 2006 and it was composed of members of the People's Liberation Army whom the Maoists did not want to stay in cantonments under the supervision of UNMIN (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011; International Crisis Group, *Nepal's Political Rites of Passage*, Asia Report No. 194, 29 September 2010, page 9).
98. At the hearing before me the applicant maintained that the YCL had been active before November 2006 and he said that there was a lot of information to that effect. However the information to which his representatives referred in their submission dated 21 November 2012 confirms that the YCL was only reactivated in November 2006. I accept that, as referred to in that material, human rights violations were committed by both sides in the armed conflict in Nepal between 1996 and 2006. I likewise accept that there are numerous reports of human rights abuses committed by the YCL after it was reactivated in November

2006. However this does not make it any more credible that the applicant could have joined the YCL in 2005, as he claims.

99. As I put to the applicant, even if he had been involved with the Maoists in some way prior to his departure from Nepal in July 2007, the information available to me suggests that he would have nothing to fear from them if he were to return to Nepal now. As I put to him, the Australian Embassy in Nepal has advised that it is not aware of any evidence that Maoist cadres have been physically harming former party members for changing their political affiliation and that it would consider this unlikely. It has said that many former Maoists have left the party and that there are widespread media reports of former Maoists openly criticising the party and declaring an end to their allegiance (DFAT, 'Nepal: Maoists engaged in violent activities', 9 March 2012, CX283243).
100. In the statement accompanying his original application the applicant said that he was familiar with the internal workings of the organisation and both at the Departmental interview and at the hearing before me he claimed that he knew of secret meeting places used by the Maoists and that he knew the identities of people from the government and agents who had been helping the Maoists. However I do not accept on the evidence before me that the applicant's situation would be any different from that of the former Maoist cadres referred to in the advice from the Australian Department of Foreign Affairs and Trade.
101. The applicant also referred in this context to his claim that he had been recruited to join the YCL by a friend and he said that when he had told this friend that he had left the organisation his friend had not been happy or that he had been angry. At the hearing before me, however, the applicant said that after he had ceased attending YCL activities in the middle of 2006 he had received one telephone call telling him that he could not leave and that he had to go for training and that he had encountered his friend once in the street. He said that after he had received the telephone call he had turned his mobile phone off for six months.
102. The applicant said that when he had met his friend in the street his friend had been with a few other people who had had knives and guns but that they had not attacked him. He said that they had told him that he had to come back and that he had to pay all this money back and that if he did not come back they would come for him. However he confirmed that he had continued living at his parents' home until he had left Nepal in July 2007 and that nothing further had happened. Even if I were to accept the applicant's claims, therefore, it would be very difficult to accept that he faced any threats from his friend or the YCL or the Maoists more generally because he left the organisation.
103. I find on the basis of the information available to me that the YCL was not active at the time when the applicant claims that he joined that organisation in 2005 and that it was only reactivated in November 2006, around the time when the applicant claims he left (Prasanta Kumar Pradhan, 'Maoist Proxy', *Outlook India*, 18 May 2007, downloaded from <http://www.outlookindia.com/article.aspx?234657>, accessed 7 November 2012; 'What went wrong with YCL', *Republica*, 11 August 2011; International Crisis Group, *Nepal's Political Rites of Passage*, Asia Report No. 194, 29 September 2010, page 9). Having regard to the other problems with the applicant's evidence identified above I do not accept that the applicant joined the YCL in 2005. I do not accept that between 2005 and the middle of 2006 he attended meetings or seminars or rallies or printed or distributed pamphlets nor that he was involved in any other activities as a member of the YCL or any other Maoist organisation.

104. Since I do not accept the applicant's evidence regarding his involvement in the YCL or any other Maoist organisation I do not accept that he was threatened by his friend or other members of the organisation because he left the organisation. I do not accept that the YCL or any other Maoist organisation is or was demanding that the applicant repay between 50,000 and 70,000 Nepalese rupees which had been paid to him to reimburse him for the costs involved in distributing pamphlets. I do not accept that there is a real chance that the applicant will be regarded as a dissident because he refused to join the Maoists or because he holds a political opinion opposed to the Maoists, as his representative submitted at the Departmental interview. I do not accept that there is a real chance that the applicant will be persecuted by the Maoists, the YCL or his friend for any Convention reason if he returns to Nepal now or in the reasonably foreseeable future.
105. The applicant has also claimed that he fears harm from his father, his family or the Newar community because he has had a child out of wedlock with someone outside the Newar caste who is not even a Hindu by religion. The applicant has said that the Newar community will not accept him but, as I put to him, such social ostracism does not in itself amount to persecution for the purposes of the Refugees Convention (see *Guitta Levy*, referred to above). The applicant said that they might humiliate him, they might discriminate against him and they might torture him because he had broken his religion or his caste by having a child with someone not of his religion and not of his caste. However I do not accept on the evidence before me that there is a real chance that anything worse will happen than that the applicant will be excluded from the community.
106. Both at the Departmental interview and at the hearing before me the applicant claimed that his father had been violent towards him. He said that his father might hit him or bash him or torture him. Having regard to the view I have formed of the applicant's credibility I do not accept that his father has been violent towards him. To the contrary, his father appears to have been very generous in paying for the applicant to come and study in Australia. While I accept that the applicant's father is no doubt disappointed by the applicant's failure to complete his studies in Australia, I do not accept that there is a real chance that the applicant will be physically harmed or tortured by his father for any Convention reason if he returns to Nepal.
107. I do not accept that, if the applicant returns to Nepal now or in the reasonably foreseeable future, there is a real chance that he will be persecuted by his father, his family or the Newar community because he has had a child out of wedlock with someone outside the Newar caste who is not even a Hindu by religion. For the reasons given above I do not accept that there is a real chance that the applicant will be persecuted for one or more of the five Convention reasons if he returns to Nepal now or in the reasonably foreseeable future.

Complementary protection

108. Having regard to my findings of fact above I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will suffer significant harm from the Maoists, the YCL or his friend who he claims recruited him to join the YCL. Having regard to my findings of fact above I do not accept that the YCL or any other Maoist organisation is or was demanding that the applicant repay between 50,000 and 70,000 Nepalese rupees. I do not accept that, as the applicant said at the Compliance Client Interview, he is unable to return to Nepal because some people are looking for him because he had a fight and he owes them money.

109. Having regard to my findings of fact above I likewise do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will suffer significant harm from his father, his family or the Newar community because he has had a child out of wedlock with someone outside the Newar caste who is not even a Hindu by religion.
110. The applicant said in this context that the Newar community might humiliate him, they might discriminate against him and they might torture him. He said that they had already discriminated against him by excluding him from certain religious festivals. However I do not accept on the evidence before me that there is a real risk that anything worse will happen than that the applicant will be excluded from the community. I do not accept that being excluded from one's community in this fashion, without more, amounts to 'degrading treatment or punishment' as defined, that is an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. I do not accept on the evidence before me that there is a real risk that the Newar community will engage in conduct that causes, and is intended to cause, extreme humiliation to the applicant. I find on the evidence before me that they simply want nothing to do with the applicant because he has excluded himself from the community by his own actions.
111. Having regard to my findings of fact above I do not accept that the applicant's father has been violent towards him in the past. I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that the applicant will be subjected to torture as defined by his father or by the Newar community as he has claimed.
112. Having regard to my findings of fact above, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment or that he will be subjected to degrading treatment or punishment as defined. Accordingly I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.

CONCLUSIONS

113. For the reasons given above I am not satisfied that the applicant is a person in respect of whom Australia has protection obligations. Therefore the applicant does not satisfy the criterion set out in paragraph 36(2)(a) or (aa) of the Act for a protection visa. There is no suggestion that the applicant satisfies subsection 36(2) on the basis of being a member of the same family unit as a person who satisfies paragraph 36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in subsection 36(2) for a protection visa.

DECISION

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

