

Asylum and Immigration Tribunal

KG (Review of current situation) Nepal CG [2006] UKAIT 00076

THE IMMIGRATION ACTS

**Heard at Field House
On 14 August 2006**

**Determination Promulgated
31 October 2006**

Before

**SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE LATTER**

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Mullins, Counsel, instructed by Gillman-Lee Solicitors
For the Respondent: Ms S Leatherland, Home Office Presenting Officer

- 1. The fact that conditions in a country are unstable or fluid does not necessarily mean the AIT will avoid producing country guidance decisions relating to risk categories in that country.*
- 2. Generally speaking and given recent developments, it would only be in the exceptional case that an appellant could show a continuing risk of persecution or serious harm or treatment contrary to Article 3 by virtue of being perceived by the authorities in Nepal as a Maoist.*
- 3. Similarly, it will only be in very limited cases that a person would be able to show he or she faces risk in his or her home area at the hands of the Maoists.*
- 4. However, even those able to show a risk (from Maoists) on return to their home area (such as businessmen, industrialists and entrepreneurs), will generally have a viable*

internal relocation alternative in Kathmandu. Only in an exceptional case would this not be so.

5. The following cases should no longer be referred to for country guidance on Nepal: [KH \(Risk - Maoist\) Nepal CG \[2002\] UKIAT 03945](#), [IP \(Risk - Maoist - Farmer\) Nepal CG \[2002\] UKIAT 04038](#), [DG \(Journalist – Healthcare\) Nepal CG \[2002\] UKIAT 04284](#), [LG \(Maoist – Ex -Military\) Nepal CG \[2002\] UKIAT 04334](#), [Gurung \(Exclusion - Risk – Maoist\) Nepal CG \[2002\] UKIAT 04870](#), [GC \(Relocation - Maoists\) Nepal CG \[2002\] UKIAT 05241](#) and [RS \(Relocation - Maoists\) Nepal CG \[2002\] UKIAT 05407](#). (*Gurung remains starred on the point of law it deals with*).*

DETERMINATION AND REASONS

1. The appellant is a national of Nepal. On 14 February 2003 the respondent refused to grant him leave to enter and refused to grant him asylum. He appealed. In a determination notified on 4 November 2004 the Adjudicator Mr K O Adio allowed his appeal on asylum and human rights grounds. Permission to appeal to the Immigration Appeal Tribunal was granted on 7 March 2004. By virtue of transitional provisions made under the Asylum and Immigration (Treatment of claimants, etc) Act 2004, the respondent's appeal took effect as a reconsideration. On 4 October 2005 a panel of the Asylum and Immigration Tribunal (the Hon Mr Justice Hodge OBE President, Senior Immigration Judge Latter and Immigration Judge G Jones) decided that the Adjudicator had materially erred in law. Omitting only the description of the proceedings, their reasons were stated as follows:

“2. The first question we have to decide is whether there was any error of law on the part of the Adjudicator. The appellant's evidence that he had been attacked by Maoists was accepted. The Adjudicator found that he had been persecuted and allowed the appeal.

3. We concluded that the Adjudicator erred in law, in failing to make findings about the sufficiency of protection available to the appellant in the light of the decision of the House of Lords [in [Horvath \[2000\] INLR 239](#)] He accepted the appellant's evidence of two attacks in June 1999 and August 2002 by Maoists. He describes the attacks as serious. He gave no reason for concluding that such attacks were in fact persecution by non state agents. There is objective evidence that the authorities are strongly opposed to the Maoists. There are areas of Nepal where the population are not generally at risk from Maoists. The Adjudicator failed to make adequate findings about whether the state is able or willing to protect this appellant.

4. The objective evidence indicates there may well be areas of Nepal where those who face persecution may relocate without that being unduly harsh. We do not consider that the Adjudicator addressed this issue as fully as he might have done. If indeed the treatment meted out to the appellant is persecutory, the case provides an opportunity for the tribunal to consider the issue of internal relocation within Nepal.

5. We accepted the appellant may wish to give further oral evidence in relation to his attempts to report his concerns to the police. We considered both parties should have the opportunity to present updated material on the generalised country conditions in Nepal, so the tribunal might consider the issue of sufficiency of protection and internal relocation. We accordingly adjourned the case for a second stage reconsideration hearing.”

2. In consequential directions the panel stated the issues for reconsideration as being:

“1. Given the adjudicator accepted the evidence the appellant had been attacked by Maoists on two occasions, are the authorities in Nepal, able or willing to protect a person in the appellant's position from the actions of the Maoists as non state agents; is there sufficiency of protection? If not; 2. Would it be unduly harsh for this person to internally relocate within Nepal?”

3. Whilst the panel in this way identified the issues as twofold, that of protection and internal relocation, it seems clear to us from what is stated at paragraphs 3 and 4 that the protection issue was seen as encompassing also the issue of whether the two attacks did indeed amount to serious harm. Given that the Court of Appeal in Bagdanavicius [2003] EWCA Civ 1605, [2004] INLR 163 has emphasised that the issues of serious harm and whether a state can protect against such harm are interrelated, we consider we are obliged in any event to examine the issue of serious harm as a prerequisite to considering the protection issue proper.

4. The basis of the appellant's asylum claim was that he had been a farm worker on his parents' farm. In 1988 he joined the Nepali Congress Party (NCP). His father was also a member. He eventually became involved in attending meetings and distributing leaflets as a result of which he suffered two incidents of attacks by local Maoists in Kaski, a district of Pokhara: one at a meeting in June 1999, the other at a meeting in August 2002. The 1999 incident led to him being hospitalised for 4-5 months. Afterwards he continued to attend NCP meetings secretly. He said he had become the leader of the party in his area. After the August 2002 incident, when Maoists brandished guns, he had fled. His evidence as to whether and when he reported the 1999 incident to the police in his home area was equivocal, but in relation to the August 2002 incident he said that he had reported this to the district police headquarters in Kathmandu. They refused to take statements from him and told him to leave the police station. He decided to leave Nepal and did so on 5 December 2002. He came to the UK via India, Malaysia, Argentina and Italy, destroying his passport on the flight from Rome.

5. At the outset of the hearing Mr Mullins said he was aware the case had been listed for potential country guidance but urged the panel not to attempt any guidance, since the current situation in Nepal was highly fluid and there was good reason to think that the ceasefire in place currently would collapse - like all the previous ceasefires. In his view the three main issues raised by this case were: (1) protection from persecution; (2) the significance of the appellant having gone into hiding before he left; and (3) why the appellant thought he would still be at risk on return, notwithstanding the ceasefire.

6. In the light of point 5 of the previous panel's reasons for finding the determination of the Adjudicator legally flawed, we granted permission for Mr Mullins to call the appellant to give evidence concerning the circumstances in which he had gone into hiding.

7. In oral evidence the appellant said he had gone into hiding in Sunnali. He had not approached the police there to report the August 2002 incident as it was a border area. He only stayed there two days. Asked about the current situation, he said he had had no contact with anyone back in Nepal since he left. His father had come to India. Although he had some relatives in his home area of Nepal, he had not had contact with them.

8. He was cross-examined by Ms Leatherland about what he was recorded as saying about the 1999 incident which took place in Kaski. Why, she asked, had he first said that he went to the police in Kaski before going to hospital yet later said he had only gone to them after being discharged from hospital. The appellant said he had only gone to the police after being discharged from hospital. Ms Leatherland asked him why in October 2004 he had said he had only gone once to see the police and that was in Kathmandu after the second incident in August 2002. The appellant said he had gone to see the police both in Kaski and in Kathmandu. If he had said differently before, it was because it had slipped his mind.

He had not informed any of his party members about the treatment he had received in 1999; at that time there was no NCP office in his area and party members were scattered around. He was not in contact now with any party members.

9. In submissions Ms Leatherland asked us not to accept the appellant's evidence about his past attempts to obtain protection from the authorities. His evidence as to whether he had sought to obtain protection after the 1999 incident was inconsistent. His evidence on this matter was also implausible because, if these events had happened, one would expect him to have approached other members of the party for help in obtaining police protection. In relation to the appellant's attempt to obtain protection in August 2002 in Kathmandu, he had only spoken of making one attempt, which should not be considered enough, given the background evidence indicating that the authorities were willing and able to protect civilians in government-controlled areas. As regards the general situation, recent events amounted to a material change of circumstances. There were formal talks, the UN was involved, the parties were mostly observing the cease fire, and there were clear plans for an interim government involving the Maoists in some form and for elections to be held in 2007. Maoist rebels had been released from jail; the Maoist leader had met the new Prime Minister face-to-face in Kathmandu. It was clear the government security forces were in control of government areas. If a person had a well founded fear of persecution in Maoist-controlled parts of Nepal, they could relocate to Kathmandu, where there was a clear sufficiency of protection.

10. Mr Mullins urged us to consider the appellant's past experiences as being consistent with the background evidence concerning the ability of Maoists to operate with impunity even in government-controlled areas. The Amnesty International report made clear that in late 2002, although the Maoists were only in control of 7 districts, there had been Maoist attacks in 74 out of Nepal's 75 districts. There had even been attacks in Kathmandu. There had also been an incident as recently as March 2006 in an area south-west of Pokhara – the appellant's home area. Attacks had continued right up until the ceasefire and beyond it. Hence the risk to this appellant was not dependent on what happened to the cease fire. If he returned to his home area and sought to continue his political activities, he would face a recurrence at some point of similar problems at the hands of Maoists. The appellant's evidence regarding his attempt to obtain protection was indicative of the ongoing general problem for members of political parties in Nepal. The government "umbrella" of protection had proved ineffective. The appellant had been targeted because he had been a political activist. In the absence of a permanent cease fire and a firm agreement about power-sharing the political and military future of Nepal was fraught with danger and the appellant should be given the benefit of the doubt.

11. Mr Mullins submitted that the appellant would not only continue to be at risk in his home area of Pokhara; he would also remain at risk wherever he went in Nepal, including in Kathmandu. He had been to Kathmandu already and had met with difficulties there. The panel should bear in mind that the appellant was not in the same position as the general run of the population. First of all, he was a party activist. Secondly, he had suffered previous attacks from the Maoists because he was a party activist. Thirdly, he had been unable to obtain protection when he had sought it. Fourthly he had no immediate family and his only relatives were in Pokhara, his home area where he faced ongoing difficulties at the hands of the Maoists.

12. As regards the general situation, Mr Mullins submitted that given the history of breakdown in past ceasefires, it could not be said that Nepal had achieved stability. There

were major issues that still separated the Maoists from the government, including the future of the monarchy, which were potentially explosive issues. As regards whether it would be unduly harsh for him to internally relocate, it was clear that in Nepal there were a significant number of internally displaced persons who were in a vulnerable situation and the appellant would face similar dim prospects

The background situation

13. We had a considerable body of background material before us: this is listed in the Appendix. It presents the following picture of Nepal's history over the past ten years.

14. Since February 1996 the Communist Party of Nepal (Maoist) or CPN has been conducting a "people's war". Initially confined to the remote mid-west regions of the country, it gradually spread to almost all areas of the country. In November 2001 the Royal Nepalese Army (RNA) was deployed and from November 2002 the Nepal Police and the Armed Police Force (APF) were placed under the "unified command" of the RNA for counter-insurgency operations. However, even before then, in October 2002, Maoist insurgents were said to control nearly half of the country. Against the background of civil war, the parliamentary process was beset by difficulties: since October 2002 four Prime Ministers either resigned or were dismissed by the King, the last been removed on 1 February 2005. Although the Maoists appear now to have control of only 10-15% of the 75 districts of Nepal, they remain a dominant force in many rural areas and their military wing, the PLA, is 20,000 strong and has not yet agreed to disarm.

15. The 10 year Maoist insurgency has resulted in the deaths of over 13,000 people. The conflict has been marked by what the 2006 UN Office of the Commissioner for Human Rights (OCHR) report describes as "...gross violations of international human rights and humanitarian law committed by CPN (Maoist) in the course of its insurgency and by security forces in the State's response." The US State Department March 8, 2006 report covering 2005 events states that:

"The government's poor human rights record worsened and the government continued to commit many serious abuses, both during and after the state of emergency that suspended all fundamental rights except for habeas corpus. Members of the security forces and the Maoist insurgents committed numerous grave human rights abuses during the year. The following human rights problems were reported:

- Obstruction of citizens' rights to change the government
- Arbitrary and unlawful lethal force including torture
- Vigilantism
- Disappearances
- Poor prison and detention conditions
- Arbitrary arrest and lengthy pre-trial detention
- Impunity for security forces
- Compromised independence of judiciary
- Suspension of news broadcasts
- Restrictions on the Tibetan community
- Restrictions on internal travel
- Discrimination against persons with disabilities and lower castes
- Violence against women and trafficking in women and girls
- Abuses of child labour
- Restriction on workers rights."

16. There have been various attempts to end the conflict: a ceasefire declared by both sides in July 2001 was eventually broken by the Maoists in November 2001; a ceasefire agreed in January 2003 stalled after three rounds of negotiations and the Maoists unilaterally ended it on 27 August 2003; a three month ceasefire unilaterally declared by the Maoists in September 2005 was ended by them on 2 January 2006. Up until April 2006 there seemed limited prospects of the conflict ending. Events centering on the monarchy were to change all that. The authority of the monarchy had already suffered a serious setback in 2001, with the murder of King Birendra and other members of the Royal Family on 1 June 2001 by Birendra's son, the Crown Prince Dipendra, who subsequently shot and killed himself. King Gyanendra came to the throne in these tragic circumstances in June 2001.

17. The second setback was the decision by King Gyanendra in February 2005, following the failure of several transitional governments, to announce that he was assuming direct (executive) power. He had dissolved the government, saying that a new government would be formed under his leadership that would restore peace and effective democracy within the next three years. He took control of the 78,000 member army. Under the subsequent state of emergency there was a crackdown on senior political leaders, trade unionists, human rights activists, student activists, lawyers, journalists and suspected Maoist sympathisers. Thousands of arrests took place. Many other civil and political rights, including freedom of movement and freedom of assembly, were suspended. Press freedom was suspended. There was widespread international condemnation of these measures. Following the declaration of a state of emergency the CPN leadership denounced the King's seizure of power and called for an indefinite bandh (strike). The Human Rights Watch report December 31 2005 stated that:

“Extrajudicial killings, illegal detentions, and “disappearances” continue to be instigated by the Royal Nepalese Army (RNA) while the Maoists continue to engage in extortion, murder, forced displacement of civilians, and abductions”.

18. The same report noted that in 2005 Nepal continued to have the largest reported number of enforced “disappearances” in the world. In September 2005, the report also noted, the UN Special Rapporteur on Torture visited Nepal and said that torture and ill treatment was systematically practised in Nepal by the police, armed police, and the RNA in order to extract confessions and to obtain intelligence. In the case of the Maoists the Rapporteur found “shocking evidence of torture and mutilation” in order to extort money, punish non-cooperation and intimidate others.

19. However, the King's seizure of power resulted in an uneasy but effective alliance developing between the main political parties on the one hand and the Maoists on the other. On 22 November 2005 a seven-party alliance and the CPN (Maoist) announced their common adoption of a 12-point “Letter of Understanding” including a call for an “end to autocratic monarchy” and the election of a constituent assembly.

Events leading up to the April 2006 situation

20. The Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office including technical cooperation, in Nepal dated 16 February 2006 stated that its concerns about the government's actions grew in the second half of January 2006, as public protest intensified in opposition to the municipal elections called for 8 February 2006 against a background of government banning of all assemblies, processions and sit-ins in the Kathmandu Valley. A further

report of the same body entitled “Investigations into violations of international humanitarian law in the context of attacks and clashes between the Communist Party of Nepal (Maoist) and Government Security Forces: findings and recommendations January –March 2006” considered that the resumption of hostilities was leading to a worsening situation.

21. The 3 July 2006 version of the Home Office Operational Guidance Note on Nepal (OGN v4) summarises the position up to April 2006 as follows:

2.1 On 1 February 2005, the Nepalese King Gyanendra dismissed the cabinet, declared a state of emergency, and assumed direct control of the government under the emergency powers article of the Constitution, citing the need to fight a Maoist insurgency. Amnesty International reported that the human rights situation deteriorated sharply after King Gyanendra seized direct power. Civil liberties were undermined, with thousands of politically motivated arrests, strict media censorship and harassment of human rights defenders. The state of emergency was lifted on 29 April 2005.

2.2 Since February 1996 the Communist Party of Nepal (CPN) (Maoist) has been conducting an increasingly high profile insurgency (the People's War) against the government. Initially this insurgency was limited to the remote Mid-West regions of the country, but it has since spread to most parts of Nepal. In local elections held in May and July 1997, the Maoists disrupted the election process in some areas by intimidating non-Communist candidates and party workers. In May 1998 the government launched a major police offensive against the Maoists. It is estimated that over 12,000 people, including Maoists, police and civilians, have been killed since the troubles began.

2.3 During 2005 the government's poor human rights record worsened and both members of the security forces and the Maoist insurgents committed numerous grave human rights abuses. The security forces often operating with impunity unlawfully arrested, tortured and killed civilians and suspected Maoists, while Maoist forces abducted civilians and committed unlawful killings and torture. Thousands of people were displaced by the conflict, while strikes, insecurity and displacement prevented many people from enjoying their economic and social rights.

2.4 The law prohibits torture, beating, and mutilation, however, during 2005 the security forces regularly engaged in such activities to punish suspects or to extract confessions. The Centre for Victims of Torture (CVICT), a local NGO, reported that blindfolding and beating the soles of feet were commonly used methods. The government failed to conduct thorough and independent investigations of reports of security force brutality and generally did not take significant disciplinary action against those involved. Citizens were afraid to bring cases against the police or the army for fear of reprisals.”

The Post-April 2006 situation

22. The situation since April 2006 is described in the July 2006 OGN as follows:

2.5 In April 2006 after weeks of strikes and protests against his direct rule King Gyanendra recalled parliament and appointed GP Koirala (who had been chosen by the leaders of a seven-party alliance to be their leader) as prime minister.⁸ Following the reinstatement of parliament on the 27 April 2006 Nepal's Maoist rebels declared a three-month ceasefire. The rebel leader, Prachanda, said the ceasefire was intended ‘to express deep commitment to people's desire for peace’.

2.6 In May 2006 parliament voted unanimously to curtail the monarch's political powers including his control of the military and effectively rendered him a ceremonial figure. They also declared a ceasefire in the 10-year conflict with Maoist insurgents. Announcing the move, the Deputy Prime Minister Khadga Prasad Oli said all terrorism charges against the rebels would be dropped. Politicians have promised to work with the Maoists as a prelude to bringing them into government. The government also announced that it was annulling controversial municipal elections held by the King in February 2006 and sacking local officials he appointed. In addition, it said it was awarding compensation of about \$14,000 to families of those killed by security forces during the recent demonstrations, and was appointing a judicial commission to inquire into the deaths.”

23. In the bundle were a number of press cuttings covering events since April. Ekantipur.com referred to two incidents of abductions by Maoists in Ramechap and and Siraha. The same source gave a report dated 11 May 2006 headed “Parliamentarians accuse Maoists of intensifying extortion”. It recounted an incident in Maheshpur where Maoists

were said to have demanded a donation from a Congressman. The report also said that SPA leaders had accused the rebels of continuing with extortion and terrorizing civilians. One SPA leader was quoted as stating that:

“Maoists have been extorting money on the excuse of feeding their 20,000-man army, said CPN-UML General-Secretary Madhav Kumar Nepal. Asking the Maoists to stop all atrocities against [the] people, Nepal added that he was ready to take responsibility for feeding the Maoists army”.

24. The same report also mentioned a breach of the ceasefire involving the abduction of five policemen from the APF in Nawalparasi.

25. A report dated 14 May 2006 refers to a group of men demanding Rs3 million from the Life Care hospital. A report of May 16 states that the Deputy Prime Minister and Minister for Foreign Affairs urged the Maoists to stop extortions, intimidations and recruitment for their militia. Reference was made to abduction of a local timber trader from Sarlahi and it was stated:

“Our report from Dolakha says that Maoist rebels are still continuing with the collection of forced ‘taxes’ from various government and non-government organisations”.

26. A May 15 2006 report quotes the CPN leader Prachanda as stating, when asked about continued extortion by rebels, “Donation was necessary for food and treatment for thousands of Peoples Liberation Army, the party’s military wing”. Prachanda was said to have added that it was the government’s duty to allocate 50 percent of its budget to people in rural areas and to fulfil the basic needs of the PLA. “Otherwise we remain compelled to collect taxes through our government”. A May 16 report gives details of three other incidents involving abduction and/or extortion. A May 18 report notes the evidence of US Assistant Secretary of State for South and Central Asian Affairs Boucher being “wary” as to whether the Maoists were genuinely committed to disarmament and acceptance of the rule of law and democratic political process. Boucher said that the Maoist insurgency had been an exceptionally brutal one and their forces had become accustomed to control over the countryside exercised through terror. A May 18 report notes complaints by industrialists and entrepreneurs. There are also reports for 22 May, 27 May, 29 May and 30 May variously chronicling incidents of abductions, extortion and intimidation. The 27 May report quoted the Industrial Security Group (ISG) comprising six foreign diplomatic missions, including the US, France, Germany, India and the UK expressing its deep concern over continued Maoist extortion and violent intimidation of businesses and industries across the country. The 30 May report states that Maoists made “large-scale military recruitments” in several places of Nawalparasi district, coming just two days after rebels committed themselves to abiding by the 25-point code of conduct signed on May 26.

27. A 2 June 2006 report says that tens of thousands of people had assembled at a point in Kathmandu to attend the mass meeting of the CPN.

28. A source called the People’s Review Weekly dated 12 June reports that “Maoist people’s open court has been opened in the capital, receiving 10 complaints on average a day.” A 3 June report mentions another incident of abduction and says that Maoists have been taking “road taxes” from vehicles using the Tansen-Tamghas roadway: “According to the Maoists, the proceeds of the “road-tax” will be used to build infrastructures to maintain the road for the People’s Army, a driver said”. A 6 June report describes US Ambassador to Nepal, James F Moriarty saying that although the US could not provide assistance to the rebels, since the US still considered Maoists as terrorists, he recognised that other donor

agencies could provide food and other financial support to feed the rebels. The report continues:

“He accused the rebels of amassing weapons for their guerrillas, continuing recruitment, forcing people to attend its rallies and extorting from people and killing two political activists in Rautahat in recent days”.

29. A 7 June cutting refers to Maoists forcibly taking away 150 students from schools in Rame-chhap to make them participate in rebel programmes recently

30. The Home Office OGN of July 2006 stated at 2.7 that:

“In recent talks (June 2006) Nepal's new government has struck a deal with Maoist rebels, agreeing to dissolve parliament and set up an interim administration that would include the rebels, raising hopes for an end to a decade-long violence. The interim government will oversee elections for a special assembly meant to draft a new constitution and review the monarchy's role. The Maoist leader Prachanda has said elections are likely to be in March or April 2007. However, there are still a number of difficult issues that require further discussion such as disarmament of the Maoist rebels and the future of the Monarchy, for example the political parties are undecided about whether to declare Nepal a republic.”

31. A BBC News item dated 7 August 2006 states that although the Maoists have extended their ceasefire shortly after they and the seven-party alliance clinched a landmark power-sharing deal in June, the two sides continued to differ over a government plan for the UN to be involved in the decommissioning of the rebels' weapons and over the future of the monarchy. It quoted the deputy chief of the CPN, Baaburam Bhattarai as saying “The talks are very close to collapse. The dialogue process is stuck at a very sensitive stage”. However, it added that he also said his party would not return to the jungle and would launch a peaceful movement in order to make the country a democratic republic.

32. In a Guardian Unlimited press cutting of August 7 2006 it was reported that deputy rebel chief Bauram Bhattarai considered that the peace process between Maoist guerrillas and Nepalese politicians was on the verge of collapse over the issues of the future of the monarchy and disarmament. The report ended:

“Analysts say that the Maoists were attempting to strengthen their hand in the negotiations by talking tough. “The international community has been quite firm. India, the US, the EU have all told the Maoists they cannot join the interim government with guns in hand”, said Kanak Mani Dixit of Himal magazine. “What they need is a face-saving measure (for the Maoists) because Nepal does not want to return to war”.

The legal framework

33. Since the hearing of this appeal there have been two important changes in the law. The first is in the form of new Regulations, the Refugee or Person in Need of International Protection (Qualification) Regulations SI 2006/2525 (hereafter the “Protection Regulations”). The second is the Statement of Changes in Immigration Rules, Cm6918 (hereafter “the Cm6918 Rules” or the “amended Immigration Rules”). These Regulations together with amendments to the Immigration Rules in part implement EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 of 30.9.2004 (hereafter “the Directive”; articles of the Directive are cited simply as “A”, e.g. A9). By virtue of a Practice Direction from the President of the AIT issued on 9 October

2006, we are obliged to apply these Regulations and amended Immigration Rules to all pending appeals, of which this is one. We considered whether it was necessary to notify the parties of these changes so as to give them an opportunity to make submissions on the basis of these new provisions. We decided it was not, as in our view these provisions are not materially different from those in place previously. However, in view of the fact that they are new, it is appropriate to set out the legal framework so far as it is relevant to this case in more detail than usual.

34. The Protection Regulations set out, inter alia, definitions of acts of persecution (Regulation 5), actors of persecution or serious harm (Regulation 3) and actors of protection (Regulation 4). Regulation 4 in its material parts states:

“ 1) In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:
(a) the State; or
(b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.
(2) Protection shall be regarded as generally provided when the actors mentioned in paragraph 1(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.
...”

35. This is word-for-word the text of A7 of the Directive save for introductory words in Regulation 4(1) “shall be regarded” (instead of “is”) and in Regulation 4(2) the omission of the phrase “inter alia” immediately before “by operating”).

36. The amended Immigration Rules (Cm6918) contain among other provisions, paragraph 339K, which deals with the approach to past persecution, in the following terms:

“339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated”.

37. Also pertinent to this appeal is paragraph 339O headed “Internal Relocation”. This states:

(i) The Secretary of State will not make:
(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return.”

38. In considering the proper approach to the issue of internal relocation we have also to apply the principles set out in the recent House of Lords judgment in Januzi [2006] UKHL 5 which adopts the criteria now contained in paragraph 339O but also contains more detailed guidance.

39. The new Regulations and Rules also identify the right of a person to be considered as to his or her eligibility for humanitarian protection. Paragraph 339 C (in its first part) provides:

“ A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
- (iv) he is not excluded from a grant of humanitarian protection”.

40. The same paragraph in its second part gives a definition of serious harm:

“Serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or
- (iv) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

41. We remind ourselves at this point that by virtue of the new Practice Direction we are obliged not only to consider the appellant’s asylum and human rights grounds of appeal. We also have to treat the grounds of appeal as including the ground that the decision of the respondent was contrary to the Immigration Rules relating to eligibility for humanitarian protection.

42. Where below we refer to “risk” or “real risk”, this is to be understood as an abbreviated way of identifying respectively: (1) whether on return there is a well-founded fear of being persecuted under the Refugee Convention; (2) whether on return there are substantial grounds for believing that a person would face a real risk of suffering serious harm within the meaning of paragraph 339C of the amended Immigration Rules; and (3) whether on return there are substantial grounds for believing that a person would face a real risk of being exposed to a real risk of treatment contrary to Article 3 ECHR.

Our assessment of general issues

43. We first address Mr Mullins’ submission that we should not proceed (as was intended by the previous panel) to make this case a country guidance case in view of the fact that the current situation in Nepal is fluid. As noted in KA (Draft-related Risk Categories updated) [2005] UKAIT 00165, it is a matter for the Tribunal, not the parties, whether a case is to proceed as a country guidance case. Whilst we accept that conditions in a country being fluid may sometimes afford a good reason not to proceed with giving guidance in relation to claims made by asylum-seekers from that country, we consider that much depends on the particular context and the extent to which it is possible, notwithstanding such fluidity, to draw conclusions about risk categories. To take an obvious example, the fact that for most of the time since the 1990s Somalia has been viewed as being a highly unstable country has not prevented the Tribunal from concluding that members of minority clans from that country are generally (albeit not universally) at risk on return. Broadly speaking asylum-seekers tend to come from countries whose conditions are unstable rather than stable, fluid rather than static. Since one of the main purposes of the Tribunal’s practice of

country guidance is to ensure consistency in judicial decision-making on asylum or asylum-related appeals, it would be self-defeating if it were not carried out in relation to cases brought by nationals of countries which most frequently feature in the AIT's asylum appeal lists.

44. Turning to the situation in Nepal, Mr Mullins is right in our view to highlight the fact that the current situation there is fluid and that there remain major issues yet to be resolved between the two main sides in ongoing peace negotiations. It is also right to bear in mind that the Maoist insurgency has been an exceptionally brutal one and Maoist insurgents have become used to the exercise of terror as a mode of control over the countryside. Having said that it is clear that the popular uprising in 2006, which ended in Parliament curtailing the powers of the monarchy in June 2006, has led to a fundamental change in the political situation. The attempt by King Gyanendra to impose direct rule and then take the war-ravaged Nepalese government in an even more repressive direction proved a watershed. It led to a popular uprising and the King being constrained to step aside and reinstate Parliament under an interim government involving seven different political parties. It has resulted in the two sides reaching an agreement firstly on the setting up of an interim government which will at some point include the Maoists and secondly on the holding of elections to a constituent assembly to be held by April 2007 at the latest. It has led to Maoist rebels have been released from jail and all terrorism charges being dropped. At the invitation of the interim government and with the active approval of the Maoists, a UN mission has visited and both sides have agreed to keep their armies under UN supervision. Although nothing is yet concretely concluded, there have been landmark formal talks in mid-June in Kathmandu between the Maoist leader Prachanda and Prime Minister Girija Prasad Koirala, resulting in an eight-point agreement. Although there have been some level of ongoing violations, the ceasefire has generally been holding.

45. By any standard these and related developments constitute a very significant change of circumstances. It is true and important to bear in mind that it is reasonably likely that there will be ongoing breaches of the various ceasefire agreements, occasional future setbacks in the negotiations. However, we do not think on the basis of the most recent evidence that Nepal is reasonably likely to see a recurrence of the same scale or patterns of armed conflict. We do not consider it reasonably likely that there will be a return either to wide-scale government targeting of Maoist insurgents and those suspected of supporting them or (on the other hand) widespread targeting by Maoists of government officials and certain categories of civilians. There continue to be violations by the Maoists of the ceasefire agreements, but such acts are largely concentrated on obtaining monies by extortion, raids and other comparable measures. From the background evidence it is also clear that there is no longer in Nepal a situation of internal armed conflict in the international law sense of that term.

46. The following are cases which still appear on the AIT website under country guidance cases for Nepal: [KH \(Risk - Maoist\) Nepal CG \[2002\] UKIAT 03945](#), [IP \(Risk - Maoist - Farmer\) Nepal CG \[2002\] UKIAT 04038](#), [DG \(Journalist – Healthcare\) Nepal CG \[2002\] UKIAT 04284](#), [LG \(Maoist – Ex -Military\) Nepal CG \[2002\] UKIAT 04334](#), [Gurung \(Exclusion - Risk – Maoist\) Nepal CG * \[2002\] UKIAT 04870](#), [GC \(Relocation - Maoists\) Nepal CG \[2002\] UKIAT 05241](#) and [RS \(Relocation - Maoists\) Nepal CG \[2002\] UKIAT 05407](#). In view of the fundamental changes in the political and military situation which have taken place in Nepal during 2006, we do not see any value in continuing to refer to previous Tribunal country guidance cases on Nepal, except for the purposes of historical reference, for example, when considering whether something claimed by an appellant to

have happened at a certain period in the past, was consistent with the country guidance assessment made in relation to that time.

Risks to Maoists

47. So far as the issue of risk on return to Maoists from the current government is concerned, we consider that the latest background evidence, which includes reference to the dropping of all terrorism charges against Maoist rebels and to a clear commitment from the interim government to include Maoists both in the interim government (at some stage) and in a new regular government following elections, demonstrates that even active members of the CPN and members of the PLA would not be at risk on return to Nepal. In our view it would only be in the exceptional case that an appellant could show a continuing risk of persecution or serious harm or treatment contrary to Article 3 by virtue of being, or being perceived as, a Maoist.

Risk from Maoists

48. So far as the issue of the risk on return at the hands of the Maoists is concerned, we also think that the same body of evidence makes clear that it would only be in respect of a very limited number of categories that a person would be at risk on return. In particular we do not consider that such a risk (from Maoists) would arise simply by virtue of the fact that a person was a government official or involved in one of the current political parties. Whilst we do not seek in this determination to try and specify all the current categories of those who face a risk on return to Nepal, we would accept that such a risk may arise in a person's home area where he is (or would be perceived as being) a businessman or industrialist or entrepreneur. It would appear that the CPN (at least through its military wing) is continuing to engage in the practice of extortion and/or abduction and for this purpose to target businessmen, industrialists and entrepreneurs – broadly speaking those perceived as having significant wealth. Whether or not it is correct that the Maoists have a viable option of reaching an agreement with the current interim government and with donor agencies in a position to help them pay the salaries of their military wing, it does appear that their inability to raise taxes through any governmental structure means that they are continuing to target businessmen, industrialists and entrepreneurs with a view to obtaining financial resources with which to pay their own soldiers. Thus a person who was able to show that in Nepal he ran a business or was an industrialist or entrepreneur may on the facts of an individual case, be able to show a real risk of persecution/serious harm/treatment contrary to Article 3 in their home area. Whilst we accept that there continue to be raids and attacks on governmental and non-governmental organisations, this does not appear to involve any consistent pattern of targeting of those who are officials in these organisations.

Internal relocation

49. It is not necessary to consider the issue of internal relocation in respect of all parts of Nepal. That is because in our view the latest background evidence clearly demonstrates that in Kathmandu, the capital, the situation is stable and there is an effective system of government and law. There is nothing to indicate that in Kathmandu, apart from isolated incidents, Maoists are acting with impunity against residents of that city. In the event that Maoists were to threaten serious harm to an individual or individuals in Kathmandu, we consider the authorities there would be willing and able to protect them against such harm. This observation would generally apply to businessmen, industrialists and entrepreneurs.

We emphasise here that we are describing only what we consider to be *generally* the case. We would not rule out that in an exceptional case it may be possible for a person under real threat from Maoists in their home area (assuming that is somewhere other than Kathmandu) to show that he or she would not have a viable internal relocation alternative in Kathmandu. We emphasise, however, that the case would have to have exceptional features turning very much on the particular circumstances of the individual's case.

50. It may be that for those who face a real threat from Maoists in their home area there is another part (or other parts) of the country to which they could relocate. But since, as we understand matters, all returns from the UK would be to Kathmandu, it is the issue of internal relocation in this city that would be the normal starting-point for any inquiry as to whether a person could show either or both that he would continue to face a real risk of persecution (or the suffering of serious harm) or that he could not reasonably be expected to stay in that city. The same applies when considering internal relocation in the context of Article 3 ECHR.

The appellant's case

51. Given the careful terms in which the panel at first-stage reconsideration adjourned the case for further reconsideration, we do not consider it would be right, as Ms Leatherland seemed to urge at certain points, to undertake a re-examination of the Adjudicator's findings of fact. In any event, in cross-examination the appellant was asked to clarify why he had not given consistent evidence previously in respect of his past efforts to obtain protection from the authorities and we are satisfied by the explanation he gave. We are also satisfied by the explanation he gave of the circumstances in which he had gone into hiding. We do not think that Ms Leatherland's point about the implausibility of the appellant not approaching other party members for help in obtaining protection is a strong one, since on the accepted evidence the appellant was leader of his party locally and he had no close links with party officials elsewhere. Having considered his various accounts we are satisfied that the appellant had been broadly consistent in stating that : (1) in June 1999 he had been beaten unconscious by Maoists and had then been taken to hospital, only going to the police in Kaski afterwards; and (2) after the attack in August 2002 he had gone to Kathmandu to complain to the police, leaving that city straightway after they asked him to leave. Given that the police in Kathmandu had not only failed to offer him protection but had refused to let him lodge his complaint and that thereafter his thoughts were intent on getting out of Nepal, we consider that we should not seek to interfere with the finding made by the Immigration Judge that the appellant had been unable to access adequate protection in Nepal. We are prepared to assume in the appellant's favour, therefore, that by virtue of his experiences in his home area between 1999 and August 2002, he did suffer past persecution and serious harm and treatment contrary to Article 3 ECHR.

52. We approach his case on the basis, therefore, that the past persecution he experienced is a serious indication that he would continue to face a real risk of persecution or suffering of serious harm if returned. We also bear in mind that he was a party activist who had been targeted for attack by local Maoists because he was a party activist and that he had been unable to obtain protection when he had sought it. We accept also that he has no immediate family and in Pokhara has only relatives.

53. However, in our view this history of persecution is far from been determinative in this case, as there are good reasons for considering that he would not any longer face a

repetition of similar acts. Even assuming that on return to his home area he would resume his activities as a Congress party member and local leader there, it is clear that the Maoists have moved away from their long-term strategy of armed struggle. Although they have not declared a permanent cease fire and although there continue to be some level of violations by Maoists of the ceasefire, these are no longer widespread and primarily involve actions intended to forcibly extract monies from wealthy members of the population. In particular there is nothing to indicate that Maoists in areas such as Pokhara, even though there are still isolated incidents of attacks by them in or around such areas, would be any longer interested in disrupting Congress party meetings or targeting local Congress party officials, such as this appellant.

54. However, even if we had been prepared to accept that the appellant would still face a real risk of severe harm in his home area, we would not have accepted that it would give rise even to local persecution, as we are satisfied that there are good reasons for considering that the authorities in his home area would now be able and willing to protect him. We draw attention once again to the wholly different position in which the interim government on the one hand and the Maoists on the other now find themselves, a situation in which the Maoist leadership is now seeking participation in the parliamentary process and does not want to “return to the jungle”. These developments have greatly enhanced the willingness and ability of the authorities, at least in those areas of Nepal not currently controlled by the Maoists, to afford protection to local populaces.

55. Accordingly we do not consider that the appellant would face a real risk of persecution or serious harm or treatment contrary to Article 3 in his home area of Pokhara.

56. In such circumstances it is not necessary for us to address the issue of internal relocation in his case. However, even if we had considered he would still face a real risk of persecution in his home area, we consider he would clearly have a viable internal relocation alternative in Kathmandu. As we have already noted, there is no evidence to suggest that the Maoists are able to undertake violent or illegal actions in Kathmandu except in isolated incidents; the Maoists now have a legal presence in the capital and that itself is a strong indication that the authorities no longer view their presence as a threat to law and order. Even if we had considered that the Maoists would be intent on targeting the appellant in Kathmandu (something we find remotely unlikely), we would have concluded that the authorities there would be both willing and able to protect him against such action. Furthermore, we are quite satisfied that it would be reasonable to expect this appellant to relocate to Kathmandu. He is young, relatively educated, has not particular health difficulties and is a member of one of the most influential parties in the current political system.

57. For the above reasons, we conclude:

The Immigration Judge materially erred in law.

The decision we substitute is to dismiss the appellant’s appeal. The appellant is not a refugee. He is not a person eligible for humanitarian protection under the amended Immigration Rules and he does not face a real risk of treatment contrary to Article 3 ECHR. There was no Article 8 issue in this case.

Signed:
Dr H H Storey, Senior Immigration Judge

Appendix: Background Materials

Kingdom of Belgium CEDOCA Mission to Nepal, 21 January-9 February 2002

US State Department Report Nepal, 2001, March 4 2002

Amnesty International: A deepening human rights crisis, December 2002

Amnesty International: Nepal: Human rights abuses have reached unprecedented level, 19 December 2002

Amnesty International: Nepal: A spiralling human rights crisis, 4 April 2002

US State Department Report 2002, 31 March 2003

US State Department Report 2003, 25 February 2004

CIPU Nepal Country Report April 2004

Global IDP Project: Nepal..., 8 September 2004

Amnesty International: Nepal: Escalating “disappearances” amid a culture of impunity, 27 October 2004

Human Rights Watch: Between a Rock and a Hard Place, October 2004

Amnesty International: Nepal: Killing with impunity, February 2005

Home Office Country Information Bulletin: Nepal 1/2005 18 February 2005

CIPU Country of Origin (COI) Request on Freedom of Movement/Internal Relocation, 27 July 2005

BBC News Country Profile 2 August 2005

Foreign and Commonwealth Travel Advice for Nepal- 23 September 2005

Human Rights Watch, Overview of human rights issues in Nepal, 31 December 2005

Report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office including technical cooperation, in Nepal dated 16 February 2006

US Department of State Report on Nepal -2005, 8 March 2006

Report of the United Nations High Commissioner for Human Rights “Investigations into violations of international humanitarian law in the context of attacks and clashes between the Communist Party of Nepal (Maoist) and Government Security Forces: findings and recommendations January –March 2006

Amnesty International Press Release: Nepal: Human rights crucial at dangerous political crossroads, 23 March 2006

ekantipur.com: items on Nepal 8, 11, 15, 16, 18, 22, 27, 29, 30 May 2006; 2, 3, 4, 6, 7 June 2006

People’s News Review Weekly, 12 June 2006

Amnesty International: Nepal: Solidarity brings prospect of permanent peace, 14 June 2006

Home Office Operational Guidance Note Nepal v4.0 3 July 2006

The Hindu, 4, 28 July 2006

IRIN News.org 4 August 2006

2006 Guardian Unlimited, “Nepal...”, 7 August 2006

GlobalSecurity.org: Insurgency in Nepal, 14 August 2006

International News Safety Institute (INSI) update 14 August 2006

NB. Except in relation to 2006, the above does not include a large number of press cuttings covering 2002-2005.

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