

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

**REFUGEE APPEAL NO 75218**

**AT AUCKLAND**

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| <b><u>Before:</u></b>                    | B Burson Member) |
| <b><u>Counsel for the Appellant:</u></b> | E Dawn Patchett  |
| <b><u>Appearing for the NZIS:</u></b>    | No Appearance    |
| <b><u>Date of Hearing:</u></b>           | 10 December 2004 |
| <b><u>Date of Decision:</u></b>          | 13 January 2005  |

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**DECISION**

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[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant.

**INTRODUCTION**

[2] The appellant is a married man from Nepal. He arrived in New Zealand on 22 October 2003 and claimed refugee status on 29 October 2003. He was interviewed by the RSB on 1 March 2004 and his claim was declined by decision dated 26 May 2004. He duly appealed to the Authority.

[3] The appellant's claim is that he is at risk of being killed by Maoist forces operating inside Nepal, who have accused him of spying for the government. The central issue to be decided in this appeal is the well-foundedness of this claim. Before turning to consider this issue, a summary of the appellant's evidence will be set out.

## **THE APPELLANT'S CASE**

[4] The appellant was born in the early 1970s. He completed his secondary school studies in 1990. Thereafter, the appellant attended university graduating in the mid 1990s.

[5] In 1990, the appellant's father was appointed to the first of a number of positions occupied continuously by him until 2003, as either deputy or chief district officer (CDO). The post of CDO is an extremely high government position; there are only 75 in the whole country and the CDO effectively runs the district to which they are appointed on behalf of the Nepalese government. His father's appointments were of different durations in a number of districts throughout Nepal. As the appellant had commenced university by the time his father was first appointed he remained in Kathmandu but would occasionally travel to visit his father in the relevant district.

[6] In 1998 the appellant began undertaking some voluntary work for X organisation, a non-government organisation (NGO) involved in development and educational programmes in villages throughout rural Nepal. By 1999 the appellant had obtained a full-time job but nevertheless continued to work for X organisation. He became a formal member in January 2001.

[7] One aspect of his voluntary work was the undertaking of field trips from time to time, discussing issues relevant to the particular project in rural villages in various districts. He undertook four such field trips between 2001 and 2003, two of which being to districts where his father was the CDO.

[8] The work of the group was not without controversy. Sometimes persons in a village indicated to him that the group was not welcome; the village did not need his help. The appellant believes that these people were Maoists sympathizers. The Maoists were not generally supportive of X and other development NGOs because programmes aimed at improving the lives of rural population would be seen as a direct challenge to the aims of the Maoists insurgency.

[9] In 2003 the appellant travelled on his last field trip for X organisation. It was to an area in the district where his father was the CDO. The appellant and his colleagues completed their field work and returned without incident to Kathmandu.

The next day he learnt that two Maoists had been killed in that district. The Maoists had claimed the dead men had been killed by the army. His father however, issued a statement, reported in the press, to the effect that it was the Maoists who had killed these two people themselves.

[10] A month later the appellant received a telephone call from a person who said he was a commander in the Maoist movement. He directly accused the appellant of spying for his father when on his field trips for the X organisation. The caller referred to not only this last incident but also the killing of other Maoist rebels in another district where his father had been CDO, which the appellant had also visited as part of his voluntary field work.

[11] The appellant spoke to his father about this matter. His father said that the situation was such that he could not provide effective protection to his son. Further calls were made to the family home threatening the appellant. The appellant registered his situation with the Nepalese Maoist Victims Association, which had been established some years earlier to assist persons in the appellant's situation. He began investigating a number of possibilities for escaping Nepal using his work for X organisation and in mid to late 2003, he left Nepal for New Zealand.

[12] He has been in contact with his family since being in New Zealand who have told him there have been further calls to the family home asking his whereabouts. The appellant believes that nowhere is safe for him in Nepal. The Maoists are now very strong and are able to strike anywhere in Nepal. Although his father retired in late 2003, he does not believe this will make any difference. The Maoists will still be interested in him; they believed him to be responsible for the deaths of their comrades. They will want to kill him because he will always be seen as a spy for the government.

[13] The appellant submitted to the Authority various documents including an original letter from the Nepal Maoist Victims Association confirming the appellant's registration with them; a letter from his brother confirming his father's concern about his own personal safety now he has retired together; and e-mail correspondence from X organisation. On 20 December 2004 the Authority received final written submissions with further country information from counsel in

addition to the written memorandum filed before the hearing. All of this has been considered in reaching this decision.

## **THE ISSUES**

[14] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:-

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

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

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

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

### **CREDIBILITY**

[16] The Authority accepts the appellant as a credible witness. There is credible documentation on the file confirming his father's position as CDO and also the appellant's involvement in X organization. Further credible documentation has been received from the Nepalese Maoist Victims Association and his brother. The appellant's account is accepted in its entirety.

### **A WELLFOUNDED FEAR OF BEING PERSECUTED**

[17] There is no doubt a brutal civil war is being waged in Nepal. A recent Human Rights Watch Report *Between a rock and a hard place: Civilians struggle*

*to survive in Nepal's civil war* (October 2004) (the HRW report), documents significant to human rights abuses carried out by both the Nepalese security forces (see p26-53) and the Maoist forces (see p53 -64). See also Amnesty International *Nepal is spiralling human rights crisis* (April 2002) (the AI report) at pp8-11 & 12-15, 16-18.

[18] Within this context, the appellant's claim to be at risk is based on the confluence of two discrete factors: Firstly, his father's position as a CDO and secondly, his work for the X organization. Each will be considered in turn.

#### His Father's Position as CDO

[19] Country information confirms that CDOs occupy an important administrative role in the government of Nepal. The United States Department of State *Country Reports on Human Rights Practices for 2003: Nepal* (25 February 2004) (the DOS report) notes that CDOs enjoy a wide discretion in maintaining law and order. The Nepalese Public Offences Act vests considerable discretionary power in their hands. This legislation authorises CDOs such as the appellant's father to order detentions, issue search warrants and specify fines and other punishments for misdemeanours without judicial oversights. Indeed in 2002 following the imposition of the state of emergency, CDOs were given extra powers to issue preventative detention. Orders under the Public Security Act and the Terrorism and Destructive Activities Act 2002 – see the HRW report at p14; see also the AI report at p19.

[20] Some measure of the symbolic significance of the CDOs for Maoists can be gathered from the fact that the opening day of the "People's War" – 13 February 1996, recorded eight incidents from five districts including attacks on CDO offices - see Norwegian Refugee Council, *Global IDP Database, Profile of internal displacement in Nepal* (8 September 2004) at p13. CDOs continue to be the object of attack – see the AI report at p11; Canadian Immigration and Refugee Board, Research Directorate *Nepal: Reports of Maoists rebel activity in the Solukumbu district*, NPL4107.e (27 January 2003); Amnesty International *Nepal: Amnesty International calls for release of hostages* (24 March 2004).

[21] The significance of the above is that the appellant's father's identity as CDO, plainly placed him at the highest level of government with direct

responsibility for the enforcement of security and anti-terrorism related legislation at a district level. This provides fertile ground for an accusation of spying to flourish; the appellant was at all times in a perceived unique position to channel any information he may have gained, to the Nepalese police and other security forces operating at a local level via his father.

#### The Work with the X Organization

[22] The Authority observes there are reports of an increase in attacks by Maoist forces on non-government organizations (NGOs) – see Canadian Immigration and Refugee Board Research Directorate *Nepal: Whether Maoist forces in Nepal have targeted non-governmental organizations (NGOs) and/or other human rights and community workers*, PL42648.E (9 June 2004). The Norwegian Refugee Council, *Global IDP Database, Up to 200,000 people displaced by fighting remain largely unassisted* (8 September 2004) at p6, reports that both UN agencies and NGOs have in rural areas under the control of Maoists, been pressured to formally recognize the latter's parallel administration. Several agencies are reported to have suspended their operations as a result.

[23] This is perhaps unsurprising. The HRW report at p2, notes that Nepal is amongst the poorest countries in Asia: almost 40 percent of Nepal's 23 million people live below the poverty line, 90 percent of which live in rural areas. Delivery of basic services such as health, education and clean water is inconsistent at best. Almost 50 percent of the children under five suffer from malnutrition and 82 percent of the population survive on less than \$2.00 a day. With this in mind, it can be seen why Maoist insurgents may be extremely reluctant to see development programmes in rural areas, which do not recognize the legitimacy of their parallel administration, successfully operate. The point is simple: if the present system delivers enhanced living conditions via the work of NGOs, the less people will see a need to change it and greater the need for the Maoists to appropriate the local administrative system within which NGO work is carried out, so that they, and not the government, receive the resulting kudos.

[24] Against this background, the fact that that the appellant has been engaged in work for an NGO will only serve to reinforce the suspicion of the Maoists that the appellant is someone who does not support them and strengthen their belief that

he has been passing on information about suspected Maoist sympathizers to his father.

The risk to the Appellant

[25] The brutality that characterises the Nepalese civil war has been the subject of many reports and the Authority does not propose to canvas the multiple and grievous human rights abuses carried out over the years in great detail. Reference, however, can be made to the HRW report at Chapters 4, 5, 6 and 7 (pp26-77); the AI report at Chapters 3 and 4 (pp8-25). What is salient for present purposes is the fact that there are ample reports of the torture and execution by the Maoists of persons suspected of spying for the government. Thus for example, the HRW report (at p 53) notes:

“The Maoists tend to target particular individuals for assassination or execution, particularly suspected government informants...”

It goes on to state:

“An official of the Nepal Human Rights Commission who explained to them that the killings, particularly killings of suspected informants were often ‘unimaginably brutal’ involving mutilation such as the cutting out of tongues of victims, breaking individuals’ bones until death of the victims and burning victims alive.”

[26] The extrajudicial execution by the Maoists of suspected informants is confirmed by country information submitted by counsel - see “Maoists kill journo for ‘spying’” *Kathmandu Post* (16 August 2004); “Maoist killed, injured two others” *Kathmandu Post* (24 August 2004); “Maoists kill civilian on spying charge” *Kathmandu Post* (7 October 2004). Yet another “Six Maoist, civilians killed” *Kathmandu Post* (22 August 2004) records the killing of a victim accused of spying on the Maoist. This is of particular significance. The person executed was the president of a flood victims’ co-ordination committee, the implication being the person was using his position in his committee to spy on the Maoists.

[27] What emerges is compelling evidence of both the willingness and ability of the Maoist to successfully target those suspected of informing against them. The Human Rights Watch report gives details of examples of this and includes (*ibid* at 56) details one such killing in Kathmandu. In fact, the person killed was the founder of the very organisation the appellant registered with. The Authority finds that the risk of the appellant being attacked by the Maoists, even in Kathmandu, is real.

[28] While the willingness of the Nepalese security forces to protect the appellant as the son of a now former CDO is not open to question, their ability to offer effective protection most certainly is. The Authority has seen no information to persuade it that such protection as the Government is able to provide would be truly effective so as to reduce the risk of attack on the appellant to below the real chance threshold. A willingness unsupported by the ability to offer effective protection will not suffice to take the appellant outside the scope of the protection afforded by the Convention – see generally *Refugee Appeal No 71427/99* [2000] NZAR 545 at [66]; *Refugee Appeal Nos 73898 and 73899* (9 November 2004) at [73].

#### Internal Protection Alternative

[29] The Authority finds that the appellant would not have a viable internal alternative available to him. The Centre for Strategic Studies *South Asia Monitor : Number 72 Nepal's Agony Deepens* (1 July 2004) notes that Maoist forces are present in all of Nepal's 75 districts and some estimates indicate that they control 43 percent of the territory. The report notes the Maoist leader is supported by 4000–5000 well trained guerrillas who are supported by a 10,000–15,000 strong militia. It is a sizable force with a country wide reach. Nepal's overwhelming rural demography means that the appellant's ability to keep his identity hidden is limited. The chance that his identity will become known to the rebels in the district he was living is very real. The risk of harm to him will not be eliminated by his relocating outside Kathmandu.

#### Conclusion of Well-foundedness

[30] In light of the above the Authority finds that the unique confluence of these two factors, namely his father's appointments as CDO and his work for the X organization, means that there is a real chance that he would be targeted by the Maoists for execution. The latter factor provided the perceived opportunity to discover compromising information, the former the perceived opportunity for disclosure. That the Maoists are wrong in their suspicions does not in any way reduce the risk to him. The Authority does not overlook the fact that his father has retired as a CDO but accepts counsel's submission in this regard that once he has been "tagged with this label", the Maoists will see him as a legitimate target lest he



continue his spying activities in the future. For these reasons the Authority answers the first principal issue in the affirmative.

#### **NEXUS TO CONVENTION REASON**

[31] Turning to consider the second principal issue, there can be no doubt that the Maoists are imputing to the appellant a political opinion against their cause by reason of his work for the X organization and in their wrongful belief that he is passing on information. The second principal issue is also answered in the affirmative.

#### **CONCLUSION**

[32] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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B Burson  
Member