

071296105 [2007] RRTA 122 (29 June 2007)

DECISION RECORD

RRT CASE NUMBER: 071296105
DIAC REFERENCE(S): CLF2006/144228, ABD2006/77066
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: Suseela Durvasula
DATE DECISION SIGNED: 29 June 2007
PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies paragraph 36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies subparagraph 36(2)(b)(i) of the Migration Act, being the spouse of the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants are husband and wife. They claim to be citizens of Nepal, arrived in Australia and applied to then Department of Immigration and Multicultural Affairs for Protection (Class XA) visas. The first named applicant applied for a protection visa on the basis that he was a refugee and his wife (hereafter called 'the second named applicant') applied on the basis that she was a member of his family unit.

The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter. The delegate refused the visa applications on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicants applied to the Tribunal for review of the delegate's decision. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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

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

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

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

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

persecution even though the possibility of the persecution occurring is well below 50 per cent.

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

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

CLAIMS AND EVIDENCE

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

Protection visa application

The applicants claimed to be citizens of Nepal and are husband and wife. The first named applicant (hereafter called 'the applicant') is married to the second named applicant and they have children. In his protection visa application, the applicant states that he was born in Nepal. He lived in Nepal from birth until mid 2000s and completed his schooling there. He completed secondary school and commenced a certificate at the University. He was employed after his schooling. The second named applicant was born Nepal.

The applicants arrived in Australia on temporary short stay visas. These visas were granted following the lodgement of a security by the applicant's relative in Australia.

In a statutory declaration, the applicant sets out his protection visa claims. He states as follows:

- While at university, he joined the Student Union, due to his relative's influence. His involvement in politics at that stage was rather nominal. He did not complete his studies.
- He is a great believer in the democratic principle of a multi-party system and is pro-royalist. In the early 1990s he joined a political party A which believes in liberal democracy and constitutional monarchy.
- His home area was one of the areas most affected by Maoists. He started talking against the Maoists. In early 2000s they kidnapped him, took him to an unknown place, tortured him mentally and physically and he was forced to do labouring jobs. He was released after several weeks, on condition that he was not allowed to talk against Maoists in the future.
- Following this incident, he became more actively involved in the activities of the political party A.
- He assisted some Christian friends with their programs while they stayed in his city, as he supported religious equality. The Maoists accused him of introducing different religions and cultures into the city and started threatening to kill him again.

- Soon after, a group of Maoists broke into his home and robbed him. They forced his family to leave the house and destroyed it completely.
- He could not get any assistance from the police or the army as they were controlled by the Maoists. He decided to move to a different district. He continued working against the Maoists with the help of his Christian friends. The Maoists sent him threatening letters and telephone calls.
- To secure his wife and children he moved to Kathmandu. As he was the main target of the Maoists and they have a big network all over the country, he felt that their lives were not safe wherever they went.
- Although political and Maoists leaders have recently signed a peace treaty, the Maoists have not stopped searching and seeking revenge against those people who were against them in the past.
- He asked his relative to sponsor him and his wife for visas and deposited a security. He did not apply for visas for his children, thinking that it would impact on his and his wife's visa applications. Also, Maoists usually harm the main person in the family. He left his children under the care of a hostel.

In a written submission the applicant's migration agent stated that the applicant feared persecution for reasons of his political opinion and his membership of a particular social group. The applicant is a strong supporter of party A, which was founded by the monarchists supporters, and is against communism. The applicant is a relative of a monarchist supporter. He is also an able-bodied person and fears that he will be conscripted by the Maoists to join their People's Army.

Departmental interview 1

The applicant was interviewed by the delegate. His comments at that interview may be summarised as follows.

The applicant's family lives in Nepal. He has relatives in Australia. He has telephone contact with his family in Nepal, they are mostly with his children. His children are being educated in Nepal. The delegate asked the applicant about his Political Party, its ideologies and the current leader.

The delegate asked the applicant about his claims that he was targeted and kidnapped by Maoists. The applicant stated that while he was living in his city young Maoist men came to his house and asked him questions. They had weapons, so he did what they said and they took him and detained him for several weeks. He believed the Maoists attacked him because he had opposed them and was a supporter of the monarchy. He was released on condition that he was not allowed to speak out against the Maoists.

After his release from detention, he was silent for a while, but he soon started to speak out against the Maoists, through social work and through helping his Christian friends. He was at his home with some of his Christian friends. The Maoists were not happy with him helping Christians. They came to his house and forcing him to leave and damaged his house.

When asked whether he had any problems with the Maoists when he was not active in politics, the applicant stated that he did not believe in their doctrines and their threats. He was strong and principled in his party and he did not yield to them so they targeted him.

After he was forcibly removed from his house he lived for several months in a nearby adjoining house. The Maoists threatened his family and kept asking for donations. He therefore moved with his family to another city. He lived there for several months before moving to Kathmandu with his family. When asked if any specific incident prompted him to move to Kathmandu, the applicant stated that he did not feel secure as the police of that city and the army did not provide sufficient protection.

In Kathmandu, they moved between different relatives' houses as the applicant was worried that the Maoists might find him. Eventually, his children were sent to study elsewhere. His children were safe as they were not targeted and no one was allowed to visit them. Except for his relatives and friends, no one knew about the children's whereabouts. When asked if he worked in Kathmandu the applicant stated that he did not work. When asked if he feared harm in Kathmandu, the applicant stated that he lived in secret and not did move around too much. He did not have any contact with the Maoists while living in Kathmandu. When asked if he went back to his home city, the applicant stated that he went back a few times to secretly.

The delegate put to the applicant that on his temporary visa application, he had stated that he was living in his home city before his departure to Australia, not in Kathmandu. The applicant stated that his permanent address was in his home city but he had a temporary address in Kathmandu. When he applied for a visa, he thought that he had to provide his permanent address.

The delegate put to the applicant that in support of his visa application he had provided a letter from his work, signed by the managing director, stating that he worked there and had approved leave. The applicant stated that he had worked randomly in Kathmandu. The hours were flexible and he was not a permanent employee. The managing director was a relative and he assisted him financially in return for this work. In relation to the document provided in support of his visa application, the letter was genuine, but the information in the letter, especially the dates, was partially fabricated to enable him to get a visa. He went to his city to obtain the documents and his family members also helped. If he had to return to Nepal, he fears that the Maoists will hold him.

Departmental interview 2

The delegate obtained further information from the applicant's visa file, including:

- A letter from the managing director, stating that the applicant had been working at the company for a few years. He had approved leave for certain period.
- A letter from the managing director, stating that the applicant had commenced work in early 2000s and was eventually promoted a few years later. He had been working at the company since then and was on sick leave for few days.

- Time sheets indicate that the applicant had worked at the company for several days a week for many months.
- Payslips for a pay period.
- A medical certificate signed by a general physician in support of the applicant's application for sick leave.
- Evidence that the applicant owned a property and was a permanent resident there.

The delegate put this information to the applicant in a further interview. The applicant stated that this information was partially fabricated to allow him to obtain a visa. He did not work any of the dates specified at the company. The medical certificate was genuine and then the doctor had flown a long distance to write the certificate. The delegate asked the applicant why he needed a medical certificate if he was not actually working in Kathmandu. The applicant stated that he thought he needed the certificate for his visa application.

After the interview the applicants' migration agent made a written submission to the Department. The agent stated that the applicant's house had been destroyed and he therefore had to compile documentation to flee Nepal. The employment papers from the company and their contents were fabricated to allow him to get a visa to enter Australia. The medical certificate was obtained solely to get the visa to enter Australia. The applicant's relatives, the director of the company and the doctor had helped him to arrange his papers and provided support to allow him to flee Nepal. The applicant's relative has also risked a large sum for security to enable the applicant to come to Australia.

Tribunal hearing

The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's relatives. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages. The applicants were represented in relation to the review by their registered migration agent.

Applicant's evidence

Applicant's political activities

The Tribunal asked the applicant about his political activities. The applicant stated that he became involved with politics due to his relative's influence. The applicant used to accompany his relative to political meetings.

The applicant stated that he became involved with political party A when he studied at university. He described the party's principles, symbol and flag, organisational structure and current key membership. He was elected to a committee. His party activities involved giving speeches in villages and at functions and being involved in projects. In doing so, he often spoke out against the Maoists.

Targeting by Maoists

When asked how and why the Maoists targeted his family, the applicant stated that his family had always been long affiliated with political party A in Nepal and was well known to the

Maoists. Since mid 1990s, they had targeted his family by asking for donations, and making verbal and written threats by telephone, letters and in person. The applicant described the incident where he was detained by the Maoists and where his house was destroyed. The house has now been repaired and a relative lived there until he passed away.

The Tribunal asked the applicant whether other members of his family had been targeted by the Maoists. His relative was not seriously threatened as he had not been politically active recently. One of his siblings has received threats from the Maoists although this sibling was less politically involved than the applicant. This relative lives outside the town and cannot move about freely.

Applicant's children

The Tribunal asked the applicant why he left his children if he feared threats from the Maoists. The applicant stated that they are in a very secure place. His children did not leave the hostel except for weddings or festivals. They are not allowed to have contact with anyone apart from family members. He sent his children away as he wanted them in a secure place and to continue schooling.

Relocation to Kathmandu

The applicant relocated to Kathmandu during the mid 2000s and stayed with his relatives. In Kathmandu, he did not work and his relatives supported him. When asked if he experienced any problems from the Maoists in Kathmandu, the applicant stated that he did not have any problems as the Maoists did not know where he was living. However, his relatives lived in a large secure compound and he rarely ventured outside the house. When asked why he could not relocate to Kathmandu, the applicant stated that if he returned to Kathmandu he would have to live there secretly and he could not hide there forever. He would not be able to express his political opinion freely.

Visa application

The Tribunal asked the applicant about the documents he had provided in support of his visa application, particularly regarding his employment and residency in his home city. The applicant assured the Tribunal that he did not work in Kathmandu. He was nervous at the Departmental interview and was not sure how he should have responded. He had worked at a company in his home city for few years. He stopped working there when he moved from that city. He again repeated that the documents provided in support of his visa application were genuine documents, but the information in them was fabricated.

The general manager is a relative and he helped prepare the employment documents for him. The first time the applicant applied for a visa, his application was refused, as the Department contacted the company and he was not there. He therefore had to produce a medical certificate covering the period when the Department telephoned to verify his employment. In relation to the medical certificate, he personally obtained the certificate from the doctor when he was visiting there. The doctor did not fly especially to write the certificate for him.

Current political situation in Nepal

The Tribunal asked the applicant why it was not safe for him to return to Nepal now that a peace agreement was in place and the Maoists had been included as part of the interim

government. The applicant stated that the peace agreement was not enforced in practice and some members of the Maoist army were still harassing those who had been opposed to them. Recent news reports indicated that members of opposing political parties were still being beaten by the Maoists.

Relocation to India

The Tribunal asked the applicant why he could not relocate to India. The applicant stated that there were plenty of Maoists in India, as the movement began there. It will be difficult for him to find food, shelter and work there as Nepalese are discriminated against in India. He also has relatives in Australia.

Evidence from witnesses

Witness 1 told the Tribunal that he recently went back to Nepal to attend a funeral and he did not feel safe there. The deceased was well known in the district and his family is still targeted. Witness 1 left Nepal in mid 1990s. His parents often told him not to come home as it was not safe. He confirmed the applicant's evidence and the fact that the applicant's relative and the applicant were involved in Politics.

Witness 2 also confirmed the applicant's evidence and the fact that his relative and the applicant were involved in Politics. He confirmed that he had helped the applicant obtain fabricated documents to support his visa application.

Further documentary evidence

At the hearing the applicant submitted the following documents to the Tribunal:

- A letter from a district Representative confirming the incident in which the applicant's house was destroyed by Maoists.
- A letter on political party A letterhead stating that the applicant was an active member their political party since the mid 1990s and had been threatened by Maoists.
- A letter from a Church stating that the applicant supported the Church's Christian programs.
- A letter from the District Police Office stating that the applicant's house was destroyed by Maoists.

The Tribunal asked the Department of Foreign Affairs and Trade (DFAT) post in Nepal to verify the authenticity and contents of the documents submitted by the applicant. DFAT advised the Tribunal that:

A. Through contact with district police, the political party and local committees, post has confirmed that the documents provided by the applicant are authentic.

[Information deleted in accordance with s431 of the Migration Act]

Independent country information

The Tribunal has had regard to the following independent country information in making its decision.

2006 peace agreement between Maoists and state authorities

Recent material suggests that so far, the peace agreement between the Maoists and the state authorities in Nepal is holding, although there have been some violent clashes in recent months with small groups who feel left out of the movement towards constitutional change, and there are still some news reports of Maoist clashes in remote districts. Some commentators also suggest that when the planned elections take place later in 2007, there is the potential for disagreement over the form of the new political system.

An April 2007 report by Jane's Intelligence Review provides a recent update of the security situation in Nepal:

However, questions remain over whether the Maoists are genuinely committed to joining the political mainstream and renouncing their former sources of power. There have been reports in the Nepalese press that Maoist cadres are continuing to demand 'voluntary donations' in the capital, extorting money from businessmen and kidnapping their children. In addition, Nepalese newspapers have claimed that the YCL has threatened their editors who publish critical articles (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', *Janes Intelligence Review*, 23 April 2007).

The report goes on to indicate those issues that may be of concern in the coming months:

- Under the terms of the peace agreement, the Maoist militia called the People's Liberation Army (PLA) was placed in camps and its weapons locked up under UN supervision. However there is some doubt as to whether all the PLA members are in the camps, and whether all their weapons have been handed in.
- When elections are eventually held, there is the risk that the Maoists may win only a small number of votes "which might tempt them to return to the jungle to push for power militarily".
- If the Maoists win a plurality of votes they may interpret this as "a mandate to seize control of government" in which case "the Nepalese Army, logistically and perhaps materially supported by India, could intervene..."
- The election polls are likely to be delayed. There are still many people displaced from their homes and "intimidation appears to be on the rise in a general atmosphere of lawlessness". October or November seems a realistic estimate of when they may be held (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', *Janes Intelligence Review*, 23 April 2007).

Nepal's commentators tend to stress that the situation remains unstable. The following extract from a December 2006 report by the International Crisis Group (ICG) is indicative of the unstable situation:

The ceasefire was tenuously defined and monitored, although both sides refrained from military activity. The Maoists declared a three-month unilateral ceasefire immediately after the April movement and extended it; the government responded with an indefinite ceasefire. On 26 May both sides signed a 25-point code of conduct and formed a 31-member national monitoring committee, headed by former election

commissioner Birendra Prasad Mishra. However, a formal bilateral ceasefire came only with the November peace accord (p.5, n.22).

...Political maneuvering in Kathmandu took place against a background of lawlessness and confusion across most of the country. Despite poor monitoring mechanisms, the ceasefire held. But re-establishing anything like normal governance was hampered by Kathmandu's weakness and Maoist intransigence. The rebels were happier to move into any vacant political space than to share power (p.5).

...Maoist violence did decrease after the ceasefire but other intimidating behaviour appears to have increased, at least in the period before the CPA. The killings which took place differed from the targeted "annihilation" that was a trademark during the war. Most were due to torture in Maoist "people's government" custody: in the first five months of the post-April ceasefire, almost 200 people were arrested by the rebels, although most were subsequently released. Local Maoists may feel they have free rein until their "people's governments" are dissolved (p.5).

...Maoist cadres were becoming restive, and their public threats of an "October revolution" were taken literally by many observers. At a central committee meeting in September held not far from Kathmandu, all their army's divisional commanders and commissars participated as observers and presented situation reports. The six-day session saw serious debate and concluded that if peace talks were blocked, the only remaining option was revolt (p.8).

...The CPA is not truly comprehensive. It does open the way for a more durable ceasefire and charts the course for the rest of the process but even if it ends the armed conflict, it has deferred certain central issues. Structural changes have yet to take place: if the political understanding falls apart or the process is otherwise derailed, the Maoists are prepared to start another type of struggle, albeit not a simple resumption of "people's war". As long as their armed forces remain intact and the state security sector unreformed, there is potential for a rapid return to conflict (p.13) (International Crisis Group 2006, *Nepal's Peace Agreement: Making it Work*, Asia Report no.126, 15 December, pp.5, 8 http://www.crisisgroup.org/library/documents/asia/south_asia/126_nepals_peace_agreement___making_it_work.pdf – Accessed 20 December 2006).

A March 2007 *Operational Guidance Note* on Nepal by the UK Home Office states that after the transition of power in April 2006, government abuse of human rights "decreased substantially" but "Maoist abuses, such as abduction, extortion, and violence, continued relatively unabated" (UK Home Office 2007, *Operational Guidance Note: Nepal*, 23 March, p.3 http://www.ecoi.net/file_upload/432_1175069868_nepalogn.pdf – Accessed 5 April 2007).

Maoist attacks against royalist parties since the 2006 peace agreement

Despite the comprehensive peace agreement (CPA) being signed in late November last year, Maoist cadres are reportedly still committing serious human rights abuses, including killings, abductions, torture, and extortion.

The US Department of State have released a recent report claiming that despite the current cease fire agreement Maoist violence has continued relatively unabated. The report also states that oppositional political parties have reported continued threats and intimidation from Maoists:

A Maoist insurgency-punctuated by cease-fires in 2001, 2003, 2005, and the latest one from April 26, 2006-has been ongoing since 1996... However, Maoist violence and intimidation have continued since the agreement.

Both the Maoists and security personnel have committed numerous human rights violations. The Maoists have used tactics such as kidnapping, torture, bombings, intimidation, killings, and conscription of children.

...After the April 2006 cease-fire announced by the government and the Maoists, incidents of human rights violations by the government declined substantially while incidents of human rights violations by the Maoists remained relatively unabated. Even after signing a comprehensive peace agreement with the government in November 2006, Maoists' extortion, abduction, and intimidation largely remained uncontrolled. Although activities by other political parties have increased significantly in the rural parts of Nepal, political party representatives, police, non-governmental organization (NGO) workers, and journalists reported continuous threats and intimidation by Maoist cadres. (US Department of State 2007, *Background Note: Nepal*, US Department of State website, May, <http://www.state.gov/r/pa/ei/bgn/5283.htm> - Accessed 25 May 2007 - \\ntssyd\refer\research\internet\sou-asia\nepal\npl31796.web7.doc).

The UK Home office have also reported on the continued abuse of human rights by Maoists rebels:

Despite the signing of the ceasefire agreement and repeated pleas from the United Nations, there were reports in 2006 that the Maoist rebels continued to commit human rights abuses including killings, abductions, torture, and extortion. There were also reports that Maoist forces did not release the thousands of children under the age of eighteen believed to be serving in their ranks. In some instances, the rebels reportedly even continued to forcibly recruit child soldiers. (UK Home Office 2007, *Operational Guidance Note: Nepal*, 23 March http://www.ecoi.net/file_upload/432_1175069868_nepalogn.pdf).

Recent incidences of violence have been reported against royalist political parties including the Rastriya Prajatantra Party and the Rastriya Janashakti Party. The majority of the reported attacks were reported to have been allegedly undertaken by the Maoist student wing. Sources state that despite the current cease fire arrangements Maoists are still engaged in violent activity and human rights abuses. Sources report that opposition political parties have continued to have been the target of threats and intimidation by Maoists. Set out below are a number of reports which highlight attacks allegedly committed by Maoists against RPP party members:

- On 11 February 2007, *eKantipur* allege that Maoists attacked a party meeting of the Rastriya Prajatantra Party (RPP). The assailants are reported to have used bricks and rods during the attack. 18 people sustained serious injuries as a result of the attack. Pro-Maoist students are also reported to have attacked a Rastriya Janashakti Party's program held in Damauli on the same day (Ghale, P.K. 2007, 'Maoists attack RPP meet 18 injured', *eKantipur* website, 11 February, <http://www.kantipuronline.com/kolnews.php?&nid=100368> – Accessed 24 May 2007 - \\ntssyd\refer\research\internet\sou-asia\nepal\npl31796.web1.doc).
- On 15 December 2006, *Indo-Asian News Service* reported a Maoist attack of a pro-monarchy march. The Rastriya Prajatantra Party (RPP) organised the march which was allegedly overtaken by the Maoists' student union. The royalist's claim they were

physically attacked resulting in 10 of their members sustaining injuries ('Royalists take to the streets in Kathmandu' 2006, Indo-Asian News Service, 15 December, \\ntssyd\refer\research\internet\sou-asia\nepal\npl31796.web4.doc).

- On 23 September 2006, *Hindustan Times* reported the murder of Krishna Charan Shrestha, MP from the Rastriya Prajatantra Party. Another royalist party member was also killed in the incident. A splinter group of the Maoists was suspected of committing this crime. ('Royalist MP among four killed in Nepal' 2006, *Hindustan Times*, 23 September. \\ntssyd\refer\research\internet\sou-asia\nepal\npl31796.web3.doc).

A 2006 report by the Asia Centre for Human Rights on Internally Displaced Persons (IDPs) in Nepal also states that a majority among the IDP'S are cadres of parties, including the RPP:

The IDPs have fled their villages for a variety of reasons. A majority among the IDPs are cadres of mainstream political parties such as United Marxist-Leninists (UML), Nepali Congress (NC) and Rastriya Prajatantra Party (RPP) whose political ideology and opinion are different from that of the Maoists. (Asia Centre for Human Rights 2006, Nepal: One Year of Royal Anarchy, 30 January, p.76 –\\ntssyd\refer\research\internet\melbnet\npl060130.pdf).

Effective protection in India

On the issue of effective protection in India, the current information is inconclusive and indicates that practical access to and enjoyment of notional rights cannot be safely assumed in practice.

Article 7 of the 1950 Treaty of Peace and Friendship between India and Nepal states as follows:

The Governments of India and Nepal agree to grant, on reciprocal basis, to the nationals of one country in the territories o [sic] the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.

In a 2006 advice to the Refugee Review Tribunal, DFAT advised that in practical terms, India has not prevented citizens of Nepal from entering India. India's Foreign Registration Regional Office (FRRO) had informed DFAT that: 'currently, Nepalese nationals were not denied entry into India unless they were on the look-out list of security agencies, suspected of involvement in terrorist activity or under instruction from the intelligence agencies'.

The post provided information on the status and implantation of the 1950 Treaty sourced from 'Dr VD Sharma (Legal Division, Ministry of External Affairs' who advised 'that the provisions of the Treaty were implemented as a matter of course'; and 'that in the case of more general treaties, such as the 1950 Treaty of Peace and Friendship, the practice was for the conditions of the treaty to be met by India without the passage of the domestic legislation' (Department of Foreign Affairs and Trade 2006, *DFAT Report 554*, 23 October 2006).

Of the rights accorded under the treaty, the right to employment has never been explicitly enshrined in the agreement and that 'it is difficult for India to ensure that Nepalese nationals enjoy national treatment in all parts of India' (Subedi, S.P. 2005, *Dynamics of Foreign Policy and Law: a Study of Indo-Nepal Relations*, Oxford University Press, Oxford & New York).

Other country information indicates that as the Treaty has not been incorporated into Indian domestic law, it cannot be enforced by the Indian courts:

Parliament has not enacted any laws that regulate the manner in which the executive shall sign or ratify international treaties and covenants. Nor does Parliament decide the manner in which these treaties should be implemented, except in cases where such implementation requires Parliament to enact a law' (Kapur, D. & Mehta, P.B. 2006, 'The Indian Parliament as an Institution of Accountability', UN Research Institute for Social Development website, January [http://www.unrisd.org/UNRISD/website/document.nsf/240da49ca467a53f80256b4f005ef245/8e6fc72d6b546696c1257123002fcceb/\\$FILE/KapMeht.pdf](http://www.unrisd.org/UNRISD/website/document.nsf/240da49ca467a53f80256b4f005ef245/8e6fc72d6b546696c1257123002fcceb/$FILE/KapMeht.pdf) – Accessed 11 May 2007).

A 2001 paper by the Indian government's National Commission to Review the Working of the Constitution provides information on 'The effect of Treaties on Indian Domestic Law'. The paper notes that different Indian courts have taken different views of the relevancy of the provisions of Indian treaties within Indian domestic law. For instance, the paper notes that 'a decision of the Kerala High Court, where it was held that until domestic legislation is undertaken to give effect to the letter or spirit of an international covenant or declaration, the covenant or declaration cannot be held to have the force of law and cannot be enforced by the Courts in India' (National Commission to Review the Working of the Constitution 2001, 'Treaty-Making Power Under Our Constitution', Ministry of Law & Justice Government of India, 8 January <http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm> – Accessed 11 May 2007).

Several recent reports indicate that some members of India's Nepalese population have not, or at least feel that they have not, been reciprocated the rights of an India national. An update on vulnerable persons in India, published by the Norwegian Refugee Council on 3 May 2007, reports that: 'Nepalis living in north-eastern India are... a particularly vulnerable group in the North-East and have been targeted and displaced in Assam, Manipur and Meghalaya. It is unknown how many remain displaced today. Many have fled to Nepal'.

In recent years, reports from a number of sources, including news agencies and human rights groups, have claimed that some citizens of Nepal are subject to mistreatment in India by way of economic exploitation, police harassment and displacement. For example, a July 2005 Refugees International report which claims that only a fraction of India's Nepalis enjoy the rights accorded them under the 1950 treaty: '[w]hile the Nepalis in the formal sector in India enjoy the same legal rights as Indians by joining labor unions, the formal sector only includes 8% of the workforce, and the majority of Nepalis fall outside this sector'. Those working in the informal sector are reportedly 'often denied their basic legal rights and are vulnerable to labor rights violations and various forms of exploitation'.

A Kathmandu Post report of January 2004 states that: 'police [had] made 'identification certificate' compulsory for Nepalis in order to stay in hotels or to apply even for menial jobs in the city, said Pradeep Khatriwada, first secretary at the Royal Nepalese Embassy' (Shuyilka, K. & Brown, M. 2005, 'India: Nepali migrants in need of protection', Refugees International website 25 July <http://www.refugeesinternational.org/content/article/detail/6429/?PHPSESSID=5ce00f92779c166324e1d> – Accessed 20 June 2006; Timsina, N.N & Bhattarai, D. 2004, 'Migrant Nepali workers are marked in Delhi', *Kathmandu Post*, 28 January <http://www.kantipuronline.com/php/kolnews.php?&nid=6786> – Accessed 8 March 2004. One source also reports that some workers had been 'repatriated' (Roka, H. 2003, email to Sarai List 'Research Proposal', 20 January, Sarai website <http://mail.sarai.net/pipermail/reader-list/2003-June/005799.html> – accessed 21 March 2006).

A 2002 article reports that Nepalese 'leaving their villages need letters from the authorities to prove to Nepali and Indian police that they are not Maoists' (Thapa, K. 2002, 'The Exodus', Nepali Times, 13-19 December). Another article reports that Indian police forced around 40 Nepalese labourers to return to Nepal after failing to produce valid documents of personal identity:

According to the labourers, the Indian police do not consider Nepalese citizenship certificate as a valid document of personal identity and only consider the one that is provided by personnel at the Indian border, on the recommendation of concerned District Development Committee (DDC) or VDC authorities identifying the labourer and the area he comes from. ('Indian police send back 40 Nepali workers' 2002, The Kathmandu Post, 20 April).

FINDINGS AND REASONS

On the basis of the first and second applicant's passports, the Tribunal finds that they are nationals of Nepal. The Tribunal accepts the evidence as to their identity and date of birth.

The Tribunal found the applicant to be a credible witness. His evidence regarding his political activities in Nepal and the attacks by Maoists was detailed, consistent with his written statements and evidence at the Departmental interview, and was corroborated by the other documentary evidence on file and the evidence of his relatives. He answered the Tribunal's questions in an open and straightforward manner. He provided a detailed and credible account of his past experiences in Nepal.

Claims to be a member of the Political Party A

The Tribunal accepts that the applicant was a long standing and member of a political party in his district. At the hearing, the applicant gave a detailed account of the party's policies, organisational structure and his role in the party. DFAT confirmed with Political Party A that the applicant was a member since early 2000s. The Tribunal also accepts that the applicant's relative was involved in political movements.

Claims to have been targeted by Maoists

The Tribunal accepts that the applicant was adversely targeted by Maoists because of his active involvement with Political Party A and because of his relative's longstanding involvement in the politics. At the hearing, the applicant gave a detailed account of the threats he and his family received from Maoists including letters, telephone calls and in-person visits. The Tribunal accepts that the applicant was detained by the Maoists and that his house was destroyed by Maoists. The applicant has provided documentary evidence corroborating the destruction of his house, including letters from local authorities from his city. DFAT has verified the authenticity of these reports, confirmed that the destruction was reported to local authorities, and was investigated by the police.

The Tribunal accepts the applicant's evidence that he moved to a different city and subsequently to Kathmandu after the incident. The Tribunal accepts that the applicant had a prominent anti-Maoist political profile, and as a result, the Maoists continued to threaten him while he remained in his home city.

Visa application

The Tribunal has considered the evidence in the applicant's visa application that indicated he was living and working in his city during the period he claims to have relocated to Kathmandu. The evidence from his employer regarding the applicant's work is reasonably detailed, but the Tribunal accepts the applicant's claim that he fabricated this evidence with the help of the managing director who was a family friend. The applicant's claims are also supported by the fact the Department rang the company to verify the applicant's employment and he was not there. As a result, the applicant considered that he needed to produce a false medical certificate to cover the days when the Department rang. As he explained to the Tribunal at the hearing, doctor gave the applicant this certificate while he was visiting. He did not fly especially to write the medical certificate. The applicant's actions and the fact that he was not present when the Department telephoned to verify his employment are consistent with his claim that he did not work at the company after he relocated.

In relation to the applicant's responses at the Departmental interview, the Tribunal accepts that the applicant was nervous and did not know how to explain the fabricated documents in his visa application. He therefore stated that he had worked in Kathmandu, when he had not, but only after further questioning by the delegate. The Tribunal accepts his evidence at the hearing that he did not work in Kathmandu and only occasionally went out to visit his children.

The fact that the applicant made false claims regarding his employment and residency in his visa application does not mean that he is fabricating his claims to be a refugee. His actions are consistent with a person who wanted to obtain a visa to leave Nepal at any cost, as he feared for his safety. In conclusion, the Tribunal does not draw any adverse inference from the applicant's claims in his visa application.

Applicant's children

The Tribunal has some concerns that the applicant left his children while he and his wife went to Kathmandu. This may indicate that the applicant did not have a well-founded fear of persecution. However, the Tribunal accepts the applicant's evidence that his children were in a secure place and were not allowed to meet anyone or go out unless they were accompanied by trusted family members. The applicant told the Tribunal that he rarely went out in Kathmandu and feared for his safety there. It is therefore reasonable that he wanted to give his children some stability and keep them in a safe place. The Tribunal accepts that the applicant did not apply for visas for his children as the visas may not have been granted if the whole family was traveling. In conclusion, the Tribunal does not draw any adverse inference from the fact that the applicant's children were in a different location while he was in Kathmandu.

Relocation elsewhere in Nepal

The Tribunal has considered whether the applicant could relocate within Nepal and live safely in another part of the country, including in Kathmandu. It concluded that he could not do so. The country information referred to above indicates that violent Maoist attacks have occurred in various parts of the country against pro-monarchist supporters. While it is less likely that the applicant would face harm in Kathmandu than if he returned to his home city, there is still a possibility that he may be targeted for persecution by Maoists if he returned to Kathmandu or elsewhere in Nepal. The Tribunal accepts the applicant's evidence that while he lived in Kathmandu for a short while, he still feared for his safety and rarely went out. He had to live discreetly without being able to openly express his political opinions. The

Tribunal therefore finds that the applicant faces a real chance of persecution for a Convention reason should he return to Nepal now or in the reasonably foreseeable future.

Whether the applicant has a well founded fear of harm in the reasonably foreseeable future

The Tribunal has accepted the applicant's claims that he had experienced past persecution at the hands of the Maoists for reasons of his political opinion and his support for the monarchy.

The Tribunal has considered whether the applicant would be able to access reasonable state protection against the risk of harm posed by the Maoists. The Tribunal has also considered whether the peace agreement signed in November 2006 and its potential for future peace and stability means that the applicant would be safe from the risk of future serious harm if he returned to Nepal. The country information quoted above indicates that the situation in Nepal is fragile and unstable with continued reports from reputable sources of human rights abuses. A stable and lasting peace is contingent on many matters (see report in *Janes Intelligence Review*). Many violent incidents perpetrated by Maoists against opposition political parties have been reported. It appears from these reports that the state has not yet established an effective system for controlling such violence.

In the applicant's particular circumstances, the Tribunal considers that he may be particularly targeted by Maoists given his and his relative's previous political profile and their outspoken support for a constitutional monarchy. In these circumstances, the Tribunal does not accept that there is a reasonable level of state protection available to the applicant, against the risk of future harm from Maoists, at the date of this decision. Therefore, the Tribunal cannot make a finding with confidence that the applicant would be safe from the risk of serious harm from Maoists in the reasonably foreseeable future.

The Tribunal is satisfied that there is a real chance that the applicant would experience persecution from the Maoists if he returned to Nepal and that the state is unable to provide him with protection from that persecution. The Tribunal accepts that the persecution the applicant would suffer is 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act, in that it involves a threat to his liberty or significant physical harassment or ill-treatment. The Tribunal is satisfied the applicant's political opinion is the essential and significant reason for the persecution he fears, as required by paragraph 91R(1)(a). The Tribunal therefore finds that the applicant faces a real chance of persecution for a Convention reason should he return to Nepal now or in the reasonably foreseeable future.

Effective protection in India

The Tribunal has considered whether the Applicant might seek and obtain effective protection in India, but the country information (already set out) is such that the Tribunal is unable to be satisfied that he has an existing legally enforceable right to enter and reside in India either temporarily or permanently. While there is an inter-governmental agreement (the Treaty of Peace and Friendship) to accord equal 'privileges' to nationals when they are 'in the territories of the other', as is observed above this does not impose an obligation on India's government to allow free entry into India by all nationals of Nepal. There is also no evidence before the Tribunal of a provision in Indian domestic law giving enforceable rights of entry to all Nepali nationals or evidence that the Treaty has legal effect under Indian domestic law.

Further, even if the Applicant were able to enter India the Tribunal cannot find the chance remote that he would be returned to Nepal by the authorities in India, as has happened to

some other nationals of Nepal for, on occasion, spurious reasons. The Tribunal cannot be satisfied that he will not be returned to Nepal, where he faces persecution, by the authorities in India.

Accordingly, the Tribunal finds that the Applicant has a well-founded fear of persecution in Nepal for reasons of political opinion. It is satisfied that subsection 36(3) of the Act does not apply to him with respect to India. In all the circumstances, the Tribunal is satisfied that the Applicant has a well-founded fear of Convention-related persecution in Nepal.

CONCLUSION

The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in paragraph 36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

No specific claims were made by or on behalf of the second named applicant. The Tribunal is satisfied that she is the spouse of the first named applicant for the purposes of subparagraph 36(2)(b)(i). The fate of the second named applicant's application therefore depends upon the outcome of the first named applicant's application. She will be entitled to a protection visa provided she satisfies the criterion set out in paragraph 36(2)(b) and the remaining criteria for the visa.

DECISION

The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the second named applicant satisfies s.36(2)(b)(i) of the Migration Act, being the spouse of the first named applicant.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. Sealing Officer's I.D. PMRTAK</p>
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