

060779039 [2006] RRTA 187 (21 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060779039

DIMA REFERENCE(S): CLF2001/34278

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Ron Witton

DATE DECISION SIGNED: 21 November 2006

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

The applicant, who is a citizen of Nepal, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights. The applicant sought review of the delegate's decision.

The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The matter is now before the Tribunal.

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, in this case 5 July 2001, although some statutory qualifications enacted since then may also be relevant.

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

Definition of 'refugee'

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

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

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

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

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

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

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

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

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

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

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

CLAIMS AND EVIDENCE

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

The applicant appeared before the Tribunal to give evidence and present arguments.

The Tribunal, pursuant to s424a, wrote to the applicant as follows:

The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.

The information is as follows.

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

Application for a Protection Visa

The applicant claims that she was born in [year] in [location], Nepal. The applicant claims that in [date] she became friendly with some people who were living in [location] and who were members of the Maoist Party. She claims that she became interested in the ideas and policies of the Maoist Party and began reading books provided by the Party to learn more about its ideology. She claims that in [date] she decided to join the Maoist Party.

The applicant claims that she worked as a campaigner and activist with the Maoist Party. Her role was to spread general awareness about the Maoist Party activities at informal communal gatherings. The applicant claims that while she was spreading the propaganda of the Party she was harassed and persecuted by the police and supporters of the Nepal Congress Party and the National Democratic Party. The applicant claims that in [date] she was approached by the police and threatened that if she did not manage to disappear that they would kill her. The applicant claims that she continued to be persecuted because of her membership of and activities for the Maoists.

The applicant claims that she cannot relocate within Nepal having regard to not only the importance of the family in Nepalese society but also because of ongoing violations of her right to privacy and other rights.

The applicant claims that the Nepalese authorities/governing party has attempted to crush the Maoist insurgency in the poorest areas of Nepal and deliberately and systematically targeted members and supporters of the Maoist Party.

The applicant claims that she is afraid to return to Nepal because as a Maoist she will be targeted for persecution.

There is information on the file that the applicant first arrived in Australia on [date] and departed on [date] returning to Nepal on [date]. She then arrived [date]. The applicant had obtained a visa for multiple travel to Australia on

[date] for business activities. She also travelled to [country] on [date] and departed [date] on [date].

Independent Evidence

Maoists/Nepal Political Landscape

General background

Nepal is a constitutional monarchy with a parliamentary form of government. Parliamentary democracy was established in 1990. Elections are scheduled at least every 5 years. Nepal is extremely poor, with an annual per capita gross domestic product of approximately \$242. Over 80 percent of its 23 million persons support themselves through subsistence agriculture: see *Country Reports on Human Rights Practices 2000 - Nepal*, released by the Bureau of Democracy, Human Rights, and Labor, February 2001, introduction.

Political parties

There are currently several Communist Parties in Nepal. They include the Communist Party of Nepal (Unified Marxist-Leninist: CPN: UML), Communist Party of Nepal (Marxist-Leninist: CPN: ML), the Communist Party of Nepal (Unity Centre), the Communist Party of Nepal (Mashal), the Communist Party of Nepal (United), Communist Party of Nepal (Marxist:CPN) and Nepal Workers' and Peasants' Party: see *Political Handbook of the World: 1999*, Editor Arthur Banks et al. New York at pp 690-1.

There is also the United People's Front (UPF or UPFN), which is also known as the Samyukta Jana Morcha (SJM). It was formed as a registered political party in 1991 from a coalition of leftist Maoist groups previously referred to as the United National People's Movement: see DFAT Cable KM6620, 17 March 1994, CX13447.

The United People's Front contested both the 1991 and 1994 general elections. In 1991 they secured 9 out of 205 parliamentary seats, making them the third largest party behind the Nepali Congress (NC) and the Communist Party of Nepal (United Marxist-Leninist) (CPN-UML). They were unable to retain any of these seats in the 1994 election: see *Political Handbook of the World: 1999*, Editor Arthur Banks et al. New York at p 691.

There is no suggestion that political parties including Communist parties in Nepal are not free to promote their political views in accordance with Nepalese law: see for example *Country Reports on Human Rights Practices 2000 - Nepal*, introduction. However under the Public Security Act, the authorities may detain persons who allegedly threaten domestic security and tranquillity. Other laws including the Public Offences Act permit arbitrary detention. This latter Act covers crimes such as disturbing the peace: *Country Reports on Human Rights Practices 2000 - Nepal*, Section 1 (d).

United People's Front Leadership/Party split

In 1994 the United People's Front (Samyukta Jana Morcha -SJM) split into two, one faction forming the radical Communist Party of Nepal (CPN - Maoist) which took with it an allied SJM faction. It is this faction which has led a Maoist insurgency in Nepal. In February 1996 the CPN (Maoist) launched the "People's

War" insurgency and it was proscribed in the same year. The insurgency is centred in the districts of Rolpa and Rukum in the west of the country. The other faction of the SJM opposes the Maoist insurgency. It also remains known as the United People's Front (Samyukta Jana Morcha -SJM) and is the political-electoral front of the Communist Party of Nepal (Unity Center) CPN: see *Political handbook of the World: 1999* at pp 691-692 and *Country Reports on Human Rights Practices 2000 - Nepal*, introduction.

DFAT Cable KM500006 discusses the division of the SJM into two due to internal party conflicts. The two groups are identified as the SJM (Bhattarai group), and the SJM (Vadiya group), whose leaders at the time were Dr Baburam Bhattarai and Niranjana Govinda Vadiya, respectively: see DFAT Cable KM500006, *Nepal: Samukta Jana Morcha, etc*, 8 February 1997. It is the Bhattarai faction which is allegedly responsible for the Maoist insurgency.

□People□s War□

On 13 February 1996 the armed wing of the UPF (Maoists), declared a □People□s War□ against the government due to the Government□s failure to meet its 40-point plan which included demands for the establishment of a Republic. The □People□s War□ was declared in mid-western Nepal. It has led to violence in 50 of 75 districts and has resulted in a number of deaths, including innocent bystanders committed by both police and Maoist activists: see *Country Reports on Human Rights Practices 2000 - Nepal*, introduction.

The Amnesty International report, *Sharp increase in human rights violations since the outbreak of the □People□s War□*, 10 March 1997 outlines the actions of both these groups as follows:

By the end of November 1996, some 1,358 people had been arrested on suspicion of being members of the CPN (Maoist) or SJM, since the □People□s War□ started. Although many had been released, approximately 600 people remained in prison awaiting trial....

At least 50 people have been killed in what Nepal□s police call □encounters□ or armed confrontations with CPN (Maoist) activists. Amnesty International believes however that the police have repeatedly resorted to killing people in situations where such force was clearly unjustified, and as an alternative to lawful arrest.

In this report Amnesty International also indicates that the CPN (Maoist) is ideologically close to the Communist Party of Peru (Shining Path). It has reportedly been responsible for deliberate killings of civilians, including members of mainstream political parties, defectors from its political wing, the United People's Front (SJM) and suspected informants.

A report by Agence France Presse states the Maoist group was responsible for the hacking to death of an NC candidate for the upcoming local elections. The 1997 US Department of State Country Reports claimed □Guerrillas, usually armed with homemade guns, explosives, knives, and sticks, attacked landowners, civilians, government officials, and government facilities in a number of districts□: see Agence France Presse, *Nepal Maoists step up attacks*, 7 May 1997 and United States Department of State *Country Reports on Human Rights 1997 - Nepal*, February 1998.

Up until 2 March 1999, a total of 1,440 incidents had been reported to the police including 367 cases of looting, 184 physical assaults, 143 explosions, 80 arson attacks, 63 attacks on police units and 563 police encounters. In this period, Maoists killed 38 police personnel and 121 civilians (mostly members of other political parties), and maimed or seriously wounded 242 police personnel and 297 civilians. Of 63 government and NGO properties attacked, 14 were telecommunication repeater stations. During the same period the Maoists stole a gun from a tourist, 43 police rifles, three police revolvers and 241 privately-held guns. In a raid against an irrigation canal construction project at Kota village on 27 June 1998, the Maoists killed the policeman guarding the site and looted all the weapons and explosives: see Rohan Gunaratna, "Nepal's insurgents balance politics and violence", *Jane's Intelligence Review*, 1 October 2001.

According to the *Country Reports on Human Rights* during 2000 the Maoists have increased the scope of their campaign, frequently committing torture, killings, bombings, and other abuses. Both police and insurgents continued to be killed. The Maoists were responsible for numerous abuses towards police and civilians including killing, kidnap and injury. Although their activities are focused on the police, the Maoists continued to kill, injure, and kidnap civilians as well. On February 14, Maoists pulled two men out of a political procession in Rukum and beheaded them in front of hundreds of onlookers. It is believed that the victims were targeted because they were carrying Nepali Congress Party flags. A bomb planted by Maoists behind a police post in Dolpa killed an 11-year-old boy on February 15. Two other persons were injured in the blast. On February 24 in Sindhupalchowk, a group of rebels attacked a local official, tied him to a tree and hacked him to death with khukuri, large machete-like knives.

Specific Maoist targets include 'the rich', which as a class is identified as the enemy and has been singled out for maiming or killing. They also seek to disrupt legitimate government administration by attacking public targets, such as police stations, local government offices and banks. The staff and property of non-governmental organisations (NGOs) and foreign-funded development projects have also been designated as legitimate targets, as have tourist facilities - all part of a plan to discredit and destabilise the present Nepalese state. In spite of their stated aim of attacking the bourgeoisie and the aristocracy, the Maoists have also targeted the poor, including labourers, farmers and school teachers. Several school teachers have been murdered, probably for expressing opposition to the Maoist campaign: see Rohan Gunaratna, "Nepal's insurgents balance politics and violence", *Jane's Intelligence Review*, 1 October 2001.

The political tactic used by the UPF when protesting against the government has been to organise a general strike, or *bandh*, rather than mass demonstrations. These strikes usually involve a general shut down of shops, schools, bus and taxi services, etc in central city areas. However, numbers of protesters do gather together for sometimes violent standoffs with police, resulting in arrests and, in some cases, injury or death.

For example in April 1998 the UPF called a strike to protest the continued neglect of its 40-point demand (covering a variety of issues such as Nepal's relations with India, distribution of land and the establishment of a republican state). Two people were killed and 12 injured when buses and trucks were stoned, and police detained a total of 118 people. Few vehicles were seen on the streets and most of the shops were closed across the country affecting the normal life of residents: see Reuters, *Two killed in nationwide strike in Nepal*, 6 April 1998.

Since 1996 the police have killed nearly 1,000 Maoists. There are also reports of the police having arrested or illegally detained some suspected Maoist insurgents and held them incommunicado. The government has committed human rights abuses in its efforts to combat the insurgency. For example in January 2000 the police opened fire on a Maoist "cultural program" at a school killing nine persons and wounding numerous others. Police later admitted that seven of those killed were innocent bystanders: see United States Department of State *Country Reports on Human Rights 2000 - Nepal*, February 2001, introduction, sections 1(a), (b); (c) and (d).

Under the Public Security Act, the authorities may detain persons who allegedly threaten domestic security and tranquillity, amicable relations with other states, and relations between citizens of different classes or religions. Persons whom the Government detains under the act are considered to be in preventive detention and can be held for up to 6 months without being charged with a crime. Human rights groups allege that the police have used arbitrary arrest and detention during the "People's War" to intimidate communities considered sympathetic to the Maoists (see Section 1.b.). Since the insurgents began their terrorist campaigns, police have arrested 5,866 suspected Maoists. Of those persons arrested, 1,654 had been tried and 4,182 had been released: see *Country Reports on Human Rights Practices 2000 - Nepal*, section 1(d).

The 1991 amendments to the Public Security Act allow the authorities to extend periods of detention after submitting written notices to the Home Ministry. The police must notify the district court of the detention within 24 hours, and it may order an additional 6 months of detention before authorities file official charges.

Other laws, including the Public Offences Act of 1970, permit arbitrary detention. This act and its many amendments cover crimes such as disturbing the peace, vandalism, rioting, and fighting. Human rights monitors express concern that the act vests too much discretionary power in the Chief District Officer (CDO), the highest-ranking civil servant in each of the country's 75 districts. The Act authorises the CDO to order detentions, to issue search warrants, and to specify fines and other punishments for misdemeanours without judicial review. Few recent instances of the use of the Public Offences Act have come to light, since it has become more common, particularly with the Maoists, to arrest persons under the Public Security Act.

On 26 November 2001 as a result of further violence initiated by Maoists the cease fire between the Maoists and the government ended and a state of emergency was declared: see "*Nepal hit by new rebel violence*", BBC news,

25 November 2001 and "*Nepal Emergency Declared*", BBC news, 26 November 2001.

The following information was extracted from an *Update Mission Report prepared by CEDOCA of the Office of the Commissioner General for Refugees and Stateless Persons, Kingdom of Belgium* dated 7 June 2002:

Low profile Maoists namely sympathisers of the party or minor members who did not fulfil an executive function within the party can avoid possible problems with the local police by using the internal flight alternative. It is unlikely that the police – who do not dispose of a good centralised information system – would look for them on a national level.

.....

Reportedly the army which has only been actively participating in the conflict since the proclamation of the state of emergency dated 26/11/01, is not better organised than the police, according to our contacts. The army is believed to be targeting Maoists of the armed wing or Maoists with executive functions (executives, spokespersons). Maoists with a low political profile who have encountered local problems with the army can avoid these problems by using the internal flight alternative.

First Tribunal Hearing on [date]

The applicant told the Tribunal that she was born in [location] Nepal in [year]. She completed her primary schooling in Nepal and her secondary schooling in India. Her father was in the [organisation] and her mother always went with him. The applicant said that she studied in India because her brother was already studying there. The applicant completed her education in [year] and she returned to Nepal. She said that in [year] she lived with her brother in [location]. Her father sent them money. She said that she believed that at that time her father was with the [organisation]. Her mother was with him. The applicant said that her father retired from the [organisation] about [years] ago and he returned to [location].

The applicant told the Tribunal that while she was in Nepal she learnt [arts] at the [location], Nepal. She said that she was training for a number of years and this [organisation] arranged for her to travel to other countries for further training. She said that she went once or twice every year and she stayed at her destination for about 5 or 6 days. The applicant said that she visited countries such as [countries].

The applicant told the Tribunal that in [year] she joined the Maoists. She said that she had been trying to find a job with the government for some time but could not find one and the Maoists believed in equality for all and were good for women.

The applicant told the Tribunal that prior to [year] she had not been interested in politics and she had previously voted for the UML Party – Communist

Party of Nepal. The applicant was asked to explain what UML stood for. She could not explain. She said that the Maoists and the UML were the same. The applicant was asked if she believed that the UML and the Maoists were the same then why did she change to support the Maoists in [year]. The applicant said that she decided to join the Maoists because her friends were Maoists. The applicant said that the government gave no preference or priority to women. She said that she had tried to get work but could not because she did not sufficiently high qualifications. She was asked why she wanted a government job when all her training had been in [another area]. She agreed that she had done a lot of training but in reality she wanted a government position. The applicant said that women can obtain work in the government in Nepal but only if they have contacts.

The applicant told the Tribunal that she had read in the newspapers that the Maoists wanted to bring equality to Nepal but she also read in those newspapers that the Nepalese authorities were shooting the Maoists in confrontations. She said despite that her friends were Maoists and she wanted to join them.

She said that in [date] she joined the Maoists. She was involved in demanding money from people, that is asking for donations. She said that they were a group of about 50 or 60 in [location] and they would go in groups of 6 or 7 to the villages demanding money or food from people. She said that they told the people that they were from the Nepal Communist Party – Maoists and people felt scared, so they gave money and food. She said that they intimidated people into handing over money and food. The applicant said that she was also involved in gathering people in the villages and organising cultural programmes with singing and dancing in order to spread general awareness about the Maoist Party. The applicant told the Tribunal that between [date] and [date] she went around obtaining money and food from people once, twice or three times every week.

The applicant was asked to explain why she left Nepal. She said that it was hard to continue doing these things and she was scared of the police. She said it was easy to say to do them but they were hiding in the jungle and having to be careful. She said that the police were after the Maoists and she was afraid. The applicant was asked whether she had ever been detained by the police or whether she had a confrontation with the police. The applicant said that she had not had any confrontation and had not been detained. She said that the police did not know of her activities. The applicant said that she left Nepal because it was a difficult life. She said that if the police did not see a person in the village for some time they might surmise that that person was a Maoist.

It was put to the applicant that in her original claims to the Department of Immigration that she had claimed that she had been harassed by the police and persecuted by members of the opposition parties but that she had not mentioned these during the Tribunal hearing. The applicant said that what she meant by those things in her original claims was that she and her friends were always on the run and could never remain in one place.

It was also put to the applicant that she had claimed in her original claims that the police had approached her and threatened her that she must disappear. It was put to her that she had told the Tribunal that she had not had any confrontations with the police. The applicant said that the incident as described in [date] did not happen but that because she was a Maoist, she was scared and because she was afraid, she wrote her claims in that way.

The Tribunal discussed the contents of the Kingdom of Belgium, Office of Commissioner General for Refugees and Stateless Persons, Mission to Nepal: 21 January to 9 February 2002 (CEDOCA, Documentation and Research Centre and Update dated 7 June 2002) in which it is stated that low profile Maoists or sympathisers of the Maoists can avoid any possible problems by relocating to Kathmandu. It was put to the applicant that her activities on behalf of the Maoists were low level, continued for a short period of just over one year and that she did not come to the adverse attention of the authorities as a Maoist even in her own district. It was put to her that someone with her profile could relocate to Kathmandu according to the independent evidence before the Tribunal. The applicant said that she would still be afraid in Kathmandu and she said that the police would know that she is a Maoist. She was asked how they would know this since she herself had said that she had not come to their attention. The applicant said that the police would know because she has been absent from Nepal for some time and they would surmise that she was a Maoist from that. The applicant said that the circumstances in Nepal are very bad.

This information is relevant because if the above evidence and the findings of the first Tribunal are accepted, then [the Tribunal], might find that your claims are not credible and might therefore find that you do not have a well-founded fear of persecution.

You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by [date].

In a submission sent by her representative, the applicant states that

I wish to make the following comments on information to the Tribunal in relation to my case.

I had not fully understood the questions which [the Tribunal] had put to me. I was in the stress of the moment that I had not been able fully to communicate appropriate answers to them because of the difficulty in assessing the credibility of evidence given through an interpreter.

Accordingly, it may be at times inappropriate to place weight on the record of interview.

I gave my evidence without embellishment and presented my story on a lucid manner at the hearing before [the Tribunal] had relied to much heavily upon cross examination of myself to highlight seeming inconsistencies and memory lapses and then to discount my evidence on the basis. My oral evidence before the Tribunal in my case that my

circumstances were not appropriately dealt with by applying a presumption of national protection.

[The Tribunal] was assuming the same level of political knowledge, technology and procedural systems that people enjoy in Australia is found in a country of Nepal's third world status when dealing with my case.

It was not a correct assessment of the evidence in relation to country information as the Tribunal reached its conclusion that there was a reasonable level of judicial and related services in Nepal.

The RRT should understand that diplomats overseas, of course live secure, sheltered lives in affluent circumstances and they are mainly in contact with officials of their host governments from whom they tend to pick up optimistic views of the country in which they serve the real situations concerning the degree of insecurity. It is nothing like the picture given to tourists and overseas diplomats.

It is a mistake and injustice that the RRT gave weight of [country information] that law profile Maoists namely sympathisers of the party or minor members who did not fulfil an executive function within the party can avoid problems with the local police by using the internal flight alternative. This was precisely the aggrieved by the purported that the Tribunal made. I am very worried and aggrieved by the purported information found by the Tribunal member.

The fact that from time to time the police and the Royal Nepalese army conducted sweeps on the villages during which they arrested and detained any person they doubted or suspected of supporting in Maoists. The authorities killed people on suspicion of being pro-Maoists even if they were just following orders. It was at this point, having been realized my inability to protect myself, I made the decision to flee Nepal in search of protection.

My fear of return to Nepal was heightened by the fact that Maoist insurgents were being killed by the authorities and Royal Nepalese Army was being deployed to eradicate the voice of the Maoists" supporters. I claim to be entitled to protection as a refugee as I can't go back to Nepal because of persecution and the degree of insecurity in my country.

the applicant's representative made another submission and provided the following documents in support of the application:

1. Two dated statutory declarations of the applicant.
2. The applicant's response to the RRT letter.
3. Certified copy of birth certificate for the applicant's son.

The adviser also forwarded documents including: documents in relation to the problems in Nepal for a woman such as the applicant; articles in relation to women in India and why relocation to India for the applicant is not an option; documents in relation to the political problems the applicant faces in Nepal; recent US Department of State Reports on Nepal, and

also on India, especially in relation to the status and treatment of women in India. The adviser also referred to articles highlighting the problems in Nepal relating to gender violence, politically motivated violence and the ongoing serious human rights violations.

The adviser then submitted that “given the current appalling human rights situation in Nepal, there is no meaningful option there of obtaining effective protection from the Nepalese authorities”.

The adviser then made a general submission with regard to the country situation and the applicable law, in which the “Political Situation in Nepal” was discussed and it was submitted that:

... the Public Security Act is not aimed *exclusively* at Maoist supporters but it is being administered *selectively* against them since the State of Emergency was declared. This demonstrates the current systematic, but not exclusive, application of the Public Security Act against Maoists and the deteriorating rule of law in Nepal.

The applicant fears the government and its agents and is therefore unable to avail herself of its protection. Her fear is compounded by the current problems evidenced by recent events as detailed in the recent Human Rights Watch Report, “Between the Rock and the Hard Place: Civilians struggle to survive in Nepal’s civil war”, released in October 2004....The applicant is indeed trapped between ‘the rock and the hard place’; she fears that if she returns to Nepal she will be located and killed by the Maoists, and at the same time, she can not seek protection from the Nepalese government or her family.

It is evident from the country information enclosed that the applicant will not be protected by the Nepalese government and worse still that she will be targeted by the Nepalese forces because of her previous associations with the Maoists. The government’s abuse of its citizen’s human rights is apparent in all the country reports and information....”

The adviser then makes the following submissions with regard to “Imputed Political Opinion”:

The applicant fears that she may be perceived as a Maoist if she returns to Nepal because of her previous connection with the Maoist Party. This belief is supported by independent evidence from Human Rights Watch, Us Department of State and Amnesty International's Country Reports, enclosed.

The reports and articles enclosed document numerous incidents of the shooting and killing of civilians from helicopters by the Nepalese army. They also document disappearances and unlawful detention of citizens and journalists for their imputed or actual political beliefs

We submit there is abundant evidence that the State of Emergency and the behaviour of the Nepalese government targets more than just the criminally culpable. It includes civilians and perceived Maoist supporters.

We note recent press reports continue to stress the deteriorating situation in Nepal. Despite Nepal's Constitution and Civil Code prohibiting torture, Nepal's police and army have been documented committing such violations. Coupled with the introduction of the draconian Terrorist Ordinance of 2001 the government is determined to restrict human

rights - see U.S. Department of State Country Reports on Human Rights Practices Nepal.... Such reports confirm the applicant's apprehension of fear of a real and significant risk to life and freedom if returned to Nepal are justified and therefore are well founded.

The adviser then makes the following submissions with regard to the "Position of Women in Nepal":

The US Department of State Country Report, 2003, states the following in relation to the treatment of women in Nepal:

Violence against women was a serious problem that received limited public attention. In April 2002, parliament passed the Domestic Violence Control Bill that did not receive royal approval before parliament was dissolved; if it is to become law, it or another version will have to be re-introduced in another parliamentary session. There was a general unwillingness among citizens, and particularly among government authorities, to recognize violence against women as a problem. In a 1998 survey conducted by local NGO SAATHI, 42 percent of the respondents said that in their experience medical practitioners were uncooperative or negligent in cases of violence against women and girls. This unwillingness to recognize violence against women and girls as unacceptable in daily life was seen not just in the medical profession, but among the police and politicians as well.

.....

Trafficking in women remained a serious problem in several of the country's poorest areas, and large numbers of women still were forced to work against their will as prostitutes in other countries

Although the Constitution provides protections for women, including equal pay for equal work, the Government has not taken significant action to implement those provisions, even in many state industries. Women faced systematic discrimination, particularly in rural areas, where religious and cultural tradition, lack of education, and ignorance of the law remained severe impediments to their exercise of basic rights such as the right to vote or to hold property in their own names. Inheritance laws were revised in 2002 so that unmarried, widowed, or divorced women can inherit parental property. The Citizenship Law discriminates against foreign spouses of female citizens, and denies citizenship to the children of female citizens married to foreign spouses, even if those children are born in the country. Many other discriminatory laws still remain. According to legal experts, there were more than 50 laws that discriminate against women. For example, the law grants women the right to divorce, but on narrower grounds than those applicable to men. The law on property rights also favors men in its provisions for inheritance, land tenancy, and the division of family property

....In relation to caste based discrimination the US Department of State further noted that:

The caste system strongly influenced society, even though it was prohibited by the Constitution. Caste discrimination was widely practiced at Hindu temples.

Discrimination against lower castes was especially common in the rural areas in the western part of the country, even though the Government has outlawed the public shunning of "untouchables," and made an effort to protect the rights of the disadvantaged castes. Economic, social, and educational advancement tended to be a function of historical patterns, geographic location, and caste."

The adviser then makes the following submissions with regard to "Membership of a particular Social Group - Women in Nepal and/or who are victims of gender related violence (sexual abuse):

It is submitted that [the applicant] has a well founded fear of persecution on the grounds of her membership of a particular social group; namely; Women in Nepal and/or who are victims of gender related violence (sexual abuse) in the context where the state provides such persons no effective protection.

It is evidence from the US State Department Reports that despite the constitutional and legal protections for women, women do not enjoy equal status with men under the law. Violence against women is part of, and at the same time overshadowed by the general regression of women in society. The reports clearly indicate that enforcement is weak, especially in rural areas where most of the population resides, and the Government usually does not vigorously prosecute cases which are filed.

The adviser then makes the following submissions with regard to "Lack of Effective Protection in Nepal":

... There is clear evidence of the inability of the current government to protect its citizens, especially in the light of the frequent and recent abuses of power well documented by the police – on the Human Rights situation in Nepal published by INSEC, and the many reports of attacks of women by police, and those charged with upholding the rule of law.

... We submit that internal relocation is not an option in Nepal. It ignores the reality of Nepal. Although there are many millions of people in the country, it is geographically relatively small. People in Nepal do not generally migrate around the country except on marriage or when sent to different places for employment. The presence of an outsider would immediately create notice. The dominant role played by caste is particularly significant. The Tribunal must not adopt an approach blinkered by the Australian experience. Furthermore, the applicant cannot reasonably be expected to suppress the exercise of her inalienable human rights in order to avoid being subjected to persecutory treatment.

The adviser then makes the following submissions with regard to "Lack of Effective Protection in India":

We further submit that the applicant cannot relocate to India having regard to the plight of Nepalese women in India and the problems affecting them, especially in relation to trafficking and prostitution....

The adviser then concludes by stating:

It is our submission that the applicant should receive the protection of the grant of refugee status. In summary we submit:

1. The applicant is outside her country, Nepal.
2. The applicant's claims are grounded in events which have taken place in Nepal
3. The applicant has a fear which is well founded in the circumstances in that there is a real chance that she would find herself a victim of persecution if required to return to Nepal and is evidenced by the material produced.
4. The applicant's persecution arises from the Convention based grounds of imputed political opinion, ethnicity, and/or her membership of a particular social group.
5. Given the state of political chaos and the numerous reports of police corruption in Nepal, the applicant cannot obtain effective protection in that State, nor in India.

The two statutory declarations by the applicant are both dated the same date.

The first states:

1. My name is [name] and I am a citizen of Nepal. I was born on [date] in [location], Nepal. I entered in Australia [date]. At the time I was living in [location] with my parents, [date], I became friendly with some people living in [location] who were members of the Maoist Party. I became interested in the ideas and policies of the Maoist Party and began reading books provided by the party to learn more about their ideology. In the beginning the Maoists were good and I was convinced that the Maoists were helping people.
2. I decided to join the Nepal Communist Party (Maoists) in [date] because I was persuaded by some friends and prominent people in the village. Even though I joined this party, I was not fully aware of politics. I only became aware of what they were doing in the late 1990s. At the beginning, the Maoists were doing good things but after the police began to chase them things changed. I was not involved in the armed insurgency. I worked as a campaigner and activist with the Maoist Party. My role was basically to spread general awareness about Maoist Party activities at informal communal gatherings.
3. My role, in addition to the other matter already mentioned, was to act as a messenger for the active member in the party when they wanted to arrange meetings in the village. While spreading the propaganda of the Maoist Party, I was always harassed and persecuted by the police and supporters of the Nepalese opposition parties, mainly the Nepalese Congress Party and National Democratic [sic] Party. In [date], I was approached by the police who threatened that if I did not manage to disappear, they would kill me. I continued to be persecuted because of my membership and activities for the Maoist Party.
4. The violence in Nepal, the result of the civil war between the Maoists and the government, is in fact an extension of the violence of the structure of traditional Nepal society, such as the caste system, discrimination against women, the feudal abuse of landless peasants and severe poverty. The Maoists initially gained widespread popular support in rural areas around the country from people who considered the government was not doing anything to improve their lot. The backing for the Maoists, however, has been eroded gradually over the ten years of insurgency. Many people initially

supported the Maoists agendas over social reform and greater transparency. One of the biggest problems in Nepal is corruption and lack of transparency.

5. I am unable to avail myself of the protection of my country because of fear. Internal relocation is not a viable option for me, having regard not only to the importance of the family in Nepalese society but also because of ongoing violation of my right to privacy and other rights. The Maoists initially gained widespread popular support in rural areas around the country from people who considered the government was not doing anything to improve their lot. Many people initially supported the Maoists agendas for social reform and great transparency. I was used by the prominent local Maoists.

6. I am afraid to go home because I was a former member of Nepali Communist Party (Maoists) and I have a real chance of being killed either by authorities or by the Maoists. The reason why the Maoists will kill me is I left the country without their permission and I escaped from them in search of my own protection. I will be killed by the authorities because of involvement with the Maoists.

7. I did not intend to go India for protection because India itself suffers from its own huge uncontrolled population and if I went to India, I would have felt unsafe there because the Indian police could send the Nepalese back at any time. In any event the Indians do not like Nepalese and it would have been difficult to work.

8. In addition to the above, if I am forced to return to Nepal, other factors will also make me a target for harassment, discrimination and persecution.

9. Firstly, I am unable to avail myself of the protection of my country because of fear. I am very dismayed to see Nepal plunge into deep darkness where my current situation is concerned. It has no law and justice at all. Politicians and Maoists are only fighting for their own benefit. The political instability, mismanagement, corruption and violence have wrecked the country. Democratic rights have been severely abused. Human rights violation has crossed the boundary and the people have been forced to live with no hope and no future.

10. I met my ex-boyfriend, [name] at a birthday party of my friend's son in [location] in [year]. He was attracted to me in a way that I was everything to him. I was also attracted to him but I couldn't express my feelings toward him at first. He tried to become friendly with me while we were dancing to Nepalese music at the party. He introduced himself to me and I did too. We exchanged our phone numbers. I was in search of a boyfriend with a view to a permanent relationship in my heart when I arrived in Australia. After a few weeks, we fell in deep love so we lived together sharing one bedroom. I couldn't control myself as to why I had to move in with him to live together as a couple, without thinking about other things that are important to in making such a decision. He taught me everything about love. He was so friendly and gentle at the time when I met him and we stayed together as a loving couple.

11. After living together for few months, I accidentally got pregnant. It was an unwanted pregnancy but I could not do anything about it. My ex-boyfriend tried to be distant from me after I became pregnant. I thought I was lucky to have met him. He revealed his secrecy that he was married with two children in Nepal. I felt like I was dead when I came to know about his secrecy. I didn't even think that he would ditch me. I gave birth to a baby in [year] at [location] and he is [age] year old now. I am a single unmarried mother.

12. My so-called ex-boyfriend ditched me after I was pregnant. I fear never-ending harassment/discrimination on basis of my intercaste relationship with my ex-boyfriend or a lower cast. I will be subject to selective harassment and socially

ostracized. Nepal's society is predominantly rural and the social life in the village revolves around the family which is headed by my father.

13. In Nepal, women are generally subordinate to men and have no access to education, economic resources, and political power. The caste system in Nepal divides society into sections with prohibitions against intermarriage and eating and drinking with those who are of different caste. Although the Nepali Constitution specifies that the state shall not discriminate against citizens on the ground of religion, race, caste or ideology, in practice, discrimination against women and lower castes is widespread.

14. Caste is still very much alive in Nepal. Caste is both social and religious, determining who can marry, eat and drink and even smoke together. As these old taboos lessen, it now serves mainly to indicate political and economic status, uniting some people and dividing others. Understandably, high-caste members take the matter most seriously. Discrimination against lower-castes, women and disabled remains common, especially in rural areas. The caste system strongly influences society, even though it is prohibited by the Constitution.

15. I have a strong fear of being killed either by the government securities or Maoists, having regard to the chaotic and worsening political situation of my country if I go home. I wish to stay in Australia to save my life and enjoy a life as a human being because I believe that Australian society is a fully functioning and civilized society in which people can enjoy basic need of human life and freedom of peace. I can feel that the Australian people have a compassionate heart to vulnerable people of persecution, natural disaster, war torn and so on around the world

16. I embrace a principal and then, situation by situation. For me, the most fundamental practical guiding principal on my circumstance now is something like this: I should try to produce safety and prevent suffering. It is only possible I can stay here permanently and I adopt Australia as a gifted country. I believe that Australia is a nation of small population, a nation of wealth, and a nation of humanitarians. It is also a nation rooted in a commitment to democratic principals.

17. I will be persecuted by the Maoists because of my having spent a considerable period of time in a western country and this would only serve to increase suspicions that I have earned a lot of money so I will be a target to extortion by the Maoists. I have been living in Australia for [years] and I cannot go back to Nepal now because I will certainly have problems with Maoists and authorities because I have to support their party financially otherwise I will be killed by them. I fear persecution from the Maoists due to my lengthy stay in a western country and adoption of the western lifestyle, which means I would be accused of being unpatriotic.

18. In conclusion, I respectfully submit that my life is in danger in Nepal due to my past so-called membership of the Maoists, being a single unmarried mother, my lengthy stay in a western country and my adoption of western lifestyle.

19. I would like the Tribunal to act in good faith and consider my application with a compassionate heart.

The second statutory declaration states:

I, [name], of [address], make the following declaration under the Statutory Declarations Act 1959:

1. I am afraid to go home because I was a former member of the Nepal Communist Party (Maoists) and I have a real chance of being killed either by the authorities or by

the Maoists if I go home. I would be persecuted by Maoists due to my lengthy stay in a western country and my adoption of the western life style, which means I would be accused of being unpatriotic. I am a single unmarried mother, so I would be socially ostracized. My family and relatives would see me as an outcast and would not protect me because I am a single unmarried mother and returning without my baby's father.

2. My family and I have political problems in my home country.

3. Our problems were caused by the Nepalese government authorities and the Maoists.

4. Our problems started in late [year].

5. I have problems in my country because of my political opinion. In the beginning, the Maoists raised some of the social issues and agendas, problems of exclusion, corruption, human rights violations, access resources and access to justice. I became interested in the ideas and policies of the Maoist Party and began reading books provided by the party to learn more about their ideology. I only became aware of what they were doing in the late 1990's. I decided to join the Nepal Communist Party (Maoists) because I was persuaded by some friends and prominent people of my village. I was not involved in the armed insurgency. My role was basically to spread general awareness about Maoist Party activities at informal communal gatherings. I also worked as a [role] for the active member in the party when they wanted to arrange meetings in the villages. The authorities, in attempting to crush the Maoist insurgency in the poorest areas of Nepal, have deliberately and systematically targeted members and supporters of the Maoists. From time to time the police and the Royal Nepalese Army conducted sweeps on the villages during which they arrested and detained any person they doubted or suspected supporting the Maoists. I felt unsafe to continue with my political activities but I could not refuse to carry out instructions because the Maoists had threatened me. I felt sandwiched between the Maoists and the authorities. It was at this point, having realized my inability to protect myself, that I made the decision to flee Nepal in search of protection.

6. The problems still continue. Since the conflict began, the army has become increasingly well equipped militarily and capable of striking and bombing deep within Maoist-held areas. The problem is that there is no front line in this conflict. The war is being fought in homes and villages, so families and civilians find themselves in the crossfire and horrific human rights violations are being systematically committed against the population at large. People are victims on both of sides. The State kills people on suspicion of being pro-Maoists if they are just following orders, and the Maoists are eliminating those on suspicion of being State spies. The major political parties, mixed with internal rivalries and corruption, failed to promote much needed change. These and other factors have led to profound destabilization of the Nepal political system. The instability in the central government has led to severe insecurity and a crisis of failure in the government's ability to function effectively. I believe the fighting between government forces and Maoists cannot be ceased permanently but will likely recommence with increased intensity, leading to the further deterioration of the already dismal human rights situation in the country. Consequently the problems are still very much alive.

7. I believe that there is no safe place for me to relocate to live in my country.

8. My problems are worse than those suffered by other people like me, the reason being that it is a matter of my life. I have to stay safe when there is the risk of being killed by the authorities. I was able to escape from the situation.

9. If I go home now, I will be killed either by the authorities or by the Maoists.

10. It is impossible for me to predict when it will be safe for me to return home, however I think it will never be safe for me to return home.
11. My parents, relatives and friends know about my relationship. I cannot continue to be discreet because it is not an option to be discreet in Nepalese society if I return to Nepal.
12. If people find out about my relationship in Nepal, having regard to fact that Nepal society is predominantly rural, I will be subjected to selective harassment and socially ostracized.
13. I now have no relationship as I have been ditched by my so called ex-boyfriend after I became pregnant.
14. I feel I am now a different person to the person I was before I came to Australia. I have become a single unmarried mother and I have adopted the western lifestyle and democratic principles.
15. My family knows of my relationship and if I return to Nepal, I will be expelled from the family. I will be socially ostracized.
16. My parents know of the relationship in Nepal.
17. If I go back to Nepal now that people know I am in a mixed relationship, I will be discriminated against due to having been a single unmarried mother. I will be socially ostracized.

At the hearing, the Tribunal raised the matter of her contact with the police prior to leaving Nepal. She stated that she had been a member of the Maoists and took part in their activities. She said that the police were taking an interest in the activities of the Maoists and they sometimes had to flee. She said she had never been detained. She agreed that the police had threatened her and had told her she had to “disappear”. She said the police had a usual policy of making such threats to suspected Maoists such as the applicant. She said the police did not detain her but had threatened her. She said the threats were not made directly to her but that when people disappeared for a while, there would be a suspicion that they might be Maoist and from a friend she heard that the police were looking for Maoists and had told the people in the village not to shelter Maoists. She described where her village was. She was asked if she had ever visited Kathmandu. She said she hadn’t but later said that she had not gone there until she was of a specific age and that she had left Kathmandu by a specific means of transport. She said she had travelled overseas. She said she had not worked but was supported by her parents.

The Tribunal asked about her caste background and she stated she was of a higher caste than that of the father of her child. She stated what her caste was and that of the father of her child. She was asked what problems that created and she said that she is an unmarried mother whose child does not have any legal status and would be looked down on in society and that her parents would never accept her as Nepal has ‘family values’ and men are dominant. The Tribunal asked how being ‘looked down’ would harm her and she said that she is an unmarried woman and would be seen as a woman of bad character. The Tribunal asked what might happen. She said that society may not accept her and her son does not have legal status and that the social attitudes would be “unbearable” as she would not have a place in society.

She was asked about her work experience. She said in Nepal she had been a student and then engaged in other activities while in Australia she had worked in different jobs. The adviser

referred to the Tribunal decisions mentioned in his submission which had found that caste and low status issues for women in Nepal had been discussed in terms of serious harm. The Tribunal asked if prostitution and sexual trafficking represented a danger to her. She said that if she were to return to Nepal, the fact that she is unmarried and a single mother meant she would not be acceptable by her family and that no one else would provide her with assistance or acceptance and that she would be “lost” and that she really could not “contemplate” such a future for her and her child and has no idea how they might exist.

The Tribunal discussed with her the recent reports of a cease fire and a power sharing between the Maoists and the current government and reports of Maoists being openly demonstrating in Kathmandu in support of current developments. She replied that the situation is temporary and the situation in the villages has not changed and the above situation is only relevant to the city. She said she had no idea where she might return to. In her village she would be perceived as having made money overseas and threats would be made for financial gain and she could be robbed or killed. She said she would be very vulnerable with her child.

The adviser made submissions on her vulnerability in this regard stressing that her unmarried status as a mother would make her basically unemployable, given she had only had minimal high school education. He said she could not work in the village and in Kathmandu she would be an ideal candidate for prostitution rings who operated to India and that it would not be fanciful for her to be threatened through threats made to her child given she has no family support. She might also be perceived as having money having spent time abroad and be threatened with extortion because of that.

Independent evidence

The US State Department’s *Country Reports on Human Rights Practices Report for Nepal 2005* (released by the Bureau of Democracy, Human Rights, and Labor on 8 March 2006) states:

Nepal is a constitutional monarchy with a parliamentary form of government and a population of approximately 25 million. On February 1, 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. The state of emergency was lifted on April 29. Prior to February 1, the king ruled through a council of ministers that was under his chairmanship. International observers considered the most recent elections, the 1999 parliamentary elections, to be generally free and fair; however, elections have not been held since 1999 because of, according to the government, security concerns related to the Maoist insurgency, which has intensified since its inception in 1996. While the king generally maintained effective control of the security forces, elements of the security forces often acted independently of government authority.

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' right to change the government

- arbitrary and unlawful lethal force, including torture
- vigilantism
- disappearances
- poor prison and detention conditions
- arbitrary arrest and lengthy pretrial 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 labor
- restriction of worker's rights

In May the government welcomed the opening of the UN Office of the High Commissioner for Human Rights (OHCHR) in Kathmandu. Both OHCHR and the National Human Rights Commission (NHRC) reported improved access to detention centers and progress in locating persons listed as disappeared. In September the Supreme Court ruled that, unlike in previous years, children of unmarried women could claim citizenship under the 1990 constitution. In November the Supreme Court ruled that, unlike in previous years, women did not need permission from their husband or parents to get a passport. In December the Supreme Court ruled that women no longer needed to get the permission of their husband, son, or parents if they wished to sell or relinquish ownership of property.

During the year Maoists continued their campaign of torturing, killing, bombing, conscripting children, kidnapping, extorting, forcing closures of schools and businesses, and committing other serious and gross human rights abuses. Maoist impunity remained a significant problem. A local nongovernmental organization(NGO), Informal Sector Service Center (INSEC), estimated that during the year civilian fighting killed 1,630 persons, including 134 members of the police and Armed Police Force (APF); 203 members of the Royal Nepalese Army (RNA); 599 Maoists; and 267 civilians, including at least 30 students. Maoist actions limited press freedom and the right of assembly, constrained religious communities, prevented free movement, and stopped hundreds of thousands of children from receiving an education. Since the beginning of the insurgency in 1996, the Maoists had not credibly investigated human rights abuses committed by their forces, despite their claims to respect and uphold international conventions on human rights.

...

Women

Domestic violence against women was a serious problem that received limited public attention. There was a general unwillingness among police, politicians, citizens, and government authorities to recognize violence against women as a problem. Sensitizing programs by NGOs for police, politicians, and the general public have led to a greater awareness of the problem. The women's cell of the police received 730 reports of domestic violence during the country's fiscal year, which ended on June 15.

However, in the absence of a domestic violence law, police were unable to file cases against the accused.

Police had 18 women's cells in 16 of the country's 75 districts, with female officers who received special training in handling victims of domestic violence and trafficking. Police also sent out directives instructing all officers to treat domestic violence as a criminal offense that should be prosecuted. Nevertheless, according to a police official, this type of directive was difficult to enforce because of entrenched discriminatory attitudes among police. Even though police may make an arrest, often neither the victim nor the government pursued prosecution.

More than 20 NGOs in Kathmandu worked on the problem of violence against women and on women's issues in general, and provided shelter, medical attention, counseling, and legal advocacy for the victims of violence.

Laws against rape provide for prison sentences of 10 to 15 years for the rape of a child under the age of 10, seven to 10 years' imprisonment for raping a child between 10 and 16 years old, and 5 to 7 years for the rape of a woman 16 or older. If the victim is handicapped, pregnant, or mentally retarded, an additional five years is added to the standard sentence. A 2003 Supreme Court order prohibits spousal rape. During 2004 and through September, 178 cases of rape and 26 cases of attempted rape were filed in the court, according to the women's police cell. A survey conducted by SAATHI, an antitrafficking NGO, found that 39 percent of rape victims who reported the crime to police were under the age of 19. Of those victims who reported the crime to the authorities, 25 percent said the government arrested and convicted the perpetrator. According to SAATHI, police and the courts were quick to respond to rape cases.

The dowry tradition was strong in the Terai districts bordering India; however, the killing of brides because of defaults on or inadequacy of dowry payments was rare. More common was physical abuse of wives by husbands and in-laws seeking to obtain additional dowry, or to force the woman to leave so that the man might remarry.

Traditional beliefs about witchcraft generally involved elderly rural women and widows. Shamans or other local authority figures sometimes publicly beat and physically abused suspected witches as part of an exorcism ceremony. According to INSEC, there were 13 victims of witchcraft-related violence during the year. In 2003 the NHRC asked the government to develop a mechanism to prevent such abuses and to provide compensation to the abused. During the year the government awarded compensation to 13 victims of witchcraft-related violence that took place in 2003. The district administration office in the district where the violence occurred now handles all cases of witchcraft violence.

Trafficking in women remained a serious problem throughout the country, and large numbers of women were forced to work against their will as prostitutes in other countries (see section 5, Trafficking). Prostitution was illegal.

Although the law provides protections for women, including equal pay for equal work, the government had not taken significant action to implement those provisions, even in many state industries. Women faced systematic discrimination, particularly in rural areas, where religious and cultural traditions, lack of education, and ignorance of the law remained severe impediments to the exercise of basic rights, such as the right to vote or to hold property in their own names. Unmarried, widowed, and divorced women were able to inherit parental property.

In September the Supreme Court passed a verdict allowing all children whose father was unknown to have citizenship "until the father of the child is traced." However, the citizenship law still denies citizenship to the children of female citizens married to foreign spouses, even if those children were born in the country.

Also in September the Supreme Court declared unconstitutional a clause in the Birth and Death Record Act of 1976, which permitted only a male to record birth and death information in government offices. Women may now register birth and death information. The court ordered the government to enact a law abolishing the practice of *chhaupadi*, which required a woman to stay in a cow-shed for four days during her menstrual periods.

In November the Supreme Court ruled that, unlike in previous years, women did not need permission from their husband or parents to get a passport.

In December the Supreme Court ruled that women no longer needed to get the permission of their husband, son, or parents if they wish to sell or hand over ownership of property.

Many other discriminatory laws remain. According to legal experts, there were more than 50 laws that discriminated against women. For example, the law on property rights favors men in its provisions for land tenancy and the division of family property. The Foreign Employment Act requires women to get permission from the government and their guardian before seeking work through a foreign employment agency. The law encourages bigamy by allowing men to remarry without divorcing their first wife if she becomes crippled or infertile.

According to the 2001 census, the most recent statistics available, the female literacy rate was 43 percent, compared with 65 percent for men. NGOs focused on integrating women into active civil society and the economy. There were also a growing number of women's advocacy groups. Most political parties have women's groups that advocate for women's rights and bring women's issues before the party leadership...

Trafficking In Persons

The law prohibits trafficking in persons and prescribes imprisonment of up to 20 years for infractions; however, trafficking in women and children remained a serious problem. During the year enforcement of antitrafficking statutes improved but remained sporadic. The law prohibits selling persons in the country or abroad.

The government has a national plan of action to combat trafficking and a National Rapporteur on Trafficking. However, political instability and security problems associated with the Maoist insurgency hindered the government's antitrafficking efforts.

Nepal was a source country for trafficking. Young women were the most common targets. Trafficking of boys rarely was reported, but girls as young as nine years of age were trafficked. While the vast majority of trafficking was of women and girls for sexual exploitation, women and girls sometimes were trafficked for domestic service, manual or semi-skilled bonded labor, work in circuses, or other purposes. Most women and girls trafficked from the country went to India, lured by promises of good jobs or marriage. Internal trafficking for forced labor and sexual exploitation also

occurred. Save the Children and Action Aid conducted research linking conflict, migration, and employment. The studies indicated that internal trafficking may be on the rise due to the insurgency, as rural women and children left their homes to seek both employment and security in urban centers.

According to the 2004 annual report of the Attorney General's office, 133 trafficking cases were filed in district attorneys' offices across the country. At the end of 2004, of the 133 cases, 32 resulted in full or partial convictions, 18 in acquittal, and 83 remained open. At year's end the Attorney General's office had not released its latest report.

Local NGOs combating trafficking estimated that 25 thousand to 200 thousand women and girls were lured or abducted annually into India and subsequently forced into prostitution; however, these numbers were not consistent, and NGOs continued to seek better estimates. Women were also trafficked to Saudi Arabia, Malaysia, Hong Kong, the United Arab Emirates, and other gulf states for sexual exploitation and domestic servitude. In 2003 the government lifted a ban on female domestic labor leaving the country to work in Saudi Arabia and other countries in the gulf. The government did not monitor adequately labor recruiting agencies to ensure that workers going abroad attended pre-migration orientation sessions, or that labor contracts were honored after workers' arrivals in receiving countries.

Hundreds of women and girls returned voluntarily or were rescued and repatriated to the country annually after having worked as commercial sex workers in India. Most were destitute and, according to estimates by local NGOs Maiti Nepal and ABC Nepal, 50 percent were HIV-positive when they returned. Maiti Nepal, the country's largest antitrafficking NGO, operated a hospice for HIV positive trafficking victims and their children.

Traffickers were usually from the country or India, and had links to brothels in India. In some cases parents or relatives sold women and young girls into sexual slavery. NGOs' unverified estimates suggested that 50 percent of victims were lured to India with the promise of good jobs and marriage, 40 percent were sold by a family member, and 10 percent were kidnapped. During the year the government identified 26 high-priority districts as source areas of trafficking and established antitrafficking task forces in nine districts of the country. Women and youth displaced from homes as a result of the insurgency were especially vulnerable to being trafficked.

While the government lacked both the resources and institutional capability to address effectively its trafficking problem, the government established a National Task Force at the Ministry of Women, Children and Social Welfare (MOWCSW) with personnel assigned to coordinate the response. There were programs in place to train police, and the MOWCSW worked closely with local NGOs to rehabilitate and otherwise assist victims. Police women's cells in 18 districts worked with NGOs to provide referral services to victims of trafficking and domestic violence.

The government provided limited funding to NGOs to give assistance to victims with rehabilitation, medical care, and legal services. The MOWCSW sponsored job and skill training programs in several poor districts with high rates of commercial sex

workers who are sent to India. The government protected the rights of victims and did not detain, jail, or prosecute them for violations of other laws.

The government, together with NGOs and international organizations, implemented local, regional, and national public awareness campaigns on trafficking in persons; however, the government failed to budget for adequate police training and resources, and the courts were overburdened. Government welfare agencies worked with NGOs to deliver public outreach programs and assistance to trafficking victims.

Planete Enfants, an EU-funded NGO, collaborated with the government on campaigns to educate girls about trafficking in 19 districts. UNIFEM, in coordination with the government, conducted campaigns to target potential victims and deter traffickers by advertising the potential 20-year punishment for trafficking. These efforts resulted in the interception and rescue of potential victims and in eroding the stigma associated with being a trafficking victim.

Cultural attitudes toward returned victims of trafficking were often negative. There were more than 50 NGOs combating trafficking, several of which had rehabilitation and skills training programs for trafficking victims. With the government's endorsement, many NGOs created outreach campaigns using leaflets, comic books, films, speaker programs, and skits to convey antitrafficking messages and education in urban, cross-border, and rural areas. Maiti Nepal, which stationed rehabilitated trafficking victims as guards with government officials to intercept trafficking victims at border crossings, reported that some of their female border guards had been attacked because of their work.

Relationship between Nepal and India

The Tribunal noted information from the US Library of Congress, Country Studies, which provides the following overview on the relationship between Nepal and India, including agreements between the two countries which enable citizens of Nepal to live in India.

Under the Treaty of Peace and Friendship, ratified in July 1950, each government [of Nepal and India] agreed to acknowledge and respect the other's sovereignty, territorial integrity, and independence; to continue diplomatic relations; and, on matters pertaining to industrial and economic development, to grant rights equal to those of its own citizens to the nationals of the other residing in its territory. Agreements on all subjects in this treaty superseded those on similar matters dealt with in the previous treaties between Nepal and Britain. In the Treaty of Trade and Commerce, ratified in October 1950, India recognized Nepal's right to import and export commodities through Indian territory and ports. Customs could not be levied on commodities in transit through India...

The Citizenship Act of 1952 allowed Indians to immigrate to Nepal and acquire Nepalese citizenship with ease--a source of some resentment in Nepal. And, Nepalese were allowed to migrate freely to India--a source of resentment there. (This policy was not changed until 1962 when several restrictive clauses were added to the Nepalese constitution.) Also in 1952, an Indian military mission was established in Nepal. In 1954 a memorandum provided for the joint coordination of foreign policy, and Indian security posts were established in Nepal's northern frontier...

In June 1990, a joint Kathmandu-New Delhi communiqué was issued pending the finalization of a comprehensive arrangement covering all aspects of bilateral relations,

restoring trade relations, reopening transit routes for Nepal's imports, and formalizing respect of each other's security concerns (The Library of Congress Country Studies, *Nepal: Relations with India*, at <http://memory.loc.gov/cgi-bin/query> accessed 27 March 2002).

Articles VI and VII of the 1950 Treaty of "Peace and Friendship" between the Governments of India and Nepal, state

Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, in its territory, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts relating to such development (Article VI)

The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement that privileges of a similar nature (Article VII) (full text of the treaty at http://www.humanrights.de/n/nepal/treaty/31071950_Treaty_of_Peace_and_Friendship1950.htm, accessed 27 March 2002).

A fact-finding mission to Nepal found that many citizens of Nepal lived in India:

As mentioned above, many Nepalese would flee the violence in their districts by going to India, an ever popular place for Nepalese labour migrants. Especially to the Indian states of Assam and Bihar (where many Nepalese are working in the coal mines), but also to the states of Haryana and Punjab which have a shortage of cheap agricultural labourers. The big cities of Mumbai, Delhi and Bangalore likewise harbour many Nepalese.

Until now Nepalese citizens do not need a passport to travel to India and stay there, the result of an agreement between both countries which allows for free passenger travel. Many Nepalese asylum seekers in Belgium actually claim to have travelled to Europe through India. To the question why they did not stay in India many of them answer that in such case they would have run the risk of being extradited to the Nepalese government for their ties with the Maoists.

Inquiries with our contacts resulted in the claim that the Indian government has not yet made such extraditions to Nepal. Many of the major Maoist leaders would actually have found refuge in India. The human rights organisations however do not exclude the hypothesis that such extraditions may occur in the future, especially of individuals who are suspected to be involved in such militant and terrorist activities (Kingdom of Belgium, Ministry of Interior Affairs, Office of the Commissioner General for Refugees and Stateless Persons (CEDOCA) documentation and research department, Mission to Nepal, VII. India: a safe third country, 21 January - 9 February 2002, published March 2002, publicly available 26 June 2002).

In relation to the situation for women in India, the United States Department of State *Country Report on Human Rights Practices on India 2005* (released by the Bureau of Democracy, Human Rights and Labor, 8 March 2005), states:

Women

Domestic violence was common and a serious problem. According to a 2004 National Commission for Women survey, 60 to 80 percent of women were abused in some way by their spouses, 42 percent were beaten physically, and 22 percent were expelled from their homes for at least a day. According to the women's group Majlis, many women were forced to remain in abusive relationships because of social and parental pressure and to protect their children. According to a survey conducted during the year by the International Institute for Population studies, 56 percent of women believed wife beating was justified in certain circumstances.

Rape and other violent attacks against women continued to be a serious problem. According to the National Crime Records Bureau (NCRB), in 2004 authorities arrested 133,865 persons for violent attacks against women and there were 12,558 convictions. The NCRB reported 1,157 cases of rape against dalit women in 2004 and 523 cases of rape against the scheduled castes in the first six months of the year. Human rights groups claimed that these numbers were much lower than the actual totals.

Ineffective prosecution and societal attitudes made progress against domestic violence difficult. The NCRB confirmed that the number of rapes reported had declined from 16,373 in 2003 to 14,809 in 2004, while reported molestations had decreased from 33,943 to 31,716. However, the NCRB pointed out that the number of rapes increased sharply at the end of 2004 to 17,633 cases. According to the NCRB, 2 rapes take place every hour, 1 in 5 victims was a child, and 19 out of 20 of those arrested for rape went unpunished.

The Home Ministry reported that in New Delhi during 2004, there were 130 reported dowry deaths, 490 rapes, 489 sexual molestations of women, 1,211 instances of cruelty by the husband or in-laws, and 1,599 reports of sexual harassment.

In June a father-in-law raped Imrana, a Muslim woman, in Muzzafarnagar, Uttar Pradesh. After the incident, local community and religious leaders ruled that she must separate from her husband and move in with the father-in law who had raped her. They also determined that she should consider her former husband as her son, because she was now married to his father. The All India Muslim Personal Law Board, responsible for overseeing Muslim family law issues, refused to overturn this decision. Numerous women's organizations protested, but Uttar Pradesh chief minister Mulayam Singh Yadav supported the edict, claiming that the Muslim religious leaders ruling must have been deeply considered. In July police arrested the father-in-law and charged him with rape. He remained in judicial custody at year's end.

The press reported that violence against women was increasing, although some local women's organizations attributed the apparent increase to greater reporting. Only 10 percent of rape cases were adjudicated fully by the courts, and police typically failed to arrest rapists, fostering a climate of impunity. Upper caste gangs often used mass rape to intimidate lower castes, and often gang raped as punishment for alleged adultery, or as a means of coercion or revenge in rural property disputes. The number of reported rape cases and the extent of prosecution varied from state to state.

In Lucknow in February 2004, six tribal women were raped while working in a brick kiln. The police initially refused to lodge a complaint and alleged that three of the six victims had not actually been raped. After higher authorities intervened, police filed charges and arrested two suspects.

In March a 21-year-old woman was tortured, stripped, made to sit on a donkey and paraded through Chandupur village, Uttar Pradesh, after a local mystic accused her of killing a small child. Police intervened, but no arrest was made.

On August 20, according to the AHRC, a rape victim and her child were auctioned off for 13 cents (Rs. 6) in Jharkhand. After four men raped Piary, a tribal woman, she became pregnant and demanded that her rapists take responsibility for her child. The village elders first decided that the perpetrators should pay Piary, but when she rejected this, they auctioned Piary and her child. Newspaper reports stated that a young man present during the auction empathized with Piary's plight, agreed to marry her and take responsibility for her child. The village heads approved and announced that the approximately \$280 (Rs. 12 thousand) collected from the four perpetrators would be given to Piary for the marriage. Human rights groups demanded the arrest of the perpetrators and the village heads, but at year's end, the police had made no arrests.

On September 13, a woman was allegedly gang raped on the Toofan Express train by seven people, three of whom were Railway Protection Force personnel. According to press reports, the Railway Ministry ordered an inquiry into the alleged gangrape and compensated the victim. Railway officials on duty at the time were suspended and a ticket examiner and vendor were arrested.

Women often bore the brunt of caste-based violence. For example on March 31, the NFO People's Watch-Tamil Nadu reported that in Vengamedu village, an upper caste man assaulted and sexually harassed a dalit woman for using a pathway forbidden to dalits. He tore off the woman's clothes, hit her 20 to 30 times, and verbally abused her. The victim attempted to lodge a complaint with the police, but Sub-Inspector Sidhuraj of the Chennimalai police refused to register her complaint. No action was taken and the man remained free at year's end.

The government prosecuted some rape cases during the year, but was not able to enforce rape laws effectively. In May three youths abducted and sexually assaulted a female student from Venkateswara College in South Delhi. Although police arrested one man, who was in judicial custody at year's end, the two other alleged rapists remained at large. In January two years after the gang rape of a student from the Maulana Azad Medical College in Delhi, an additional sessions court gave life sentences to the two accused.

Providing or taking a dowry is illegal under the Dowry Prohibition Act of 1961; however, dowries continued to be offered and accepted, and dowry disputes remained a serious problem. In a typical dowry dispute, the groom's family harassed a new wife for not providing a sufficient dowry. This harassment sometimes ended in the woman's death, which the family often tried to portray as a suicide or accident. In 2004 the government registered 6,250 dowry death cases under the Dowry Prohibition Act, in which husbands or in-laws murdered women for not providing sufficient dowry.

In September the Delhi Commission for Women reported 677 cases of abuse against women from January to July, of which 92 percent were dowry related and 22 percent a result of harassment by in-laws. In 2004 Delhi police's crime against women cell recorded 7,987 dowry-related cases. Of these, police counseled 1,853 families to a compromise, filed criminal charges in another 1,200 cases, and in five thousand cases

the victim did not pursue the matter. In 2004 there were 122 dowry-related deaths in Delhi. In March the West Tripura sessions court sentenced three persons to five years' rigorous imprisonment for abetting the suicide of a woman by torturing her for dowry in 2003.

The Tamil Nadu government reported an increase in cases filed under the Dowry Prohibition Act from 175 in 2003 to 294 cases in 2004. In 2004 the government won convictions in 32 cases of dowry harassment, including 8 involving murder. Lawyers confirmed that wife-battering cut across all religions, caste, and educational levels. Convictions potentially took several years. For example, during the year the Chennai high court convicted two accused persons of a dowry death case initially filed in 1995.

Usually at a disadvantage in dowry disputes, women have begun to speak out against dowry demands. In February a woman from Bhiwani, Haryana, refused to join her husband after her marriage ceremony because of a dowry demand by her in-laws. The local panchayat stood by the woman's decision.

The media often reported cases of dowry murder. On August 19, 19-year-old Charanpreet Kaur was set on fire and killed by her father-in-law because her parents could not meet her in-laws' ever-increasing demands for dowry. Kaur made a statement to police before she died, and her husband and in-laws were arrested. At year's end, all accused were in New Delhi's central jail awaiting formal murder charges.

Under the law, courts must presume that the husband or the wife's in-laws are responsible for every unnatural death of a woman in the first seven years of marriage—provided that harassment was proven. In such cases, police procedures required that an officer of the rank of deputy superintendent or above investigate and that a team of two or more doctors perform the postmortem procedures; however, in practice police did not follow these procedures consistently.

Madhya Pradesh, Kerala, Bihar, and several other states had a chief dowry prevention officer (CDPO), although it was unclear how effective they were. Madhya Pradesh also required that all government servants seeking to marry produce a sworn affidavit by the bride, the groom, and his father that no dowry exchanged hands.

In May the Supreme Court ordered the creation of a commission to end dowry. In August parliament passed the Domestic Violence Bill to deal with dowry-related harassment and murder. The bill provides sweeping powers to magistrates to issue protection orders.

In May parliament amended the Code of Criminal Procedure to stipulate that mandatory DNA tests in all rape cases. In an effort to protect women from sexual assault by police officers, the bill also prohibits the arrest of women after sunset and before sunrise except in "exceptional circumstances."

The government banned *sati*, the practice of burning a widow on the funeral pyre of her husband, in the 1800s, and there were no instances of *sati* in recent years. However, in January according to press reports, the Rajasthan High Court dropped charges against 18 persons in a 1987 case in which 18-year-old Roop Kanwar was killed through *sati* after witnesses recanted their testimony. Women's groups demanded an appeal, but there was no action at year's end.

During the year, honor killings continued to be a problem, especially in the northern states of Punjab and Haryana. Human rights organizations estimated that up to 10 percent of all killings in those two states were honor killings; however, the true number may be much higher. In August Delhi police arrested Jai Singh and four others for the alleged honor killing of his daughter, Sunita. Singh was accused of hiring the four to kill his daughter for living separately from her husband. At year's end, the five were in jail awaiting trial.

Dalit women were often singled out for harassment. For example, they were occasionally stripped naked by mobs and paraded in public for offending persons belonging to higher castes. Police failed to arrest a man in Haryana who in February 2004 cut off a 50 year-old dalit woman's nose. In December in Keraragard, Orissa, upper-caste Hindus and a priest beat four dalit women for entering a temple forbidden to them. The village council then fined the women approximately \$22 (Rs. 1,000). The district collector ordered a probe into the incident.

Numerous laws exist to protect women's rights, including the Equal Remuneration Act of 1976, the Prevention of Immoral Traffic Act of 1956, the sati Prevention Act of 1987, and the Dowry Prohibition Act of 1961. However, the government often was unable to enforce these laws, especially in rural areas where traditions were deeply rooted. According to press reports, the rate of acquittal in dowry death cases was high, and due to court backlogs, they took an average of six to seven years to conclude.

In August parliament amended the Hindu Succession Act, which removed discriminatory clauses from the Hindu Succession Act by giving equal inheritance rights to Hindu, Buddhist, Jain, and Sikh women, including giving married daughters the same inheritance rights as male heirs.

The government took a number of steps to assist female crime victims. These included establishing telephone help lines, creating short-stay homes, providing counseling, occupational training, medical aid, and other services, and creating grant-in-aid schemes to provide rehabilitation rescue.

While the act of prostitution is legal, most aspects surrounding prostitution are illegal. The Immoral Trafficking Prevention Act (ITPA) criminalizes the offenses of selling, procuring, and exploiting any person for commercial sex as well as profiting from the prostitution of another individual. Prostitution is only legal when no third party is involved, it is not done in or near a public place, it is not forced, there is no solicitation, or when the prostitute resides alone. Section 8 of the ITPA criminalizes the act of solicitation for prostitution, which has been used in the past to arrest and punish women and girls who were victims of trafficking. According to UNICEF, in 2004 the country contained half of the one million children worldwide who entered the sex trade. Many tribal women, who are particularly vulnerable, were forced into sexual exploitation (see section 6.c.).

In recent years sex workers began to demand legal rights, licenses, and reemployment training. For example, in June 2004 numerous sex workers in Goa were displaced after authorities demolished their homes. According to the chairperson of the NCW, some of the displaced sex workers refused a government compensation offer, claiming that it had not been accurately described to them.

The country is a significant source, transit point, and destination for many thousands of trafficked women (see section 5, Trafficking).

Sexual harassment was common, with a vast majority of cases unreported to authorities. A 2003 study by a senior professor at the Madras Institute of Development Studies chronicled the hazards faced by some women in the workforce. Among these were physical and verbal abuse from male supervisors, restricted use of toilets, and the denial of lunch breaks. In June 2004 a joint report released by the NCW and the national press institute found that most women experienced gender discrimination at their workplaces.

Attempts by women to report harassment often resulted in further problems or dismissal. In January 2004 a female general manager of Dena Bank in Mumbai was suspended after filing sexual harassment charges against senior bank officials; there were no developments in the case at year's end. In April 2004 a Sahara airlines executive employee in Mumbai was fired after filing a sexual harassment complaint. At year's end, the case was ongoing.

In April 2004 the Supreme Court determined that a victim of sexual harassment had a right to compensation based on the findings of an internal departmental report or investigation of the case.

The law prohibits discrimination in the workplace; however, enforcement was inadequate. In both rural and urban areas, women were paid less than men for the same job. Women experienced economic discrimination in access to employment and credit, which acted as an impediment to their owning a business. The promotion of women to managerial positions within businesses often was slower than that of males. State government-supported microcredit programs for women began to have an impact in many rural districts. In March the government amended the law to provide flexibility for women to work in factories on the night shift. Women's organizations welcomed the move but stressed the need to improve security for such women.

In February 2004 the government amended the divorce laws to expand the venues where a woman could file and obtain a divorce. Earlier provisions in the Hindu and Special Marriage Acts forced women to file cases in cities or towns where they had resided during the marriage or where the marriage took place; however, the amendment permits women to file where they currently reside. At year's end, there were no changes to the triple *talaq* provisions, which allowed Muslim men to divorce their wives simply by saying "talaq" three times.

In September 2004 after a request by the All-India Democratic Women's Association, the army allowed female military recruits to be examined by female doctors at their request.

Many tribal land systems, notably in Bihar, denied tribal women the right to own land. Other laws relating to the ownership of assets and land accorded women little control over land use, retention, or sale. However, several exceptions existed, such as in Ladakh and Meghalaya, where women traditionally controlled family property and enjoyed full inheritance rights.

Trafficking in Persons

The Immoral Traffick (Prevention) Act (ITPA) prohibits trafficking in human beings; however, trafficking in persons remained a significant problem. Some law enforcement officials participated in and facilitated trafficking in persons.

The ITPA toughened penalties for trafficking in children, particularly by focusing on traffickers, pimps, landlords, and brothel operators, while protecting underage victims. Conviction for an offense committed against a child (under age 16) was punishable by imprisonment for 7 years to life. In the case of minors (16 to 18 years), the punishment is from 7 to 14 years imprisonment. Other penalties under the act range from minimum terms of imprisonment of one year for brothel keeping, to minimum terms of 7 years to life imprisonment for detaining a person, with or without consent, for prostitution. During the year there were more than 195 prosecutions against traffickers. The police were charged with enforcing the country's laws on prostitution and trafficking in women and children, NGOs, observers, and women in prostitution said that police actions were often part of the problem. NGOs alleged that corruption at the enforcement level helped perpetuate trafficking. The government cooperated with groups in Nepal and Bangladesh to deal with the problem and began to negotiate bilateral antitrafficking agreements, particularly through the South Asian Association for Regional Cooperation. Numerous NGOs, including the Action Against Trafficking and Sexual Exploitation of Children, provided training and conducted informational meetings.

The country was a significant source, transit point, and destination for numerous trafficked persons, primarily for the purposes of prostitution and forced labor. There were an estimated 500 thousand child prostitutes nationwide. More than 2.3 million girls and women were believed to be working in the sex industry, and experts believed that more than 200 thousand persons were trafficked into, within, or through the country annually. There were approximately three million trafficking victims in the country, and two thousand rescues a year. Women's rights organizations and NGOs estimated that more than 12 thousand and perhaps as many as 50 thousand women and children were trafficked into the country annually from neighboring states for commercial sexual exploitation. According to an International Labor Organization (ILO) estimate, 15 percent of the country's estimated 2.3 million prostitutes were children, while the UN reported that an estimated 40 percent of prostitutes were below 18 years of age. Tribal persons made up a large proportion of the women forced into sexual exploitation.

The country was a destination for Nepali and Bangladeshi women and girls trafficked for the purpose of labor and prostitution. Internal trafficking of women and children was widespread. To a lesser extent, the country was a point of origin for women and children trafficked to other countries in Asia, the Middle East, and the West. The country also served as a transit point for Bangladeshi girls and women trafficked for sexual exploitation to Pakistan and for boys trafficked to the Gulf states to work as camel jockeys. The country was also a growing destination for sex tourists from Europe, the United States, and other Western countries, and NGOs reported that sexual exploitation of children for sex tourism remained a significant problem in the states of Goa and Kerala (see section 5, Women; Children).

The Ministry of Labor and Employment reported in December that it rescued 916 child laborers from Maharashtra and 648 from Delhi.

An estimated 6 to 10 thousand children from Nepal and Bangladesh were trafficked into the country annually for commercial sexual exploitation. Girls as young as seven years of age were trafficked from economically depressed neighborhoods in Nepal,

Bangladesh, and rural areas of the country to the major prostitution centers of Mumbai, Calcutta, and New Delhi. NGOs estimated that there were approximately 100 to 200 thousand women and girls working in brothels in Mumbai, and 40 to 100 thousand in Calcutta. In West Bengal, the organized traffic in illegal Bangladeshi immigrants was a principal source of bonded labor. Calcutta was a transit point for traffickers sending Bangladeshis to New Delhi, Mumbai, Uttar Pradesh, and the Middle East.

Within the country, women from economically depressed areas often moved to cities seeking greater economic opportunities, and once there they were often forced by traffickers into prostitution. In many cases, family members sold young girls into prostitution. Extreme poverty, combined with the low social status of women, often resulted in parents handing over their children to strangers for what they believed was employment or marriage. In some instances, parents received payments or the promise that their children would send wages back home.

According to the Indian Center for Indigenous and Tribal Peoples, more than 40 thousand tribal women, mainly from Orissa and Bihar, were forced into economic and sexual exploitation; many came from tribes driven off their land by national park plans. A Haryana-based NGO revealed widespread trafficking of teenaged girls and young boys from poverty-stricken Assam to wealthier Haryana and Punjab for sexual slavery under the pretext of entering into arranged marriages or for forced labor. There was also significant trafficking for real marriages due to decades of large-scale and increasing female feticide.

Boys, often as young as age four were trafficked to the Middle East or the Persian Gulf as jockeys in camel races, and many boys ended up as beggars in Saudi Arabia during Hajj (pilgrimage). The majority of such children worked with the knowledge of their parents, who received \$200 (Rs. 9,300) for their child's labor. Many children were kidnapped for forced labor, with kidnappers earning approximately \$150 (Rs. seven thousand) per month from the labor of each child. The child's names were usually added to the passport of a Bangladeshi or female citizen who already had a visa for the Gulf. Girls and women were trafficked to the Persian Gulf states to work as domestic workers or for commercial sexual exploitation.

The NCW reported that organized crime played a significant role in the country's sex trafficking trade and that trafficked women and children were frequently subjected to extortion, beatings, and rape. Although a few women were abducted forcibly or drugged, most were trafficked through false offers of marriage, employment, or shelter. Poverty, illiteracy, and lack of employment opportunities contributed to the trafficking problem as well as police corruption and collusion. Although corruption was endemic, there was no known anticorruption initiative linked specifically to trafficking. NGOs alleged that issues such as ignorance, a lack of political resolve, and corruption at the enforcement level perpetuated the problem. Police in Chennai, Mumbai, and New Delhi worked actively with NGOs to target traffickers and safeguard victims after their rescue.

Victims of trafficking were subject to threats, including emotional blackmail, violence, and confinement, as well as the threat of apprehension by authorities, detention, prosecution, and deportation. Women involved in prostitution in Mumbai

and Calcutta claimed that harassment, extortion, and occasional arrests on soliciting charges usually characterized police intervention. NGOs, victims, and the media continued to identify corruption at the enforcement level as an impediment to swifter and fairer justice for trafficked women and children.

In many cases police or the staff of government remand centers, where rescued victims were housed temporarily, sexually abused trafficking victims. Similarly, arrested prostitutes were quickly returned to brothels after the brothel operators paid bribes to the authorities. In other cases, arrested prostitutes were released into the custody of traffickers and madams posing as relatives. In these cases, the debt owed by the girls to the brothel operators and traffickers increased, as the costs of bribing or legally obtaining release of the girls was added to their labor debt.

Some NGOs knowledgeable about the trafficking situation identified traffickers and the locations of girls being held captive by brothel owners. However, other NGOs were reluctant to trust police with this information, due to their past conduct in brothel raids and the likelihood that many trafficking victims would be arrested and re-victimised rather than assisted by such raids. Several NGOs had significant successes, however, in working with police to target brothels with children.

The ITPA required police to use only female police officers to interrogate girls rescued from brothels. The ITPA also required the government to provide protection and rehabilitation for these rescued girls. The vast majority of arrests made under ITPA were for solicitation rather than trafficking or trafficking-related crimes. During the year this pattern changed in Delhi, Bangalore and Mumbai. Police reportedly no longer arrested trafficked women and children for soliciting, and in Tamil Nadu, such arrests diminished significantly.

Implementation of the ITPA's provisions for protection and rehabilitation of women and children rescued from the sex trade improved. The government significantly increased police training and modestly improved inter-state coordination of antitrafficking efforts, cooperated with NGOs, supported awareness campaigns, and increased the number of shelter facilities available to rescued trafficking victims.

The Home Ministry and the Bureau of Police and Research Development (BPRD) began a law enforcement training program, considered a significant achievement by NGOs, to sensitize police and improve trafficking arrests and convictions. The Department of Women and Child Development (DWCD) improved delivery of support services through greater coordination with its state counterparts and civil society organizations. Government-run shelters in some localities, specifically Mumbai, expanded significantly under the *Swadhar* (women's home) scheme.

In March the home minister of Maharashtra ordered the closure of all dance bars operating in the state, many of which served as prostitution and trafficking outlets. In recent years, traffickers began favoring these bars as a venue in which to engage in trafficking, instead of the more blatant brothel-based trafficking. However, the government's implementation of this order without a rehabilitation plan caused displacement of women, forcing many to enter direct prostitution in Mumbai, Delhi, Goa, and other major trafficking destinations.

In November the Home Ministry organized a significant conference with the United Nations Office of Drugs and Crime to raise awareness of human trafficking and to state, for the first time, their commitment to addressing this issue with resources and manpower.

Over the last several years, arrests and prosecutions under the ITPA increased slightly. All indications suggested a growing level of trafficking into and within the country. In particular, due to the Maoist instability in Nepal, trafficking increased significantly from that country.

FINDINGS AND REASONS

The applicant claims to fear harm both for reason of political opinion as well as for reason of her membership of a particular social group. For reasons explained below, the Tribunal accepts that the applicant has a well founded fear for reason of the latter ground and that being the case; the Tribunal has no need to address her claims with regard to political opinion.

The Tribunal accepts the applicant's oral and documentary evidence that she is the mother of a child born out of wedlock to a Nepalese who was in Australia and who has not accepted paternity. The applicant claims that as an unmarried mother she would suffer harm in that she would suffer social opprobrium and that her lack of employable skills and lack of family support would render her and her child socially and economically vulnerable to harm from men in Nepal who might wish to harm her either for sexual gratification, monetary gain through extortion or by forcing her into sexual slavery through trafficking. The Tribunal accepts that given the patriarchal nature of Nepalese society, the lack of recognised paternity of her child, a situation exacerbated by the child's mixed caste background, would make the applicant and her child particularly vulnerable to the vagaries of bureaucratic procedures and render her social status indeterminate.

The Tribunal accepts the independent evidence cited above that women in Nepal are indeed vulnerable to violence and exploitation and that the police and government authorities are generally less than adequately responsive to protecting vulnerable women in the situation of the applicant. The Tribunal accepts that Nepal remains a traditional society where family ties, caste and traditions remain particularly important for social recognition. In the light of this, the Tribunal finds that unmarried women in Nepal would constitute, for the Convention, a particular social group.

The Tribunal accepts that the current state of rapid political change in Nepal would, in addition, mean that any likelihood of an improvement in the response of the police and the authorities to the needs for assistance by a woman in the situation of the applicant, is unlikely in the foreseeable future. The Tribunal accepts the evidence before it that there is a real chance that such assistance would be denied her by government authorities, such as the police, on a selective and discriminatory basis for a Convention reason, viz her being a member of the particular social group of women in Nepal, and in particular, unmarried unskilled women with a dependent child lacking in family support, and that this would be the essential and significant motivation for that lack of protection, such as would make *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 187 ALR 574 relevant to her situation.

Having found that there is a real chance the applicant would suffer persecution for a Convention reason should she return to Nepal, the Tribunal needs to address the question of whether the applicant could avoid such harm in Nepal by living in India. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is now qualified by subsections 36(3), (4) and (5) of the Act. These provisions came into effect on 16 December 1999 and apply in the present matter:

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

The term "right" in subsection 36(3) refers to a legally enforceable right: *Minister for Immigration & Multicultural Affairs v Applicant C* (2001) FCR 154. This means that where a non-citizen in Australia has a legally enforceable right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

Where an applicant does not have a legally enforceable right to enter and reside in a third country, Australia will nonetheless not have protection obligations to that person if he or she is likely to be given effective protection in that country: *S115/00A v Minister for Immigration & Multicultural Affairs* (2001) 180 ALR 561.

Information from external sources considered by the Tribunal indicates that as a matter of practical reality and fact the applicant can enter and live in India, with rights and privileges commonly available to nationals of that country, without fear that she will be forced to return to Nepal. However, the Tribunal accepts the independent evidence cited above that, essentially for the same reasons as prevail in Nepal, the applicant, as an unskilled, unmarried mother without family support, would be vulnerable to sexual or economic exploitation and that the independent evidence cited above indicates that in India, also, there is a real chance that assistance would be denied her by government authorities, such as the police, on a selective and discriminatory basis for a Convention reason, viz her being a member of the particular social group of women, and in particular, unmarried unskilled immigrant women from Nepal with a dependent child lacking in family support, and that this would be the essential and significant motivation for that lack of protection, such as would make *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 187 ALR 574 relevant to her situation.

The Tribunal is thus satisfied that the applicant has a well-founded fear of persecution for a Convention reason in both Nepal and India.

CONCLUSIONS

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

DECISION

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

<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>. PRRRNM</p>
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