

**0802453 [2008] RRTA 263 (3 July 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0802453  
**DIAC REFERENCE(S):** CLF2007/191933  
**COUNTRY OF REFERENCE:** Nepal  
**TRIBUNAL MEMBER:** Luke Hardy  
**DATE DECISION SIGNED:** 3 July 2008  
**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the Applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The Applicant, who claims to be a citizen of Nepal, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the Applicant of the decision and his review rights by letter.
3. The delegate refused the visa application on the basis that the Applicant was not a person to whom Australia had protection obligations under the Refugees Convention.
4. The Applicant applied to the Tribunal for review of the delegate's decision. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the Applicant has made a valid application for review under s.412 of the Act.
5. The Tribunal invited the Applicant to attend a hearing. By correspondence, the Applicant initially accepted the hearing date offered, asking for a "Nepali" interpreter and stating that he had no specific needs to be met with regard to the hearing. However, in a subsequent letter FAXed he asked for a postponement of the hearing for a number of weeks on the basis, as he put it through his new adviser, that he had requested a female interpreter. No such request had ever been received by the Tribunal prior to this notification. The Applicant stated that he wanted a female interpreter because, having surveyed the matter, he had come to the view that female interpreters generated less complaints than male interpreters. He also said that a male interpreter would be acceptable if no female interpreter could be found. The Tribunal was also informed that the Applicant's new adviser was called away from Australia and would be returning in four to six weeks.
6. To the presiding Tribunal Member's knowledge, there is only one interpreter in the Nepali-English medium available to the Tribunal in NSW, and she is reportedly overseas at present. Whatever survey the Applicant might have undertaken, it is hard to imagine he was ever able to locate or identify any more than this one female interpreter. The Tribunal was thus concerned that the Applicant's request seemed indistinguishable from individual "interpreter shopping". The Tribunal decided not to grant the postponement and asked the Applicant to attend the hearing as arranged at least to discuss the issues.
7. The Applicant attended but stated that he was too ill to proceed. He produced no evidence to support this position but he did appear generally unprepared and despondent. Through a male interpreter the Tribunal listened to his arguments for a female interpreter; these, relying on subjective perceptions about the kindness and empathy of females, were not persuasive. The Tribunal put to the Applicant that the interpreter's first duty was to be faithful to language and to the principle of meaningful communication. Whilst not forgetting that the manners of interpreters can be an important asset to the smooth conduct of a hearing, the Tribunal put to the Applicant

that he might be under a misapprehension if he expected an interpreter to bear the burden of providing social support during the hearing. The Tribunal put to the Applicant that even if it were to indulge his request for a female interpreter the postponement might have to be open-ended and therefore give rise to a delay such as might go against the intention articulated in s.420 of the Act for review by the Tribunal to be “fair, just, economical, informal and quick.” The Tribunal put to the Applicant that all male interpreters used by the Tribunal are engaged on the basis of their competency. Ultimately the Applicant said he was prepared to proceed with a male interpreter.

8. On the basis that the Applicant had come to the hearing unprepared, due to the unrealised aspiration of being able to postpone it, the Tribunal agreed to postpone the hearing to a later date, and the matter was adjourned.
9. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of a male interpreter in the Nepali and English languages. The Applicant expressed no significant concerns or reservations about the behaviour or competency of the interpreter during the hearing, and his adviser raised no concerns. At an early stage in the hearing, the Applicant said that the interpreter tended to speak quickly and the Tribunal suggested to the interpreter that he speak more slowly, drawing the Applicant’s attention to the possibility that the initial pace of the interpreter’s speech might have been linked to the brisk pace of the presiding Member’s introductory remarks.
10. The only concerns about the interpreter’s performance during the hearing, and these were small and quite isolated, were raised by the presiding Member. On a few occasions, the interpreter pronounced one or two words in English that the Tribunal needed him to repeat and/or spell out. He did so and the hearing proceeded. Also, at one stage the Applicant responded to a question from the Tribunal with sentences that contained the English word “January”, and when this word did not seem to appear in the interpreter’s English translation, the Tribunal raised the issue, whereupon the interpreter indicated that he was in the process of completing his translation of the Applicant’s words, and went on to finish his translation complete with the word that the Tribunal had originally heard.
11. At one stage in the hearing, the Tribunal put to the Applicant a concern it had about the consistency of his evidence and invited him to respond, whereupon he said he did not understand. The Tribunal repeated its original position and, before asking the Applicant to respond to it, asked him if he comprehended what the Tribunal was saying. In reply, he said he did understand, and proceeded to address the concern raised. The Tribunal was satisfied in this instance that the Applicant’s claim, about not understanding what was said, had nothing to do with the quality of the interpreting; rather, it was about not understanding, initially, either the complex position being raised about potential inconsistencies in the evidence or the significance of this concern, or both. As noted, the Applicant proceeded to address the concern raised.
12. The Applicant is represented in relation to the review by a registered migration agent who attended the hearing.
13. At the end of the hearing, the Tribunal asked the adviser if he had any questions to suggest, or concerns or issues to raise, and he said that he had none.

## RELEVANT LAW

14. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
15. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
16. 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'

17. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
  - owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
18. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
19. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
20. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
21. 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.

22. 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.
23. 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.
24. 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.
25. 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.
26. 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**

27. 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.
28. The Applicant, who used to live and work in his family's company in Town A, claims fear of persecution in Nepal for Convention-related reasons of "political opinion", on account of his being a member of the Communist Party of Nepal-United Marxist Leninist (CPN-UML) and "membership of a particular social group" tolerably defined

as “businessmen”. He claims his adversaries are an armed rebel group called the Janatantric Terai Mukti Morcha (JTMM).

29. The Tribunal notes that the JTMM is independently reported to be fighting government forces in the Terai region:

Nepal, a country of approximately 28 million, is in a state of political transition. It is operating under an interim political system: a parliamentary democracy with a powerless constitutional monarchy. Prime Minister Girija Prasad Koirala heads a multiparty coalition government, which includes members of the Communist Party of Nepal–Maoist (CPN-M). The interim parliament of 329 members was sworn in January 15, the same day the interim constitution was promulgated. The interim constitution provides for the election of a Constituent Assembly; commits Nepal to become a federal republic after the Constituent Assembly meets; strips the king of all formal powers; and makes the prime minister both head of government and head of state. The interim government twice postponed elections for the Constituent Assembly. The November 2006 peace agreement between the then-Seven-Party alliance and the Maoists ended the decade-long insurgency and called for the Nepal Police (NP) and the Armed Police Force (APF) to enforce law and order across the country. Authorities reestablished many police posts, but Maoists, or their subsidiary organization, the Young Communist League (YCL), prevented some from being reestablished and subsequently forced others to close. **Numerous armed groups, largely in the Terai region in the lowland area near the Indian border, formed and engaged in attacks against civilians, government officials, members of particular ethnic groups, each other, or against the Maoists.** Lacking political backing, police were often reluctant to intervene, particularly against the Maoists or YCL members...

According to a local NGO, Informal Sector Service Center (INSEC), security forces killed at least 28 individuals, and the Maoists/YCL killed approximately 23 persons. The Terai was the site of much unrest throughout the year. According to INSEC, the Madhesi People's Rights Forum (MPRF) killed 33 people, the Janatantrik Terai Mukti Morcha (Goit) 18, the Janatantrik Mukti Morcha (Jwala Singh) 27, the Madhesi Mukti Tigers two, Terai Cobra two, Terai Bhagi one, and unknown groups killed 95 persons. The NA was confined to its barracks as a result of the November 2006 peace accord; there were no new allegations of human rights abuses filed against the army during the year. Investigations of previously filed complaints continued; from July 2006 through June the NA sent the Home Ministry 258 so-called clarifications, amounting to explanations of the status of the cases.

During recurrent unrest in the Terai region in January and February, authorities often used unwarranted and at times lethal force. According to the UN Office of the High Commissioner for Human Rights (OHCHR) the unrest was sparked on January 16 when authorities arrested a group of Madhesi protestors, including the chairman of the MPRF, because the protestors allegedly had burned parts of the Interim constitution. In response to the arrests, the MPRF called a Terai-wide strike. On January 19, a member of the CPN-M killed a protestor who was among a group trying to enforce the strike in Lahan, Siraha District.

Large demonstrations quickly spread among the Terai areas of the eastern and central regions. Members of the MPRF frequently threatened journalists and human rights defenders. According to the OHCHR report, at times the NP and APF responded to the protests with excessive and lethal force. OHCHR documented at least 24 deaths in January and February, at least 18 of which were the result of the use of live bullets and baton charges against demonstrators. One police officer was also killed and others injured in the violence.

On March 21, 26 individuals linked to the CPN-M and one unidentified individual were killed following violence that broke out when the MPRF and CPN-M organized simultaneous rallies at the same location in Gaur, Rautahat District...

On October 8 [2007], cadres of the Janatantrik Terai Mukti Morcha-Goit faction (JTMM-G) shot and killed Ram Babu Sharma Neupane, Secretary of Khutawa Parsauni Village Development Committee. Bara District coordinator of the JTMM-G, Birat claimed responsibility for the killing...

On May 18 in Rautahat, a military commander of the Janatantrik Terai Mukti Morcha (JTMM-J) threatened to kill *Kathmandu Post* correspondent Shiva Puri and five other local journalists, Sanjay Karki, Ashok Pahari, Fani Mahat, Ratna Adhikari and Bipin Gautam because the journalists allegedly had written "reports against JTMM men." JTMM-J military commander "Prabhu" phoned Puri and threatened to kill him for allegedly broadcasting a news item on Radio Birgunj FM against JTMM-J commander Khaheru Dewan...

("Nepal" chapter in the US Department of State's *Country Reports on Human Rights Practices for 2007* [Washington DC, March 2008])

30. In his protection visa application to the Department, the Applicant claimed he was approached by members of the JTMM while he was overseeing a company job. He claimed they wanted to discuss irregularities in the business. He said the encounter led to his being kidnapped, interrogated, beaten, attacked over his membership of a democratic party (he later specified that this was the CPN-UML), and pressed to decide between joining the JTMM and donating, within three days, a large amount of money to the JTMM. He claimed he was dumped by the rebels a few days later and admitted to a hospital where he was treated. He claimed his family later took him to a police station to file a complaint. He claimed he received death threats at home from the JTMM because of the complaint he had lodged with the police. He claimed he and his "husband" later fled to Kathmandu. He later explained to the Tribunal that the word "husband" was an erroneous reference to his female fiancée who later left him because of the problem discussed in his claims. The Tribunal accepts this explanation, and finds no reason simply on the basis of the incongruous appearance of the word "husband" to find that the Applicant's statement is appropriated from someone else. The Applicant told the Tribunal that he had had no contact with his fiancée since he came to Australia.
31. The Applicant told the Tribunal that the JTMM rebels demanded an amount, and not, as suggested in the Applicant's protection visa application, a different amount. Although this was not explored and clarified, the Applicant's and interpreter's use of the colloquial and apparently unambiguous word leads the Tribunal to prefer the Applicant's claim that the rebels demanded a large amount of money from him. The Tribunal is all the more confident that the Applicant meant [amount] because he divided it, or acknowledged its division into two separate amounts.
32. The Tribunal draws no negative inferences from the numerical discrepancy discussed above, and is prepared to accept that the term [amount] was turned into a multiple of that amount through a similar standard of attention to detail as that which turned a female fiancée, in submissions, into a "husband".
33. In his oral evidence to the Tribunal the Applicant said he paid the rebels an amount of rupees in the late 2000s and undertook to pay the balance within a few months or face, as the rebels threatened to him at the time, more harm. This claim is omitted from the claims he made to the Department, which of itself is not a reason to suspect its credibility, although it appeared odd to the Tribunal that, in his protection visa application, the Applicant specifically attributed the death threats to the complaint he lodged with the police and made no mention of such threats being linked to payment of an outstanding donation balance to the rebels. Still, since the Tribunal accepts that the Applicant was not so competently assisted in the preparation of his protection visa application and the submission attached to it, it seemed important not to jump to any hasty conclusions about what might have appeared to have been omitted from the material originally put before the delegate.

34. The Tribunal therefore took time during the hearing to hear the Applicant's evidence about how he responded to the rebels' demand for money from the Applicant's family's company and how they responded to his and the company's failure to date to pay the demanded balance. This evidence is further discussed below.
35. The Applicant claimed to the Department that he was desperate to leave Nepal. He claimed that in the event of return to Nepal he would face a threat to his life. He said the JTMM are searching for his family members and himself. At the time of his protection visa application the Applicant did not submit any supporting documents, but undertook to submit later a letter from the police in Nepal, a letter from the hospital, a letter from the CPN-UML and some relevant independent reports and other documents. He submitted this material after he lodged his protection visa application.
36. The Applicant told the Department that with the help of some friends and family he was able to get an Australian visa. The visa he obtained, according to material in the passport he tendered at hearing, was a Temporary Visa issued recently. The Applicant claims he applied for this visa about two weeks after obtaining his new passport, the previous one having expired. The new passport was issued prior to his visa being granted.
37. At the hearing, the Applicant gave evidence about his family back in Nepal. He initially said that his father and brother continue to operate the family's company, in and out of Town A, in his absence and the business is conducted throughout Nepal contingent on whence its contracts and commissions originate. He said that a number of staff also assist with the running of the company. He said the company has been affected by the trouble he first encountered in the late 2000s, but when asked for detail he cited arguably more general and irrelevant issues such as fuel costs and strikes. Specifically, he acknowledged that the company is still running but facing difficulties making profits due to the cost of fuel and the recent strikes. He added that the company has also been negatively affected by fines imposed under contract with clients in instances where work was not completed to the client's satisfaction.
38. When the Tribunal put to the Applicant that the company's troubles seemed linked to current, generalised economic factors and not Convention-related, he then repeated that the company was suffering due to hampering from the JTMM, and then proceeded to describe the rebels pressing his family to move the company out of the Terai region.
39. The Tribunal asked the Applicant why the rebels targeted him and not his other family members. In reply, the Applicant said he was targeted because he was a member of the CPN-UML. The Tribunal asked why his political party membership was relevant in an exercise aimed at extracting donations out of a local company. In reply, the Applicant digressed, saying his family came from a hilly region. When the Tribunal pointed out that this did not appear to answer the question raised, the Applicant said his father was now too old to work, implying that this was why he was targeted. On the basis of this suggestion that the rebels pursued their demands through whoever was more available to hear and act on them, the Applicant did not appear to provide a strong argument, here, to the effect that his CPN-UML membership was a significant or essential factor in the harm he claimed to face.
40. Having originally told the Tribunal that his relatives continued to operate the company in his absence, according to where the demand rose, the Applicant changed his



evidence, and appeared to do so in the face of concerns about how the company could still be operating under his relative's management in the context of unmet rebel demands. The Applicant claimed that the staff run the company and that his relative is only a helper who does not work openly. However, arguably inconsistently with this claim, he also referred to the rebels visiting his relative at the workplace and warning him to take the company out of the region.

41. The Tribunal asked the Applicant how the rebels expected to get money out of the family company if it closed down or left the region. In reply, the Applicant said the rebels were pressing his family to sell of its property.
42. The Tribunal put to the Applicant that much more than a few months had passed without his family having handed over the demanded money. In reply, the Applicant said the rebels are persistent. The Tribunal drew the Applicant's attention to its concern about how his relative had not become the new focus of these "persistent" rebels' attention in his absence. Specifically, the Tribunal put to the Applicant that it did not appear the rebels had continued the campaign of harm they threatened to carry out if he failed to pay the balance within a few months. In reply, the Applicant said that this was because the company exists merely in the form of its registration, implying now that it is no longer to any significant extent operating at all.
43. The Tribunal put to the Applicant that he seemed to have changed his evidence as to the ongoing viability of the family company. The Tribunal put to the Applicant that he seemed to have difficulty committing to a single consistent story about the rebels' impact in the company and its operations and about the rebels being the reason for the company's problems. In reply, the Applicant referred to the general situation in Nepal and again said the rebels make it hard for anyone to do business.
44. At one point the Applicant appeared to acknowledge again that the company is still operating and administering its contracts, saying at this point that the fear of worse conditions changing is increasing.
45. The Applicant initially said he applied for his Australian visa in a specified month. When the Tribunal drew his attention to the fact that he did not appear to have a valid passport at the time, he said he used his old passport, which was expired. Here as in other parts of his oral evidence, the Applicant appeared digressive to the point of seeming evasive. The Tribunal put to him that a visa application would normally require the existence of a current and valid passport and asked him to say when, in the context of the passport issued later that month, he first applied for his Australian visa. In reply he said he applied for it about 12 to 14 days after the passport was issued.
46. The Applicant said his visa was organised by an organisation. The Tribunal asked the Applicant to say for what kind of temporary purpose the visa was issued. In reply, the Applicant said he could not do anything because he had no English (he later gave evidence that contradicted this). The Tribunal asked him what activity or enterprise was identified in his original temporary visa application, and he said an event had been organised by an Association of Australia and that he was supposed to take part. He confirmed that this was what the organisation genuinely expected of him and he also confirmed that he attended the event, which was held recently.

47. Noting that the Applicant came to Australia on a temporary visa and also noting that he undertook the activity for which the temporary visa was issued, the Tribunal put to the Applicant that one might reasonably question if he came to Australia for protection, exploiting the visa as a “front”, since he actually performed the activity in connection with which the visa had been issued. In reply, he said he came to Australia for protection. The Tribunal then asked the Applicant why he went to the trouble of attending the event, particularly since he had moments earlier claimed that he had no English. In response, the Applicant said his delegation included English speakers, implying that they helped him understand what was going on.
48. The Tribunal then focused the question a little more, asking the Applicant why he even bothered to attend the event, since he came to seek protection. He seemed to have difficulty understanding the question, so the Tribunal repeated it, asking him why he bothered to pursue the allegedly “false” intention of attending the event, to which he replied that he attended the event because he did not want to tell anyone around him of his protection needs.
49. The Tribunal considers it reasonable to accept that a visiting delegation member who was intending not to return to Nepal might not alert his fellow delegates of that intention and act upon it later, when their common activity had concluded. A person in this situation might plausibly “wait out” for a number of days of their event and then make his move to remain in Australia on his own, perhaps when some or all of his colleagues have returned to Nepal. However plausible this scenario might be, and the Tribunal is of the view that it is, and however possible it might be that a person seeking international protection might adopt a similar course of action, the Applicant’s act of “waiting out” the duration of the event before applying to remain here does not of itself provide evidence of his motivation for remaining here.
50. The Tribunal sought information from the Applicant about his earliest efforts to flee Nepal to try and gain an impression of the extent to which he might have looked for opportunities to exploit in order to flee Nepal. The Tribunal asked him whose idea it had been that he join the group attending the event. He indicated across a number of responses that the organisation first drew his attention to the event and invited him to attend and that he took a number of days to consider the invitation before accepting. Prior to that he said he had been thinking about coming to Australia, but he provided no evidence to suggest he had done anything with to put these thoughts into any kind of action prior to the event invitation coming to him “out of the blue”, as it were. According to the Applicant, the organisation drew his attention to the event in the late 2000s. He said he sought or confirmed his participation a number of months prior to the date of the event.
51. Apparently the Applicant did not even have a valid passport or pending application for a passport at this time. The Tribunal invited the Applicant to correct this impression, putting to him that he did not obtain a valid passport until after accepting the event offer. In reply, the Applicant said he already had a passport at the time he was invited to attend the event but could not use it as it had expired. He thus confirmed in effect that he did not apply for a passport enabling him to leave Nepal until after the event invitation arose. This makes it hard to perceive that he applied for a passport enabling him to leave Nepal as a direct result of the claimed events in Town A recently.

52. The Applicant acknowledged that the invitation to attend the event in Australia arose purely by coincidence.
53. The Tribunal put to the Applicant that it might be concerned on the information before it that he was content to enjoy the protection of Kathmandu from events and pressures back in Town A, or perhaps even that his claims about what happened in Town A were not true. In reply the Applicant digressed, saying he sustained injuries from the rebel group. (The Applicant later offered to show the Tribunal some scars on his body, but the Tribunal declined to view these, stating clearly to the Applicant, with his adviser present, that the more important question for the Tribunal was the reliability of the information as to the circumstances in which the alleged injuries, leaving the scars, occurred)
54. The Tribunal drew the Applicant's attention to the documents he submitted to the Department several weeks after he lodged his protection visa application, specifically the letter from the CPN-UML in Town A, the letter from the police and the letter from the hospital.
55. The letter on hospital letterhead signed and twice stamped with what purports to be the hospital seal. The letter opens with "To Whom It May Concern! [sic]" and asserts that the Applicant was admitted the previous day for immediate treatment: "he was found physical punishment and for these general treatments were given. He had [injury description (from)] the physical bashing" The details of the Applicant's injuries and treatment are arguably vague, with the exception of one particular reference. The signature is purportedly that of a doctor.
56. The police letter is on "Ministry of Home [sic]" letterhead, and is set out in "landscape" ratio, like a certificate, rather than as a letter. It is dated a week after the Applicant's purported release from hospital. The letter purports to 'certify' that the Applicant was abducted by an unidentified group and held for a few days and finally released after intense negotiation. It asserts that the Applicant suffered severe physical abuse from his abductors and admitted to a Hospital for immediate treatment. The letter states that the Applicant's original disappearance was filed on a specified date. The document bears an ink signature from someone purporting to be a police inspector.
57. The letter from the CPN-UML Town A office. It is signed in ink by a purported party "Sectary [sic]" and asserts that the Applicant, a CPN-UML party member of a few years, was abducted recently The letter asserts that the party itself engaged in negotiations to free him. The author of the letter thanks the Applicant for his work with the party and expresses regret at (very vaguely described) activities going on in "our part ... of the nation".
58. The information about the party having negotiated for the Applicant's release does not appear in his protection visa application or attached statement, which suggests the Applicant was released so that he could organise to pay the money demanded of him. Still, the Tribunal draws no negative inferences from this omission, given that the Applicant was assisted in making the statement by someone else who may not have been very alert or experienced in the matter in which he or she was engaged.
59. In view of the dates of the documents, contemporaneous with the events preceding the Applicant's departure from Nepal, the Tribunal asked the Applicant why he did not

submit the documents at the time of his protection visa application. In response, he said he could not “get them” at that time, seeming to mean that he did not have them with him. He told the Tribunal that the person who helped him was very far away. He implied here and later confirmed that he was talking about someone in Nepal.

60. The Tribunal asked the Applicant to state clearly when he *first* set eyes on each of these three documents, which are all in pristine condition and mounted in laminate. In reply, he said they were sent to him through a “different person” who he went on to identify as his previous migration agent. He said the documents were sent to his previous migration agent as he did not have a place to keep them (or take direct receipt of them).
61. The Tribunal asked the Applicant to confirm whether or not the first time he ever set eyes on these documents was when his previous migration agent showed them to him. In reply, the Applicant explicitly said, “I first saw them at his place.” The Tribunal asked the Applicant to clarify whose place he was discussing, and he said he was talking about his previous migration agent.
62. The Tribunal again asked the Applicant to confirm whether or not he first saw these documents when his previous migration agent showed them to him, and he said, “Yes.” Then he changed all this evidence and said, “No. I saw them in Nepal.” The Tribunal put to the Applicant that he was altering his evidence here and he repeated that he first saw these documents in Nepal.
63. The Applicant went on to say, more or less, that he personally obtained the documents in Nepal in the event of needing them “if I go somewhere” citing for example a “different country”
64. The Applicant went on to say that he first obtained these documents within a few days of the events described in them. He said the hospital letter was given to him first when, a few days after his attack, he asked the hospital to provide him with a letter attesting to his treatment there. He later changed this evidence, as discussed below (from paragraph 67 onwards).
65. The Tribunal asked the Applicant why the documents were in English and he then said that this was because each of the letters was in fact the English translation of an original initially written in Nepali. Reflecting on the purportedly original letterheads, the stamps and seals, and observing the ink signatures of relevant officers rather than translators, the Tribunal summarised its concern to the Applicant that not one of these documents featured characteristics suggestive of their being mere translations of documents originally prepared in another language. The Tribunal asked the Applicant to explain where the Nepali originals were located, and he said they are still in Nepal. The Tribunal observed that there was no evidence before it of the existence of any Nepali originals, and expressed to the Applicant that it had concerns about the purported authority and competence of these documents as reliable testimony to the facts.
66. At this stage of the hearing, the Tribunal drew the Applicant’s attention to independent country information that argues the ease with which false documents can be obtained in Nepal (DIAC Country Information Service, *Country Information Report No 194/98*, 11 May 1998). The Tribunal also drew the Applicant’s attention to its concerns about the documents being written in English, and being referred to as translations where no documentary evidence of their being translations appeared to exist. The Tribunal

informed the Applicant of the potential negative inferences it might draw in relation to these documents and the Applicant's discussion of them thus far, subject to comments he might make. The Tribunal asked him whether he wished to respond now, or, mindful of any procedural fairness implications (s424AA of the Act refers), whether he wished to ask for more time to give a response later. In response the Applicant asked for more time. The Tribunal considered this request and proposed a fifteen minute adjournment in order for the Applicant to prepare a response.

67. However, before going ahead with the proposed adjournment, the Tribunal asked the Applicant specifically who he had been referring to when he had said, earlier in the hearing, that a person who was "very far away" had helped him by sending the documents to his previous migration agent. In reply, the Applicant said the person he had been referring to was a staff member at his family's company. The Tribunal then asked the Applicant to describe how that person had helped him in respect of these documents. At this stage, the Tribunal was mindful of the claim that the Applicant had obtained the documents personally several days after he was attacked (see paragraph 64 above). The Tribunal had the impression, based on this information, that the Applicant might have stored or kept the letters at home in Australia or Nepal (since he appeared not to have brought them when he came to Australia to seek protection, in spite of their stated purpose being to help him present a case for protection). The Tribunal therefore asked the Applicant how his staff member was able to find the documents in his home or lodgings.
68. In reply, the Applicant said that the staff member obtained the letters by going to the relevant offices, such as the hospital, the "party" (*i.e.*, the CPN-UML branch office) and the police, and asking for them. This information seemed to suggest that no documents of the kind presented by the Applicant had existed until the staff member went around to various offices and asked for them, a position quite contrary to what the Applicant had been claiming earlier.
69. The Applicant confirmed the claim that his staff member approached the hospital, political party and police for letters to send to him in Australia in response to his having told that staff member that he needed them. He said he communicated this request to the staff member around a specified time, in either event after he himself had arrived in Australia. (this was the point at which the Tribunal, having heard a particular word in English, perhaps precipitately expressed concern at the completeness of the interpreter's translation)
70. The Tribunal put to the Applicant that his oral evidence regarding the origin and provenance of the documents had been changed radically by him during the course of the hearing. Having stated that he first saw them after he came to Australia, and having said he collected them all himself while he was still in Nepal, he now seemed to be reverting to the position that he did not first come into possession of such material until after he came to Australia, with the additional, quite explicit indication that that they did not even exist until after he came to Australia, throwing into doubt the authenticity of their dates. In response the Applicant said he had made a lot of mistakes in the course of giving oral evidence at the hearing. He said he was nervous.
71. The Tribunal advised the Applicant that it was not, in light of this information, inclined to grant an adjournment so that he could comment on its concerns about the authenticity of the letters. However, the Tribunal invited the Applicant from that

moment on to make further comments if he wished. The Tribunal also asked the adviser if he had any questions to suggest or oral submission to make. In response, the Applicant drew the Tribunal's attention to the shooting of a former local politician in the region recently, but did not add any significant detail suggesting that the local politician and he had relevantly similar profiles. The adviser, meanwhile, made no further submissions.

72. The Applicant's claims about the shooting of the mayor are supported in a news report tabled at the hearing. The Applicant has submitted some other news reports about conflict and human rights abuses in the region over the course of his protection visa application.
73. At one stage, when the Tribunal was discussing the apparent safety and protection enjoyed by the Applicant in Kathmandu, the Applicant said he could no longer stay in Kathmandu because the rebels located him there and sent him a letter. He did not produce any such letter.

## **FINDINGS AND REASONS**

74. The Tribunal accepts that the Applicant is a national of Nepal, who has resided in Town A
75. The Tribunal accepts that the Applicant is a businessman. Specifically, the Tribunal accepts that the Applicant's family owns and operates a company based in District 1 that undertakes work throughout Nepal, depending on demand.
76. The Tribunal finds on the evidence of the Applicant that his relatives and himself are the most prominent and significant operators of the company.
77. The Tribunal finds on the Applicant's oral evidence that the family company is still operating subject to some negative economic trends affecting fuel and transport costs.
78. Although the Tribunal is prepared to accept that political conflicts in the region cause some difficulties to businesses dependent for their viability on security in that region, the Tribunal notes that the Applicant's family's company is not solely dependent on work contracted in or near this region. The Tribunal finds that the Applicant's claims about his family's company being significantly negatively affected by the activities of the JTMM are inconsistent and unreliable and gives them no weight. The Tribunal gives weight to the Applicant's claims about businesses in general suffering a degree of downturn in Nepal these days.
79. The Tribunal does not accept, on the vague, inconsistent and ultimately unreliable information provided by the Applicant at the hearing that his family members have had to change the way they operate the company in response to pressure or threats from a local rebel group such as the JTMM.
80. The Applicant claims that the pressure on his family is ongoing because of his failure to meet demands made on him during his abduction by the JTMM. He has presented a number of letters in support of these claims.

81. Based on the Applicant's inconsistent oral evidence as to the status, nature, origin and provenance of these documents, and as to when he himself first set eyes on them, the Tribunal gives none of these letters any weight.
82. It is still reasonable to consider that the Applicant might have been a member of the CPN-UML. However, the Tribunal finds no reliable evidence on which to find that the Applicant has ever been a member of a political party in Nepal.
83. It is also still reasonable for the Tribunal, in spite of placing no reliance on the letters, to consider that the Applicant was attacked by rebels, put under pressure to pay them an exorbitant sum of money, and fled the country in fear of his life for failing to meet their demands. Essentially, it is possible in principle that a sequence of events took place even if the reporting of them is on its own unreliable. One serious problem for the Applicant here, as discussed, is his inconsistent and unreliable oral account of how his family and its business have fared in his absence. Another significant problem is that whereas he claims to have fled Town A for Kathmandu and considered leaving Nepal, the Applicant in fact did nothing about leaving Nepal until a visit to Australia was offered to him out of the blue. As discussed this could potentially lead to the conclusion, adopted by the delegate, that the Applicant's claims were true but that his protection needs were reasonably and adequately met in Kathmandu. However, having assessed and considered the Applicant's overall performance as a witness of truth in the course of hearing his oral evidence, the Tribunal concludes with confidence that the claims at the heart of this application, about the conflict between himself and the rebels, are unreliable.
84. The Tribunal does not accept on the evidence before it that the Applicant was abducted by armed rebels recently, or detained by them, or tortured by them, or pressed by them under threat of further serious harm to pay a large sum of money, let alone released after the involvement of the police and/or the CPN-UML, or that the rebels' activities have led to his family having to change its approach to the operation of its business or to the business having significantly suffered as a result of the instability in the region. Since the Tribunal does not accept that these things occurred, it is not necessary to give detailed findings about whether the claimed harm was, is or would be Convention-related, whether for reasons of political opinion or membership of a particular social group or any of the other reasons.
85. Having accepted that the Applicant is a businessman formerly domiciled and working in the Town A, and noting the evidence of difficulties experienced by individuals, politicians, local administrators and businesses in and near the region, the Tribunal regards it as appropriate to consider whether the Applicant would face a real chance of Convention-related persecution in Nepal for reasons of being a member of a particular social group broadly characterised as "businessmen in Nepal". The Tribunal accepts that such a group is a particular social group for the purposes of the convention. However, the Applicant's own evidence does not help ground the view that there is a real chance of his facing serious harm for reasons of being a businessman. His family business continues to operate in the relevant region; it is evidently capable of operating throughout Nepal and is not dependent on the one region for its viability; to the extent that it is facing difficulties at the moment, the only evidence of the Applicant that the Tribunal finds reliable is that fuel and transport costs are eating into profits and that strikes may be impeding the company's ability to finish projects under deadline and to avoid paying fines imposed under contract. On the one hand, these difficulties do not of

themselves appear to amount even cumulatively to persecution. In addition, on the basis of the facts that the Tribunal considers reliable in this case, the Tribunal does not accept that the Applicant's status as a "businessman" is or would be the essential and significant factor for the difficulties he claims he and his family and its company are facing.

86. In essence, although it has considered the independent reports about JTMM and other rebel activities in the region and its environs, including those reports submitted by the Applicant to the Department and to the RRT, the Tribunal is not satisfied that the independently reported facts supported by these articles adds any weight to the Applicant's claims about himself and his family.
87. On the evidence in this case, the Tribunal is confident that the Applicant can continue to reside in the Town A area without facing a real chance of Convention-related persecution. The Tribunal is meanwhile confident that it would be reasonable for the Applicant to reside in Kathmandu if he feels uncomfortable living in other parts of Nepal. The Tribunal gives no weight to the claim about rebels having sent the Applicant a threatening letter in Nepal, as this claim, which is unsupported, is factually dependent on claims already dismissed as unreliable in the present matter.
88. The Tribunal accepts that the Applicant has or had a fiancée. Given its other findings in this matter, the Tribunal gives no weight to the claim that the Applicant and his fiancée are estranged, let alone that they became estranged over the matter claimed.
89. The Tribunal accepts that the Applicant's body bears scars from injuries, but none of the evidence before the tribunal satisfactorily argues that such injuries were caused in the circumstances claimed.
90. The Tribunal has considered whether Applicant nerves or interpreter issues could have played a part in the hearing of evidence that the Tribunal ultimately found unsatisfactory. The Tribunal is confident, on reflection, that neither of these factors can be blamed for the quality of the facts heard at the hearing.
91. The Tribunal is not satisfied that the Applicant is a witness of truth in this matter.
92. The Tribunal is not satisfied that the Applicant faces a real chance of Convention-related persecution in Nepal. His claimed fear of such persecution is not well founded. He is not a refugee.

## **CONCLUSIONS**

93. The Tribunal is not satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the Applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.



## **DECISION**

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

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 Migration Act 1958.

Sealing Officer's I.D. prrt44