

1415903 (Refugee) [2015] AATA 3601 (27 October 2015)

**DECISION RECORD**

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1415903
<b>COUNTRY OF REFERENCE:</b>	Nepal
<b>MEMBER:</b>	David McCulloch
<b>DATE:</b>	27 October 2015
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 27 October 2015 at 4:49pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## 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 to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Nepal applied for the visa [in] May 2013 and the delegate refused to grant the visa [in] August 2014.
3. The applicant, by letter dated 22 July 2015, was invited by the Tribunal to appear before it on 2 October 2015 to give evidence and present arguments. The address nominated by the applicant for notification was that of the applicant's migration agent. When no response to the hearing invitation was forthcoming, the Tribunal contacted the applicant's migration agent to ask if the applicant would be attending the hearing. The agent advised that they had been seeking to contact the applicant about the hearing, but without success. On the day of the hearing, the applicant did not appear at the time and place scheduled. The applicant's agent was present for the hearing. The Tribunal conducted a brief hearing in which the agent confirmed that they had been making attempts to contact the applicant, but without success.
4. Later that day, a fax arrived from the applicant stating that he had arrived late for the hearing because he forgot to adjust his time for daylight saving, and requesting a further hearing. The Tribunal notes that daylight saving had not started on the day of the scheduled hearing and there was no record by the Tribunal of the applicant arriving late for the hearing, which there would have been had he presented himself to staff.
5. In any event, the Tribunal convened a further hearing on 19 October 2015. In advance of the hearing, the applicant's migration agent advised that they were no longer acting for the applicant, which the applicant confirmed in hearing. The applicant appeared before the Tribunal to give evidence and present arguments on 19 October 2015. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English-languages. During the introductory comments of the Tribunal, the applicant indicated that he had some reservations with the fact that the interpreter was female. The Tribunal, as a result, made arrangements for a male interpreter. The first part of the hearing continued with the female interpreter until the male interpreter arrived, and the applicant indicated that that was acceptable to him.

### CONSIDERATION OF CLAIMS AND EVIDENCE

6. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
9. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
10. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.
11. The issue in this case is the credibility of the applicant and whether, on this accepted claims, he fulfils the criteria for protection. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

#### **Background and complementary protection criterion only**

12. The applicant entered Australia [in] June 2010 travelling on a fraudulently altered passport in the name of [his Alias]. The applicant entered on a Student visa. What is said to be the applicant's legitimate passport has been provided to the Department and was issued [in] 2008 in Nepal.
13. The applicant made his first application for a Protection visa [in] August 2010 which was refused by the delegate of the Minister [in] November 2010. A review of that decision was sought by the Tribunal which affirmed the delegate's decision on 24 February 2011. The applicant did not attend the hearing that was scheduled by the Tribunal. The current application for a Protection visa was made [in] May 2013.
14. The current application is allowed as a result of the Federal Court decision of *SZGIZ v MIAC* (2013) 212 FCR 235, dated 3 July 2013. This allows a further protection visa application to be made before 28 May 2014 under the complementary protection criterion in a situation whereby the person's prior protection visa application was made and refused prior to the commencement of the complementary protection criterion on 24 March 2012. This means that the Refugee Convention aspect of the applicant's claims has been determined and the matter before the Tribunal relates only to complementary protection criterion (section 36(2)(aa) of the Act).

## Claims

15. The applicant provided a statutory declaration dated 9 April 2014 as part of the current application for a Protection visa. The declaration states that some claims in his original statutory declaration are not correct. It is not correct that the applicant had a boyfriend who was arrested by Maoists in his village in March 2009 as a result of being accused of molesting a man who was [occupation], and this caused the applicant to fear harm and he felt that his only option was to commit suicide or disappear. It is indicated that this incorrect claim was due to a miscommunication between the applicant and the interpreter at the time.
16. The declaration states that the applicant was born on [date] in [his home town], Nepal. He was born into a conservative Hindu family. The applicant is now an atheist. The applicant's family is Ghurka where males are very aggressive and expected to behave in a masculine way. The applicant's father served as a Ghurka soldier in [another country].
17. The applicant has [a number of] sisters and is the only male child. The applicant grew up with feminine attitudes which made his father angry. The applicant was shy and reserved. The applicant did not play with local boys but would play with his sisters and their friends.
18. In [year], the applicant was sent to boarding school and placed in a hostel. When the applicant was [a teenager] he looked to males for physical and emotional support, because he himself felt like a girl. The applicant's sexual desires developed but he was afraid of expressing his feelings. In 1997, the applicant had a sexual encounter with a fellow student, [Mr A], which the applicant enjoyed. The applicant had a sexual relationship with [Mr A] and two other senior [students].
19. After finishing boarding school in [year], the applicant studied at a college in Pokhara. Because of the applicant's shyness, he did not meet any other males who were gay. The applicant was scared about his family and relatives and society finding out, and therefore he hid his sexual orientation. The applicant would watch gay porn movies and masturbate. The applicant never had girlfriends nor was interested in girls during his college days.
20. Since 2002, the applicant's family had been talking about marriage because he is the only male child. The applicant told them to wait and avoided marriage proposals.
21. The applicant started to have health issues. He started to go to Hindu temples praying for relief from his sexuality. In 2009, the applicant went to a Christian church and prayed for assistance. The applicant became disillusioned with religion and became an atheist in around 2010.
22. The applicant thought that by coming to Australia he may be able to have an operation to become a proper man. The applicant came to Australia on a fraudulent passport because it was the only option he had at the time to leave Nepal. The applicant realised after coming to Australia that he could not change his psychological and physical behaviour. The applicant was scared to come out in Australia because the Nepalese with whom he mixed considered that homosexual people have problems and they do not respect them. The applicant, because of his shyness, could not meet or form any relationship in Australia with gay males.
23. Recently, the applicant started going to a gay [venue] called [name] [at location]. He decided to explore it after gaining confidence in speaking English. The applicant had a sexual experience with a man after so many years and was very happy about this.
24. The applicant's family want the applicant to marry because he is the only son. The applicant's family do not know about the applicant's sexuality. The applicant fears that his family will disown him if he reveals his sexuality and he will face social ostracism. The

applicant considers that relatives and members of the Ghurkha Society may torture the applicant to change his sexual orientation. The applicant does not believe that Nepalese society will accept gay males, especially from his caste. The applicant will have no option except to kill himself. The applicant has tried many suicide attempts after failing to cope with the pressure of his orientation. The applicant's case officer [at a centre] knew of this and has taken record of it. The applicant cannot get protection from the police because they are corrupt and that they may use public nuisance offences as a ground to punish the applicant.

### Submissions

25. A submission by the applicant's adviser dated 1 April 2014 submits that the applicant faces harm on the basis of being a gay male in Nepal, and a gay male being forced into marriage. Internet links and details are provided of reports and statements of harassment against homosexuals in Nepal. Internet links to recent country reports are provided giving background information. References are made to country advices on Nepal and previous Tribunal decisions.
26. The submission makes reference to a report of Dr Sheleyah Courtney, University of Sydney (a copy of which was attached to the submission) which deals with the plight of homosexuals in Nepal. It is indicated that the report provides evidence in relation to the ongoing homophobia of Maoists which is indicated as relevant given the significant role the applicant's uncle plays within the family.
27. The Tribunal has taken note of all this information, including: reports in 2006 of the arbitrary arrest and police violence against persons of transgender identity; reports in 2007 of anti-gay violence by supporters of the Communist Party of Nepal – Maoist; report from 2007 of a Maoist plan to wipe out homosexuality; a report from 2010 indicating that sexual minorities are still struggling in Nepal; report from 2010 concerning the detention of a gay activist; a report from 2012 relating to asylum in Iceland being granted to a woman on the ground that she would be forced to marry an older man if returned to Nepal; a report from 2011 indicating that society lags behind progressive sexuality laws; a decision of the Tribunal from 2011 which found a real chance of serious harm on the basis of homosexuality; a decision of the Tribunal indicating lack of state protection; a 2012 report indicating that homosexuals in Nepal continue to face violence; a report from 2012 indicating that police sometimes harassed and abused homosexual persons; a report from 2014 indicating that police utilise generic laws to harass individuals; references to LGBT person facing difficulty in access to employment. It is submitted that these reports establish a number of propositions including: persecution against homosexuals continues in Nepal; there is lack of state protection; internal relocation is not an option; discrimination and harassment are suffered by homosexuals; gay men face social pressure; the government has yet to implement the Supreme Court decision of 2007; government authorities, especially police continue to harass and abuse homosexual persons; and gay males continue to face social ostracism.
28. More general information is provided on human rights violations in Nepal. Submissions are made that gay men in Nepal constitute a particular social group for the purpose of the Refugees Convention. It is submitted that lesbians who faced forced marriages form a particular social group. Submissions are made that forced marriage constitutes persecution for the purposes of the Refugees Convention. It is noted that Nepal does not have a specific law banning forced marriages. It is submitted that the applicant could not obtain state protection. It is submitted that internal relocation is not an option.
29. A number of conclusions are drawn in terms of obligations towards the applicant including: that Nepal remains Conservative; that Nepalese society dictates that men should marry women; that homosexual men who do not subscribe to conventions are rejected; cultural and legal impediments result in homosexuals opting to remain silent; that to require the

applicant to modify his behaviour would amount to persecution; that the Nepalese government continues to introduce new laws prohibiting unnatural sexual acts; state protection is not accessible; relocation is not an option; and persecutors consider the applicant is morally corrupted.

30. Submissions are made with respect to the complementary protection criteria. It is submitted that torture is practised widely in Nepal. Reports are provided that human rights abuses committed by the police remain widespread. A 2011 report is provided concerning the proposed criminal code in Nepal which contains provisions which will criminalise unnatural sexual acts including same-sex relations. It is submitted that Nepal has yet to honour its commitment to incorporate antidiscrimination policies into its domestic laws.
31. The applicant's adviser provided an additional submission to the Department dated 23 April 2014. It refers to a previous decisions of the Tribunal which indicates that India should not be considered as a safe third country from Nepal. An Internet report is provided of a decision by India's highest court to recriminalize sexuality.

### **Other independent evidence concerning homosexuality in Nepal**

32. The Tribunal asked the Country of Origin Information Section of the Department of Immigration and Border Protection to provide research as to the recent information about the treatment of homosexuals in Nepal, both in terms of legal status, protection from discrimination, state and police protection, risk of physical harm and general societal attitudes (including differences between rural areas and Kathmandu). The following response to that request was provided:

Information located highlights the diversity of Nepal's lesbian, gay, bisexual, transsexual and intersexual (LGBTI) community and the tendency of reporting to fail to delineate between the various sexual minorities within the LGBTI community. The majority of reports located generalise issues of the broader LGBTI community despite the experiences of each sexual minority differing based on the context of gender, sexual orientation, age, class or ethnicity, for example. Research located indicates that within the LGBTI community, transgender individuals are subjected to a higher level of discrimination than homosexuals.<sup>1</sup> Research further indicates that LGBTI persons legally have equal rights to all other Nepalese citizens and that there are no laws discriminating against homosexuals in Nepal. Despite anti-discrimination legislation, homosexuals may experience some social marginalisation and may be subjected to low-levels of discrimination in society. Homosexuals are not a targeted group and are not routinely subjected to ill-treatment or harm from the state or society in general. Numerous advocacy groups supporting homosexuals exist in Nepal. Society is historically tolerant of homosexuals. Moreover, the dominant religions in society are traditionally accepting of homosexuals. However notably, societal attitudes towards homosexuals tend to be more conservative in rural Nepal. Overall, Nepal is one of the most progressive countries in Asia for homosexual rights.

#### *Societal attitudes*

Homosexuals and other LGBT minorities seem to enjoy relatively tolerant treatment in society. A *Hindustan Times* article stated that a 2007 Supreme Court ruling has made Nepal 'something of a haven for sexual minorities.' The country was said to contain one of the 'most

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<sup>1</sup> Bista, S 2013, 'Legal status of Lesbian, Gay, Bisexual, Transgender, Intersexpersons in Nepal', *Social Inclusion Research Fund*, May, p.21  
<[http://www.socialinclusion.org.np/new/files/Sadixya%20Bista\\_1380091923dW9c.pdf](http://www.socialinclusion.org.np/new/files/Sadixya%20Bista_1380091923dW9c.pdf)> Accessed 13 May 2015  
<CIS36DE0BB1962>;  
Blue Diamond Society & Heartland Alliance 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III  
<<http://www.heartlandalliance.org/gishr/publications/iccpr-lgbti-loi-report-nepal.pdf>> Accessed 16 April 2014  
<CIS27885>

successful LGBT movements in the world.’ The founder of the Blue Diamond Society (Nepal’s pioneering LGBT rights organisation) became an openly gay Member of Parliament in 2008. A transgender woman was elected as a representative of the Nepali Congress Party in the election before January 2014. The LGBT ‘calendar’ in Nepal is said to include separate beauty pageants for transgender women and gay men, LGBT Olympics, and a gay parade.<sup>2</sup>

A recent combined *United Nations Development Program & USAID* 2014 report summarises that Nepalese society is generally tolerant towards diverse sexual orientations and gender identities (SOGI) partly due to two factors; historical prevalence and religious acceptance:

The context for LGBT advocacy in Nepal is complex, set in a tumultuous political environment and a complex society. Tolerance of diverse sexual orientations or gender identities (SOGI), i.e. being lesbian, gay, bisexual or transgender, can be perceived to be high. The visible presence of individuals of diverse genders and sexualities in Nepal goes back centuries and has been recorded in ancient religious texts. This is seen as contributing to tolerance. The main religions of Nepal, Hinduism and Buddhism, encompassing close to 95 percent of the population, are not seen as homophobic. The country lacks the violent religious extremism of some other countries in the region. The frequent gender segregation of society allows for a culture where friendship and physical contact between men is possible, and can enable male-to-male sexual activity (even though this may be related to sexual opportunity instead of sexual orientation or gender identity). Finally, in the last two decades there have been extraordinary political victories for LGBT advocacy, most prominently a Supreme Court ruling in December 2007 that promoted the human rights of LGBT people including anti-discrimination, same-sex marriage and the explicit recognition of transgender people.<sup>3 4</sup>

Despite Nepalese society’s general tolerance and the benefit of legal reforms for LGBT individuals, according to an *Institute of Development Studies* February 2015 report, LGBT individuals may directly or indirectly experience some social-marginalisation because of their sexuality:

Nepal is a country where there has been significant legal reform over the past decade that affirms the rights of sexual and gender minority citizens. However, the wider social context is largely conservative and many gender-variant and same-sex desiring individuals may be directly and indirectly predisposed to marginalised livelihoods because of social exclusion, lack of inclusive economic opportunities, and prejudice suffered in educational and employment contexts, among other causal and contributing factors.<sup>5 6</sup>

<sup>2</sup> Dutt, Y 2014, ‘A queer ban in India, gay and legal in Nepal’, *Hindustan Times*, 11 January, para.2,4,8-9, 11 <<http://www.hindustantimes.com/brunch/brunch-stories/a-queer-ban-in-india-gay-and-legal-in-nepal/article1-1171673.aspx>> Accessed 19 February 2014 <CX318232>

<sup>3</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, LGBT Advocacy in Nepal (p. 7) <<http://www.refworld.org/docid/54ed880a4.html>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>4</sup> This report encompasses the major discussions, findings, and recommendations from the Nepal National LGBTI

Community Dialogue held at the Radisson Hotel in Kathmandu on 22–23 April 2014 and also includes materials from a desk review of published literature on LGBT issues, a survey of NGOs, and an examination of case studies. This report concentrates on the political developments since the 1990s in Nepali society and how they are correlated with the growing visibility and strength of the LGBT movement which has created the environment for today’s social, political and cultural context for LGBT advocacy. Due to frequent changes in LGBT community advocacy and politics in Nepal, there may be recent developments that have not have been included in this report at the time of publication.

<sup>5</sup> Coyle, D & Boyce, P 2015, ‘Same-sex sexualities, gender variance, economy and livelihood in Nepal: exclusions, subjectivity and development’, *Institute of Development Studies*, February, Introduction <[http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/5773/ER109\\_SamesexSexualitiesGenderVarianceEconomyandLivelihoodinNepal.pdf](http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/5773/ER109_SamesexSexualitiesGenderVarianceEconomyandLivelihoodinNepal.pdf)> <CISEC96CF1198>

<sup>6</sup> This case study explores the relationship between socioeconomic opportunity and exclusion in relation to minority gender and sexualities in Nepal. The study, aims to advance empirically grounded insights and

### Legal status

Nepal is often viewed internationally as a progressive society for having ratified equal rights and recognition for sexual and gender minorities. According to a *Hindustan Times* article in January 2014, Nepal is the only country in the region which not only permits homosexuality but whose Supreme Court has also ruled against laws that discriminate against homosexuals.

In 2007, the Nepal Supreme Court delivered a landmark ruling when it mandated that the government abolish laws that discriminate on the basis of sexual orientation and gender identity, instituted the formation of a committee to study same-sex marriage laws across the world, and recognised a self-identified third gender category, marked as 'other' on official documents. This was described as a watershed moment in the struggle for LGBT rights in the region and across the world.<sup>7</sup>

The 2007 Supreme Court ruling proclaimed that LGBT individuals have the right to fundamental human rights that are guaranteed to citizens of Nepal:

In 2007, four LGBT NGOs were successful in a petition against the government in *Sunil Babu Pant and Others v. Government of Nepal and Others*, resulting in the verdict calling on the government to scrap laws that discriminate on the basis of SOGI, to recognize a third gender category, and to establish a committee to explore the legalization of same-sex marriage.<sup>8</sup>

According to the US Department of State (USDOS) *Country Reports on Human Rights Practices 2013 – Nepal*, there is no law that criminalises homosexual activity:

No laws specifically criminalize same-sex sexual activity, and lesbian, gay, bisexual, and transgender (LGBT) persons actively and openly advocated for their rights. Four openly LGBT individuals ran in the Constituent Assembly elections, and most mainstream political parties included pro-LGBT legislation in their party manifestos. LGBT activists continued to press for protections for sexual minorities in the new constitution.<sup>9</sup>

Nepal has ratified various international conventions including the International Covenant on Civil and Political Rights (ICCPR):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,

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recommendations to address the socioeconomic conditions of sexuality and gender minority peoples, in respect of varied aspects of life experience, subjectivity, self-identity and livelihood. Based on fieldwork conducted in Kathmandu, Nepal, between November 2013 and June 2014 the case study recounts experiences of socioeconomic marginalisation and opportunity as encountered and created by people who experience themselves as being different from socially normative conventions of sexuality and gender.

<sup>7</sup> Dutt, Y 2014, 'A queer ban in India, gay and legal in Nepal', *Hindustan Times*, 11 January <<http://www.hindustantimes.com/brunch/brunch-stories/a-queer-ban-in-india-gay-and-legal-in-nepal/article1-1171673.aspx>> Accessed 19 February 2014 <CX318232>

<sup>8</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, LGBT Advocacy in Nepal <<http://www.refworld.org/docid/54ed880a4.html>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>9</sup> US Department of State 2014, *Country Reports on Human Rights Practices 2013 – Nepal*, 27 February, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dldid=220400>> <OG1F18C90124>



religion, political or other opinion, national or social origin, property, birth or other status.<sup>10</sup>

Despite the 'Fundamental Rights and Directive Principles' section of the Interim Constitution including, 'equity to any and all persons regardless of colour, sex, race, caste, tribe, gender, sexual orientation or biological condition',<sup>11</sup> LGBTI activists point out that the Draft Criminal Code attempts to recriminalize homosexuality in Nepal. Article 223 of the Draft Code prohibits 'unnatural sex'. The section specifies that a person who commits acts of 'unnatural sex' can be jailed for up to three years and fined up to Rs 30,000.<sup>12</sup> Furthermore, the present Draft Civil Procedure Code does not allow or prohibit same sex marriage.<sup>13</sup>

A *United Nations Development Program* 2014 report further highlights the concerns of Nepalese LGBT activists in relation to a proposed amendment of the Civil and Criminal Code:

Same-sex relations or LGBT identities are not a criminal offence in Nepal. Activists are concerned by recent proposed amendments to the Civil and Criminal Code (which will update and replace the current "Muluki Ain") prepared by the Ministry of Law and Justice, including not recognizing same-sex marriage and whether the vague reference to "unnatural sex" could be used against LGBT people. While the Supreme Court ruling of 2007 ordered investigations into the possibility of same-sex marriage and the introduction of anti-discrimination laws, nothing has happened. The ruling did recognize a "third gender" category. There is an omission of LGBT persons from laws such as sexual assault laws. Several generic laws, such as the Public Offences Act of 1970 are misused to harass LGBT people. Nepal has signed and ratified a wide range of international treaties that seek to protect human rights and has various domestic laws and policies on human rights and HIV (including components on rights), but these are not necessarily implemented at the community level.<sup>14</sup>

A January 2014 *Hindustan Times* article stated that Nepal was considering the formulation of laws to legalise same-sex marriage. The same article reported that Nepal's LGBT movement's achievements included progressive policies such as: separate toilets for third gender individuals; an 'other' option when noting one's gender in some documents and the official census; a portion of the economic budget allocated to LGBT rights; and detailed manifestos on LGBT rights included in the agendas of most political parties.<sup>15</sup>

<sup>10</sup> *International Covenant on Civil and Political Rights (ICCPR)* Article 26, accession 14 May 1991, United Nations Treaty Collection <<http://www2.ohchr.org/english/law/pdf/ccpr.pdf>>

<sup>11</sup> Upreti, P N 2014, 'A queer divide', *The Kathmandu Post*, 17 November, para.7 <[http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related\\_articles/a-queer-divide/269802.html](http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related_articles/a-queer-divide/269802.html)> Accessed 13 May 2015 <CX1B9ECAB10715>

<sup>12</sup> Upreti, P N 2014, 'A queer divide', *The Kathmandu Post*, 17 November, para.4 <[http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related\\_articles/a-queer-divide/269802.html](http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related_articles/a-queer-divide/269802.html)> Accessed 13 May 2015 <CX1B9ECAB10715>

<sup>13</sup> Upreti, P N 2014, 'A queer divide', *The Kathmandu Post*, 17 November, para.6 <[http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related\\_articles/a-queer-divide/269802.html](http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related_articles/a-queer-divide/269802.html)> Accessed 13 May 2015 <CX1B9ECAB10715>

<sup>14</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Findings (p.9) <<http://www.refworld.org/docid/54ed880a4.html>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>15</sup> Dutt, Y 2014, 'A queer ban in India, gay and legal in Nepal', *Hindustan Times*, 19 February <<http://www.hindustantimes.com/brunch/brunch-stories/a-queer-ban-in-india-gay-and-legal-in-nepal/article1-1171673.aspx>> Accessed 2 July 2014 <CX318232>

In February 2015, a formal report on same-sex marriage in Nepal was submitted to the Prime Minister's office.<sup>16</sup> The report calls for the government to recognise same-sex couples as equal to heterosexual couples and requests that the government define marriage as a relationship between two individuals in an attempt to legalise same-sex nuptials.<sup>17</sup> Reportedly, officials from both the ruling centre-left coalition and other parties have declined to state whether they support recommendations of the report. According to human rights lawyer and panel member of the committee, Hari Phuyal, if the recommendation is supported, same-sex couples 'will be entitled to pension or any other benefits, inheritance, can register their marriage with government agencies, can receive parental property'.<sup>18</sup>

#### *Protection from discrimination*

Human Rights Watch (HRW) *World Report 2014* mentioned that in 2013, despite Nepal having made significant progress protecting the rights of the LGBT community, 'transgender women' were arrested under the 'Public Offense Act' (POA).<sup>19</sup> Further information located indicates that in the first quarter of 2013 police arrested 'some fifty' LGBT individuals, mostly transgender, using the Public Offences Act.<sup>20</sup> According to a *Blue Diamond Society (BDS)* report of 2013, Nepalese police used POAs to 'arbitrarily arrest individuals they perceive to be men who have long hair, including métis'<sup>21 22</sup>. The timing of these arrests coincided with a campaign aimed at curbing theft, robbery and hooliganism in Kathmandu.<sup>23</sup> According to one 2013 report, police in Kathmandu launched a campaign rounding up 711 young people, 'mostly males, sporting long hair and wearing ear studs or ear rings'.<sup>24</sup> Following a petition to the Supreme Court, the court 'ordered police personnel not to harass citizens according to their personal interests and appearance'.<sup>25</sup> However, *BDS* argued that the Supreme Court order 'does not repeal the POA, nor does it remove the threats that LGBTI individuals could still be targeted and prosecuted under the POA'.<sup>26</sup>

<sup>16</sup> Pun, W 2015, 'Same-sex couples see new ray of hope', *e-Kantipur*, 13 February, para.4  
<<http://www.ekantipur.com/2015/02/13/top-story/same-sex-couples-see-new-ray-of-hope/401630.html>>  
Accessed 13 May 2015 <CXBD6A0DE6249>

<sup>17</sup> 'Panel for legalising same-sex marriage' 2015, *e-Kantipur*, 9 February, para.2-4  
<<http://www.ekantipur.com/the-kathmandu-post/2015/02/09/nation/panel-for-legalising-same-sex-marriage/273020.html>> Accessed 13 May 2015 <CXBD6A0DE6248>

<sup>18</sup> Sharma, G 2015, 'Nepal sexual minorities back panel's call for legal same-sex marriage – TRFN', *Reuters*, 17 February, para.6-8 <<http://www.reuters.com/article/2015/02/17/nepal-lgbt-marriage-idUSL4N0VQ2AA20150217>>  
Accessed 13 May 2015 <CXBD6A0DE6250>

<sup>19</sup> Human Rights Watch 2014, *World Report 2014 – Nepal* <<http://www.hrw.org/world-report/2014/country-chapters/nepal>> Accessed 7 May 2015 <CIS2F827D92469>

<sup>20</sup> Blue Diamond Society & Heartland Alliance, 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III pp.8-9  
<<http://www.heartlandalliance.org/gishr/publications/icpr-lgbti-loi-report-nepal.pdf>> Accessed 16 April 2014  
<CIS27885>

<sup>21</sup> The term "mētis" may refer to both men by birth who identify as feminine or transgender women.

<sup>22</sup> Blue Diamond Society & Heartland Alliance, 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III p.9  
<<http://www.heartlandalliance.org/gishr/publications/icpr-lgbti-loi-report-nepal.pdf>> Accessed 16 April 2014  
<CIS27885>

<sup>23</sup> 'SC verdict lifts taboo on long hair, ear jewellery' 2013, *The Himalayan Times*, 8 April, para.6  
<[http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi\\_scan\\_2b9cb3cfb553fadb=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAAA/eGA A=&bcsi\\_scan\\_filename=fullNews.php](http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi_scan_2b9cb3cfb553fadb=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAAA/eGA A=&bcsi_scan_filename=fullNews.php)> <CXC28129414312>

<sup>24</sup> '711 youth held' 2013, *The Himalayan Times*, 26 February, para.1  
<[http://www.thehimalayantimes.com/fullNews.php?headline=711+youth+held&NewsID=367413&bcsi\\_scan\\_2b9cb3cfb553fadb=PvTLmXlW4ZekL7Sb4/sVGhPIFQsBAAAAQaaKAA=&bcsi\\_scan\\_filename=fullNews.php](http://www.thehimalayantimes.com/fullNews.php?headline=711+youth+held&NewsID=367413&bcsi_scan_2b9cb3cfb553fadb=PvTLmXlW4ZekL7Sb4/sVGhPIFQsBAAAAQaaKAA=&bcsi_scan_filename=fullNews.php)>  
<CXC28129414314>

<sup>25</sup> SC verdict lifts taboo on long hair, ear jewellery 2013, *The Himalayan Times*, 8 April, para.5  
<[http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi\\_scan\\_2b9cb3cfb553fadb=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAAA/eGA A=&bcsi\\_scan\\_filename=fullNews.php](http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi_scan_2b9cb3cfb553fadb=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAAA/eGA A=&bcsi_scan_filename=fullNews.php)> <CXC28129414312>

<sup>26</sup> Blue Diamond Society & Heartland Alliance, 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III p.9  
<<http://www.heartlandalliance.org/gishr/publications/icpr-lgbti-loi-report-nepal.pdf>> Accessed 16 April 2014  
<CIS27885>

HRW in 2014 outline an incident of discrimination against BDS whereby authorities 'did little to investigate' 'threatening' phone calls and 'harassment of members'. Furthermore, authorities delayed the organisation's 2012-2013 licence, and froze bank accounts.<sup>27</sup> The consecutive HRW *World Report in 2015* made no mention of homosexual, or more broadly, LGBT discrimination in Nepal during 2014.<sup>28</sup>

The most recent USDOS *Country Reports on Human Rights Practices 2013 – Nepal* made reference to 'low-level' police and government in rural areas and the Tarai region sometimes harassing and abusing LGBT individuals. The report did not make a distinction as to whether lesbian, gay, bisexual, transgender or intersex were specifically subjected to harassment and abuse:

Government authorities, especially low-level police in rural areas and the Tarai, sometimes harassed and abused LGBT persons. According to the Blue Diamond Society, a local LGBT advocacy NGO, harassment of such persons by both government and citizens was common, but acts of violence were on the decline. The Nepal Police HRC confirmed some low-level harassment occurred because many citizens had negative views of LGBT persons, and the Nepal Police were not immune to such social perceptions. Nonetheless, the Nepal Police HRC conducted LGBT rights training and worked closely with the LGBT community to minimize and prevent such harassment. The Nepal Police HRC reported that it did not receive any reports of harassment of LGBT persons.<sup>29</sup>

*the Freedom House* on 15 April 2015 reported that 'LGBT people reportedly faced harassment by the authorities and other citizens, particularly in rural areas.'<sup>30</sup>

A survey conducted by US-based Williams Institute in conjunction with BDS included participants from 32 districts, including from 150 castes and ethnic groups. Reportedly, 66 percent of participants claimed discrimination or harassment exists within society.<sup>31</sup>

The USDOS *Country Reports on Human Rights Practices 2013 – Nepal* notes that although the government did not discriminate against those in society who provide HIV-prevention service or against high-risk groups more likely to spread HIV/AIDS, some discrimination was evident within society. Such discrimination was more directed towards HIV/AIDS infected women rather than men.<sup>32</sup>

Nepal lacks anti-discrimination laws in employment, which may affect all citizens of Nepal including sexual and gender minorities:

Nepal does not have anti-discrimination laws to cover employment. Many LGBT people report sexual harassment and discrimination during recruitment and employment. Those who are heteronormative in appearance and can hide their sexual orientation or gender identity can feel safer, though they may feel

<sup>27</sup> Human Rights Watch 2014, *World Report 2014 – Nepal* <<http://www.hrw.org/world-report/2014/country-chapters/nepal>> Accessed 7 May 2015 <CIS2F827D92469>

<sup>28</sup> Human Rights Watch 2015, *World Report 2015 – Nepal*, 29 January <<http://www.hrw.org/world-report/2015>> <NG5A1E6BC54>

<sup>29</sup> US Department of State 2014, *Country Reports on Human Rights Practices for 2013 – Nepal*, 27 February, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220400>> Accessed 11 March 2014 <CIS27401>

<sup>30</sup> Freedom House 2015, *Freedom in the World 2015 – Nepal*, 15 April, Rule of Law <<http://www.refworld.org/docid/553616bf5c.html>> Accessed 5 May 2015 <CISEC96CF1740>

<sup>31</sup> Upreti, P N 2014, 'A queer divide', *The Kathmandu Post*, 17 November, para.8 <[http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related\\_articles/a-queer-divide/269802.html](http://www.ekantipur.com/the-kathmandu-post/2014/11/17/related_articles/a-queer-divide/269802.html)> Accessed 13 May 2015 <CX1B9ECAB10715>

<sup>32</sup> US Department of State 2014, *Country Reports on Human Rights Practices 2013 – Nepal*, 27 February, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220400>> <OG1F18C90124>

burdened by this. Transgender people confront explicit discrimination when their citizenship or identity documents may not reflect their chosen gender, or they have difficulties in obtaining documents in their preferred gender which would then enable them to seek employment.<sup>33</sup>

The majority of Nepal's population practice Hinduism. Buddhism also has a comparatively smaller following. According to an *Asia Times* 2012 report, Hindus in Nepal 'promptly' accepted the Supreme Court's decision in 2007 to provide equal rights to LGBT individuals.<sup>34</sup> Generally, discrimination from religious groups towards homosexuals is minimal:

Discrimination from religious groups is minimal due to a Hindu and Buddhist majority that are seen as not overtly homophobic. The Hindu epics record diverse sexual orientations and gender identities. References to sexual orientation or same sex behaviour are barely discussed in the Pali Canon, the scriptural texts that hold the Buddha's original teachings. So, it is perceived that religion does not contribute strongly to discrimination and harassment of LGBT individuals, except where it influences social mores and traditions.<sup>35</sup>

Acceptance by the families of some identities within the LGBT community may be limited due to social and cultural norms:

The heterosexual family structure has the greatest influence on the lives of LGBT people in Nepal, yet acceptance by families is severely limited due to overwhelming social and cultural pressures to enter a heterosexual marriage and create a family, as well as by rigid conventional expectations of gender roles. Most LGBT people simply do not "come out" or open up about their identities due to the stigma, confusion, and the loss of face this could create for their families. Same sex couples may find it difficult to find housing or experience discrimination from neighbours. LGBT people also face discrimination because of their inability to get married, have their relationships recognized, and/or to adopt children. Lesbian couples are denied access to in vitro fertilization (IVF). LGBT individuals in heterosexual marriages may be reluctant to divorce because of strict moral and social conventions that stigmatize divorce.<sup>36</sup>

LGBT issues are prominent across numerous media outlets in Nepal although there is criticism that media reports can be inaccurate or sensationalised:

The Nepali media reports on the political challenges and victories of the LGBT community and has played an important role in highlighting issues like violence against transgender female sex workers. However, they are criticized for not reporting on the lived experiences of the wide diversity of LGBT people, or reporting on them in an inaccurate and sensational manner. There is a regular LGBT radio program that communicates information and advice about sexual and gender minorities' health and rights issues throughout Nepal and there is some LGBT reporting on community radio and state TV. The Nepali movie industry has

<sup>33</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>34</sup> Arora, V 2012 'Hindus in Nepal shun homophobia', *Asia Times*, 28 August, para.1-5 <[http://www.atimes.com/atimes/South\\_Asia/NH28Df02.html](http://www.atimes.com/atimes/South_Asia/NH28Df02.html)> Accessed 29 August 2012 <CX293960>

<sup>35</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 10) <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>36</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 10) <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

now produced films like *Soongava*<sup>37</sup> and *Love U Man* that depict same-sex relationships.<sup>38</sup>

### *Advocacy groups*

Nepal's transition from an absolute Hindu monarchy to a multi-party democratic system in the 1990s and 2000s created a space for LGBT with the emergence of civil society and NGOs. International donor money to respond to HIV helped galvanize LGBT advocacy by way of the establishment of the Blue Diamond Society (BDS):

In the past decade and half it [BDS] has been joined by several other NGOs such as Mitini Nepal, Saino Nepal, Sahara Samaj, Ekata Nepal, Naulo Srijana Nepal and Paribartan Nepal. The initial focus on MSM [men who have sex with men] and transgender women has expanded to include lesbians and transgender men and has also broadened to a human rights focus. LGBT organizations and individuals also participated in the civil society movement also aligned with a broader political and social movement which galvanized against the royal coups in 2002 and 2005 and eventually led to the overthrow of the monarchy. Joining forces with broader civil society allowed the LGBT movement to gain visibility, and this was exemplified with the nomination of Asia's first openly gay parliamentarian Sunil Babu Pant who served as a Member of Parliament (MP) from 2008 to 2012.<sup>39</sup>

There are more than 55 LGBT civil society organisations throughout Nepal with most of them concentrated in major urban areas and the southern Terai belt. Blue Diamond Society is recognised as the most prominent fiduciary of the LGBT community:

Organizations such as BDS are well established and have significant funding at their disposal. In recent years, there have been concerns about sustainability and long-term commitment to the work of several organizations as many of them are entirely donor dependent. Financial resources for emerging organizations are seen as inadequate because of the concentration of funding among established NGOs.<sup>40</sup>

According to a BDS 2013 report, BDS is the leading NGO advocating for the human rights of sexual and gender minorities in Nepal. BDS provides services to over 300,000 individuals and is situated in 40 cities across Nepal:

Some of the programs that BDS runs focus on HIV/AIDS prevention, care and support, legal counselling and job training, as well as documenting the human rights violations against people based on their sexual orientation or gender identity. BDS's various services and programs aim to fill the void caused by the lack of adequate state services for sexual and gender minorities.<sup>41</sup>

<sup>37</sup> 'An exploration of homo-erotic love' 2013, *e-kantipur*, 4 January <<http://www.ekantipur.com/2013/01/04/top-story/an-exploration-of-homo-erotic-love/365125.htm>> Accessed 13 May 2015 <CXC28129414321>

<sup>38</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 11) <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>39</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 16) <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>40</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 11) <<http://www.refworld.org/docid/54ed880a4.htm>> Accessed 4 May 2015 <CISEC96CF1305>

<sup>41</sup> Blue Diamond Society & Heartland Alliance, 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III <<http://www.heartlandalliance.org/gishr/publications/iccpr-lgbti-loi-report-nepal.pdf>> Accessed 16 April 2014 <CIS27885>

Nepal hosted a UN regional seminar on 'Human Rights, Sexual Orientation, and Gender' on 22 March 2013. Discussed during the seminar was the progress concerning the social position of sexual and gender minorities in Nepal over the past decade. BDS founder Sunil Babu Pant drew international attention to a notable instance of state discrimination against sexual and gender minorities in Kathmandu by 'specific parties' within the Nepali government:

In Kathmandu the 'authorities' are giving us – LGBTIs – a hard time – giving misleading information to media, not renewing Blue Diamond Society's operating licence and thus causing a negative impact on the national LGBTI population as most of the programmes that benefit LGBTI are stopped. Kathmandu Police have been intensifying arbitrary detention of LGBTI people and charging them with 'public nuisance' charges and bail of more than US\$350 per person – the total sum of bail paid by detained LGBTI members in just last four months was some US\$9,000 – which is too high for many to pay. Transgender [people] are having to take loans to pay the bail amount and to repay the loans are having to seek more sex work...<sup>42</sup>

#### *State/police protection*

In the past, homosexuals have experienced a degree of discrimination and social exclusion from some low-level government administration and police predominately in rural Nepal. Various incidents of violence against sexual minorities have been recorded,<sup>43</sup> although, there has been a 'decline' in violence against LGBT individuals in recent years.<sup>44</sup> Incidents of police arbitrarily detaining LGBT individuals using the Public Offences Act of 1970 in early 2013<sup>45</sup> coincided with a 2013 police campaign against theft, robbery and hooliganism whereby police arrested individuals based on appearance, 'mostly males, sporting long hair and wearing ear studs or ear ring from different parts of the city.'<sup>46</sup> Nepal has numerous LGBT support groups to advocate for LGBT rights including BDS who act as a fiduciary between the LGBT community and government.<sup>47</sup> Reports were not located indicating that the state or police are unable to provide protection to homosexuals. Generally, community perceptions are that public security has improved in recent years.

<sup>42</sup> Coyle, D & Boyce, P 2013, 'Development, Discourse and Law: Transgender and Same-Sex Sexualities in Nepal', *Institute of Development Studies*, July, p. 10  
<<http://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2839/ER13%20Final%20Online.pdf?sequence=1>> <CIS28922>

<sup>43</sup> Immigration and Refugee board of Canada 2012, *Treatment of sexual minorities, including legislation, state protection, and support services*, 20 January, State Protection <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4f30ec042&skip=0&query=state%20protection&coi=NPL>> <NPL103943.E>

<sup>44</sup> US Department of State 2014, *Country Reports on Human Rights Practices for 2013 – Nepal*, 27 February, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220400>> Accessed 11 March 2014 <CIS27401>

<sup>45</sup> Blue Diamond Society & Heartland Alliance, 2013, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal*, June, Section III pp.8-9 <<http://www.heartlandalliance.org/gishr/publications/iccr-lgbt-loi-report-nepal.pdf>> Accessed 16 April 2014 <CIS27885>

<sup>46</sup> '711 youth held' 2013, *The Himalayan Times*, 26 February, para.1 <[http://www.thehimalayantimes.com/fullNews.php?headline=711+youth+held&NewsID=367413&bcsi\\_scan\\_2b9cb3cfb553fadf=PvTLmXlW4ZekL7Sb4/sVGhPIFQsBAAAAQaaKAA==&bcsi\\_scan\\_filename=fullNews.php](http://www.thehimalayantimes.com/fullNews.php?headline=711+youth+held&NewsID=367413&bcsi_scan_2b9cb3cfb553fadf=PvTLmXlW4ZekL7Sb4/sVGhPIFQsBAAAAQaaKAA==&bcsi_scan_filename=fullNews.php)> Accessed 11 May 2015 <CXC28129414314>

'SC verdict lifts taboo on long hair, ear jewellery' 2013, *The Himalayan Times*, 8 April, para.5 <[http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi\\_scan\\_2b9cb3cfb553fadf=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAA/eGA==&bcsi\\_scan\\_filename=fullNews.php](http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083&bcsi_scan_2b9cb3cfb553fadf=+OTfkYo9j5tf7shdo67bdtJoSd0BAAAA/eGA==&bcsi_scan_filename=fullNews.php)> <CXC28129414312>

<sup>47</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, Executive Summary (p. 11) <<http://www.refworld.org/docid/54ed880a4.html>> Accessed 4 May 2015 <CISEC96CF1305>

A *Saferworld* 2013 report on local security and justice perceptions in selected districts of Nepal notes that overall public security has improved in recent years.<sup>48</sup> Public perceptions of the causes of insecurity included: the lack of rule of law and impunity; social marginalisation; weak governance and state delivery; poverty; and poorly-managed socio-economic transformation. According to the report:

Communities perceive that security provision by the Nepal Police has improved. Community respondents who felt that public security had improved over the past two years attributed this to efforts by the NP to be more proactive and strengthen security provision, especially in Bara, Parsa, Morang, Banke and Makwanpur. These efforts reportedly included improved commitment and leadership illustrated by individuals within the NP; reestablishment of police posts at the local level in some areas; improved patrolling at night time and in border areas; better efforts to collaborate with communities in security provision, which is regarded to be necessary for adequately responding to security needs. Respondents stressed that the NP had collaborated with communities in community policing through the establishment of Community Service Centres; on community security initiatives; by partnering with non-governmental organisations (NGOs) to better reach communities...<sup>49</sup>

#### *Risks of harm*

Although Nepal is not a country that has been characterised as having high levels of homophobic violence, social pressure to conform to heteronormative social conventions, and discrimination towards those who fail to conform, still predominantly shape the lives of some sexual and gender minorities in Nepal.<sup>50</sup>

The state does not actively discriminate against homosexuals although discrimination may be evident in society. The *United Nations Development Program & USAID* report notes that LGBT individuals 'may' experience discrimination and violence:

Political advances have not necessarily translated into the daily lives of LGBT individuals who may experience discrimination and violence in all aspects of their lives – in employment, family, health care and education. The government bureaucracy may not be interested or may not have the capacity to implement policies and laws that can benefit LGBT people. In a country blighted by extreme poverty, the human rights of LGBT individuals may take less priority than issues perceived to be more urgent such as fulfilling basic needs including having enough food and adequate shelter. In fact, human rights for any Nepali may be difficult to prioritize in the face of widespread and crushing poverty.<sup>51</sup>

The most recent USDOS *Country Reports on Human Rights Practices 2013 – Nepal* specifically notes that incidents of violence are 'on the decline' and that Nepalese police

<sup>48</sup> Saferworld 2013, *Snapshot of Local Security and Justice Perceptions in Selected districts of Nepal*, March, Executive Summary <<http://www.saferworld.org.uk/resources/view-resource/749-snapshot-of-local-security-and-justice-perceptions-in-selected-districts-of-nepal>> <CIS36DE0BB1665>

<sup>49</sup> Saferworld 2013, *Snapshot of Local Security and Justice Perceptions in Selected districts of Nepal*, March, 1.3 Perceptions of safety and security trends in Nepal <<http://www.saferworld.org.uk/resources/view-resource/749-snapshot-of-local-security-and-justice-perceptions-in-selected-districts-of-nepal>> <CIS36DE0BB1665>

<sup>50</sup> Coyle, D & Boyce, P 2015, 'Same-sex sexualities, gender variance, economy and livelihood in Nepal: exclusions, subjectivity and development', *Institute of Development Studies*, February, p. 6 <[http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/5773/ER109\\_SamesexSexualitiesGenderVarianceEconomyandLivelihoodinNepal.pdf](http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/5773/ER109_SamesexSexualitiesGenderVarianceEconomyandLivelihoodinNepal.pdf)> <CISEC96CF1198>

<sup>51</sup> United Nations Development Program (UNDP) & USAID 2014, *Being LGBT in Asia: Nepal Country Report: A Participatory Review and Analysis of the Legal and Social Environment for Lesbian, Gay, Bisexual and Transgender (LGBT) Persons and Civil Society*, 25 February, LGBT Advocacy in Nepal (p. 7) <<http://www.refworld.org/docid/54ed880a4.html>> Accessed 4 May 2015 <CISEC96CF1305>

conducted 'LGBT rights training' and liaised closely with the LGBT community to minimise and prevent incidents of harassment.<sup>52</sup>

A *Saferworld* 2012 research report on security and crime in the Kathmandu valley noted that an increase in violent crime did not correlate with a decrease in sexual and gender based violence. However the report does suggest that this may be due to individuals not feeling comfortable in discussing sensitive issues openly during research or reporting it to the police.<sup>53</sup>

### Hearings, credibility, findings and assessment

33. In considering overall the credibility of the applicant the Tribunal is cognizant of the words of Beaumont J in *Randhawa v MILGEA* (1994) 52 FCR 437 at 451 in which he stated that 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for...[but this should not lead to]...an uncritical acceptance of any and all allegations made by supplicants'. The Tribunal notes also the remarks of Gummow and Hayne JJ in *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at 191 where it was said that 'the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising'.
34. The Tribunal is satisfied that the applicant is a citizen of Nepal, and accordingly his claims will be assessed against Nepal.
35. The Tribunal has a number of difficulties with the applicant's accounts of his homosexual activity both in Nepal and Australia.
36. **First**, the applicant has given inconsistent information as to when he commenced his first gay relationship and the length of that relationship. In the applicant's statutory declaration provided as part of his current Protection visa application he said that in 1997 (when he was [a teenager]) the applicant had a sexual encounter and then a relationship with a fellow student called [Mr A]. The declaration indicates that after the applicant left school and started college in [year], he had no further relationships before leaving for Australia. The declaration did indicate that the applicant had relationships with two other boys whilst at [school]. Evidence given by the applicant to the delegate of the Minister with respect to the original Protection visa application in the interview (which the Tribunal has listened to a recording of) provides a very different account. In that interview the applicant says that he started a relationship with [Mr A] when he was [a few years older] (i.e. in [a later year]) and it continued until 2009. He indicated that they would meet several times a week and have sex in secret.
37. The Tribunal put this information contained in the interview with the delegate with respect to the original Protection visa application to the applicant in accordance with the procedural requirements of section 424AA of the Migration Act. It noted that the information is relevant because it was inconsistent with later claims as to when the applicant commenced his first relationship and how long it continued. It was indicated that the consequence of the Tribunal relying on this information could be to question the applicant's credibility as to whether he was in a homosexual relationship in Nepal or was homosexual.

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<sup>52</sup> US Department of State 2014, *Country Reports on Human Rights Practices for 2013 – Nepal*, 27 February, Section 6. Discrimination, Societal Abuses, and Trafficking in Persons  
<<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220400>> Accessed 11 March 2014 <CIS27401>

<sup>53</sup> Shah, O 2012, *Perceptions of security and crime in the Kathmandu Valley*, Saferworld, February, p.6  
<<http://www.saferworld.org.uk/resources/view-resource/655-perceptions-of-public-security-and-crime-in-the-kathmandu-valley>> Accessed 22 May 2015 <CIS961F9402208>



38. The applicant in response indicated that the relationship happened when he was at the hostel at boarding school and that it did not continue past school. He indicated that the inconsistent evidence must be a mistake.
39. The Tribunal does not accept that this prior evidence could have been a mistake given the very significant difference in the accounts. The Tribunal draws adverse inference from the inconsistent evidence as to the applicant's claims of homosexual relationships in Nepal and, as a result, his claims of being homosexual.
40. **Second**, the applicant has disavowed a prior claim as to the fate of his partner but the explanation for this prior claim is not consistent with prior evidence given by the applicant. The applicant claimed in his original statutory declaration that in 2009 his partner was accused of molesting a [person] and this caused [Mr A] to disappear at the hands of Maoists. The applicant indicated that he never discovered what happened to [Mr A]. The declaration with respect to the current Protection visa application claims that the portion of the prior declaration that made this claim was an error due to a miscommunication between the interpreter and the applicant at the time. However, during the interview with the delegate of the Minister with respect to the original Protection visa application, the applicant specifically gave evidence to the delegate about [Mr A] being abducted by Maoists in 2009, and therefore repeated claims that he now says were a mistake. In addition, the applicant was questioned in that interview in some detail about how the statutory declaration was prepared. The applicant indicated that the interpreter faithfully recorded what the applicant told him and that the applicant read the English version of the declaration.
41. The Tribunal put this information contained in the interview with the delegate with respect to the original Protection visa application to the applicant in accordance with the procedural requirements of section 424AA of the Migration Act. It noted that the information was relevant because, in repeating to the delegate the claim that his partner was taken by Maoists, it makes a lie of the claim in the current statutory declaration that the claim in the prior declaration was merely a communication error with the interpreter. The information in the interview also makes clear that the applicant was fully aware of the content of the statutory declaration. The Tribunal noted that the consequence of the Tribunal relying on this information is to question the credibility of the applicant as to whether he had any relationship with [Mr A] or was homosexual.
42. The applicant said that he had no response to this information. The Tribunal draw significant adverse inference from the evidence on this issue as to the credibility of the applicant's claims as to his homosexual activities in Nepal and that he is homosexual.
43. **Third**, on the applicant's claims, he has expressed his sexuality in Australia in a very limited way which seems at odds with the applicant having the freedom to express that sexuality. Further, the timing of some of the evidence of the applicant's attendance at a gay [venue], the only stated expression of his sexuality, appears opportunistic to the Tribunal.
44. The applicant has previously given evidence to the delegate of the Minister that he only started gay activity in Australia at a [venue], a couple of weeks before the interview (held [in] April 2014), despite having been in Australia for nearly four years. The applicant confirmed that this was the case in the Tribunal hearing. When the Tribunal put to the applicant that it did not seem consistent with being homosexual that he would fail to express his sexuality given the freedom to do so in Australia for almost four years, the applicant said that he was living in a rural area and was not able to express his sexuality as a result. The Tribunal notes that the applicant's Protection visa application form lists him living in [a regional area] from March 2001 until April 2013. The Tribunal indicated that his application form indicates that he lived in [City 1] ([location]) from June 2010 until March 2011 and asked why he did not

express sexuality during this nine month period. The applicant said that he was shy to express his sexuality.

45. The Tribunal asked the applicant what further he had done to express his sexuality following the visit to the gay [venue] as recounted to the delegate of the Minister. The applicant said that he had gone to the same [venue] 'a couple of times'. The applicant provided the Tribunal with a 'loyalty' card for '[venue name]'. The card shows eight stamps from the venue which are dated: [four dates] (in 2014), and [four dates] (2015). The Tribunal noted to the applicant that the attendances in 2015 were in the lead up to the current Tribunal hearing after a gap of more than a year. This might demonstrate that the attendance has been opportunistic to further the applicant's claims for protection. The Tribunal notes that the first recent visit to the [venue] was the day after the Tribunal hearing which the applicant failed to arrive at on time. The applicant indicated that he had been at other times but in the afternoon when loyalty stamps were not obtained.
46. The applicant indicated that he did not otherwise express sexuality as he was shy.
47. The Tribunal acknowledges that the applicant presented in the hearing as a reserved and shy person. It accepts challenges in socialising in a strange country given difficulties of language. The Tribunal considers it plausible that the applicant would have been reluctant to express his sexuality in [a regional area]. Nevertheless, it strikes the Tribunal as quite unusual that the applicant would do so little to express his sexuality in [City 1], when he would have had the freedom to do so, and given that the repression of his sexuality was the reason for his departure from the Nepal. The Tribunal notes that the applicant was in [City 1] from June 2010 until March 2011 and from April 2013 until his first gay activity at a [venue] in March 2014, four years after his arrival in Australia. All of these factors cause the Tribunal to question claims by the applicant of his sexuality.
48. Further, given the applicant's claim to the delegate that his first visit to a gay [venue] was a couple of weeks before the interview in 2014, and the fact that the applicant has visited the [venue] four times in the month of October 2015 (just before the Tribunal hearing) after a gap of almost a year, together with the credibility issues with the applicant's evidence as identified in the first and second points, the Tribunal considers it likely that the applicant's visits to a gay [venue] have been opportunistic and designed to further his application for protection rather than revealing that the applicant is a practising homosexual.
49. Given these three areas of concerns, the Tribunal is not satisfied with the applicant's claims as to homosexual activity in Nepal, that he was in homosexual relationships in Nepal, or that the applicant has genuinely engaged in homosexual activity in a gay [venue] in [City 1], although it accepts that the has attended the [venue]. The Tribunal is not satisfied that the applicant has otherwise expressed his homosexuality in Australia other than attending a gay [venue]. The Tribunal is not satisfied that the applicant would practice as a homosexual in Nepal, and it is not satisfied that the failure to practise as a homosexual would be due to a fear of significant harm.
50. The Tribunal is not satisfied with claims by the applicant that he has tried to kill himself as a result of his sexuality, given the credibility issues identified with applicant's evidence.
51. The Tribunal noted to the applicant in the hearing claims by his former adviser that there is a particular issue relating to his uncle impacting upon his treatment as a homosexual. The applicant said that this was not the case.
52. As the applicant is not, never has been, nor will be a practising homosexual, as found by the Tribunal, the Tribunal is not satisfied that there is a real risk of significant harm to the applicant from Nepalese society or from his family due to his homosexuality.

53. The Tribunal is prepared to accept that there is family pressure for him to marry. The applicant indicated that no specific marriage has been arranged for him but there is continual family pressure. Although acknowledging the pressure, and the fact that the applicant may not wish to marry, the Tribunal is not satisfied there is independent evidence before it which establishes that adult men in Nepal are forced into marriage against their will, whether homosexual or not, or that there are reports of men suffering significant harm for not agreeing to marry. The Tribunal is not satisfied that there is anything in the applicant's particular family situation that leads to a real risk of the applicant facing significant harm due to being forced into marriage. While the Tribunal is prepared to accept that the applicant's family is conservative, is not satisfied that they would cause him significant harm for failing to marry.
54. The Tribunal is conscious that the delegate of the Minister found that the applicant was homosexual. Therefore the Tribunal considers the alternative position that the applicant is homosexual (which the Tribunal does not accept). In proceeding on this basis, the Tribunal does so on the basis that the applicant engaged in no homosexual activity in Nepal, but that the applicant identified as homosexual. The Tribunal proceeds on the basis that the applicant is extremely shy concerning the public expression of his sexuality, which is the reason given by the applicant in the Tribunal hearing as to why he has done no more than attend the gay [venue] in Australia. The applicant indicated that he would not tell his family that he is gay. Given that the applicant did not act on his sexuality in Nepal and has only done so to a very limited extent in Australia, it considers that the expression of his sexuality in Nepal would be limited and very discreet. The Tribunal proceeds on the basis that the applicant's past and future expression of his sexuality is a product of his inherent shyness, or an internal conflict with his homosexuality, rather than a fear of persecution or significant harm. This is based on the limited expression of the applicant's sexuality in Australia when he had the relative freedom to more openly express his sexuality.
55. A copy of the independent information concerning the treatment of homosexuals in Nepal was provided to the applicant in the hearing. The Tribunal summarised to the applicant its assessment of the main points arising from the independent evidence, as follows:
- LGBT persons have legally equal rights in Nepal and there are no laws discriminating against homosexuals. The Supreme Court in 2007 delivered a ruling in which mandated that the government abolish laws that discriminate on the basis of sexual orientation. A provision in the Draft Criminal code prohibits 'unnatural sex' the meaning of which is unclear;
  - There are recent reports that Nepal is considering laws to legalise same-sex marriage;
  - Homosexuals are not targeted as a group and are not routinely subject to ill-treatment or harm. A 2013 report notes that incidents of violence against the LGBT community were on the decline;
  - In practice, homosexuals may experience social marginalisation and may be subject to low-level discrimination. This can include marginalised livelihoods, lack of economic opportunities and prejudice in educational and employment contexts;
  - There are reports from 2013 indicating arbitrary arrest of LGBT individuals, mostly transgender;
  - Acceptance by the families of some within the LGBT community may be limited due to social and cultural norms;

- Numerous advocacy groups support homosexuals in Nepal;
  - Dominant religions are generally accepting of homosexuals. For example, Hindus in Nepal promptly accepted the Supreme Courts decision in 2007 to provide equal rights to GBLT individuals; and
  - Attitudes are more conservative in rural areas. There is a report that in 2013, for example, there was low-level police and government harassment of LGBT individuals in rural areas and the Tarai region.
56. The Tribunal noted to the applicant that this independent information does not support the contention that homosexuals in Nepal face, at a generic level, harm that could be said to constitute persecution or significant harm, acknowledging that there can be discrimination and hostile societal attitudes.
57. The applicant in response said that what happens in practice is different than what is written. The applicant indicated that it is not the case that Hindus are tolerant, and that gay men cannot enter Hindu temples.
58. The Tribunal has taken note of all the independent information, including that provided by the applicant's former adviser. It accepts that there is still a significant way to go to the full acceptance of homosexuals in Nepalese society (as indeed in most countries of the world). It accepts that there is societal discrimination and negative attitudes. It accepts that there are sporadic instances of violence and authorities have, on some occasions, used general security laws to target homosexuals, particularly transgender people.
59. However, the Tribunal considers that the weight of independent information indicates that there is a significant degree of tolerance of homosexuality in Nepalese society. It considers that homosexual people are not routinely subject to harm by either authorities or the general population.
60. Given the discreet way in which the applicant is likely to express his sexuality as posited by the Tribunal, it is not satisfied, based on the independent evidence, and the applicant's own circumstances, that there is real risk of the applicant facing significant harm due to his sexuality.
61. If there were suspicion or knowledge of the applicant's sexuality, the Tribunal accepts that he may face some discrimination and negative attitudes both from the society and his family. However, the Tribunal is not satisfied that the independent evidence demonstrates that the discrimination and negative attitudes that he is at a real risk of facing harm would fall within any definition of significant harm, and there is nothing in the applicant's particular circumstances which would put him at any particular additional risk.
62. The Tribunal is prepared to accept that the applicant's family and caste are conservative and that there will be disapproval should they suspect or learn that he is homosexual. The Tribunal is not satisfied, however, that there is a real risk of the applicant's family or caste causing him significant harm based on his sexuality. The Tribunal considers it most likely, based on the applicant's evidence, that he will have little to do with his family.
63. The Tribunal is not satisfied given the weight of independent information, that the applicant is at risk of being tortured by the Gurkha Society who would seek to change the applicant's sexual orientation.
64. The Tribunal does not consider that any disapproval by society or the applicant's family would cause or be intended to cause extreme humiliation and thus constitute degrading

treatment or punishment (as a defined category of significant harm under the Act). The Tribunal does not consider that there would be a real risk of cruel and inhuman treatment which (as a further defined category of significant harm under the Act), or any other category of significant harm.

65. While the Tribunal accepts that there are instances of police harassment, it is not satisfied, based on the independent evidence, that this occurs to an extent that there would be a real risk to every individual gay person facing police harassment amounting to a significant harm. The Tribunal is not satisfied that there is anything in the applicant's profile, such that he would be at any increased risk. For example, the applicant has not indicated that he is, or would be, politically active in advance of gay causes.
66. The Tribunal is not satisfied with the applicant's claims that what actually happens in practice is not reported by the media or more broadly. The Tribunal is satisfied that the independent information referred to in this decision paints a full picture of the situation facing homosexuals in Nepal.
67. The Tribunal does note the proposal in the Draft Criminal Code to make 'unnatural sex' illegal. There is no clear understanding of what this term means. The proposal has been on foot for several years. The implementation of such a proposal, at least to any extent that would make same sex activity illegal, would be inconsistent with the more liberal attitudes by government, courts and society including consideration by the government of legalising same-sex marriage and the Supreme Court mandating abolishing discriminatory laws against homosexuality. The Tribunal, considering these factors, thinks that the chance of a law being enacted that would criminalise same sex activity, and it operating to an extent that would create a real risk of significant harm to the applicant is speculative and remote.
68. The Tribunal considers the risk of self-harm to the applicant if it were to accept (which it does not) that he suffers the internal conflict as a result of his sexuality. The Tribunal does not consider that 'significant harm' as defined in the Act in 36(2A) covers self-harm. The definitions are passively worded, referring to the non-citizen being arbitrarily deprived of his or her life, the death penalty being carried out on the non-citizen, and harm that the non-citizen will be subjected to. Each of these phrases suggests harm being inflicted by a third party on the non-citizen. The Tribunal is not satisfied that self harm, without more, is harm contemplated in the definition of significant harm for the purposes of the complementary protection criterion.
69. The Tribunal has considered the risk to the applicant cumulatively and is of the view that there is not a real risk of significant harm to the applicant based on his sexuality, if the Tribunal were to accept that he is homosexual (which it does not).
70. In summary, considering the alternative position that the applicant is homosexual (which the Tribunal does not accept), the Tribunal is not satisfied that the applicant faces a real risk of harm if he was to return to Nepal that would constitute significant harm for the purposes of the Act as a result of his sexuality, societal attitudes or mistreatment, mistreatment by his family or caste, torture by the Ghurkha Society, mistreatment by authorities, his family forcing him to marry, self-harm, or for any other reason. In particular, the Tribunal is not satisfied that the applicant would face a real risk of cruel or inhuman treatment or punishment, or degrading treatment or punishment, or any other category of significant harm.
71. The Tribunal is not satisfied there is any other evidence before the Tribunal to indicate that the applicant would be at a real risk of significant harm on return to Nepal for any other reason.

72. The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will suffer significant harm for the purposes of s.36(2)(aa) ('the complementary protection criterion') on the basis of the applicant being homosexual or the attitudes of or treatment by the applicant's family or caste, the Ghurkha Society, or society in general in Nepal, being forced to marry, self-harm, or for any other reason.
73. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the complementary protection criterion. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa) for a protection visa. It follows that he is also unable to satisfy the criterion set out in s.36(2)(b) or (c). As he does not satisfy the criteria for a protection visa, he cannot be granted the visa.

**DECISION**

74. The Tribunal affirms the decision not to grant the applicant a Protection visa.

David McCulloch  
Member