

1216221 [2013] RRTA 777 (8 October 2013)

DECISION RECORD

RRT CASE NUMBER: 1216221
DIAC REFERENCE(S): CLF2012/108016
COUNTRY OF REFERENCE: Nepal
TRIBUNAL MEMBER: James Silva
DATE: 8 October 2013
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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

INTRODUCTION

1. The applicant is a man [from] Kathmandu District, Nepal. He came to Australia in April 2009, as the dependant spouse of another student. In May 2012, he lodged a protection visa application.
 2. The applicant seeks protection on political grounds, claiming that he was an active member of the pro-monarchist *Rastriya Prajatantra* Party, the RPP, who oppose the Maoists and their associates. The Maoists threatened and demanded money from him, and later kidnapped him. He fears that the Maoists and their youth organisation will attack him anywhere in Nepal, and that the authorities are powerless to protect him.
 3. Before the Department delegate and the Tribunal, the applicant claimed that his conflict with the Maoists arises from a land dispute around 2005. He claimed that his family owns [a farm] in their traditional area in [eastern] Nepal,¹ used to grow sugar and rice. The tenant farmer started to agitate for permanent possession of the land, with the support of local Maoists. The applicant tried to thwart these efforts, by planting [trees] to displace the more intensive farming. This led to his kidnapping. The applicant claims that the Maoists have an ongoing interest in him, as they want him to sign title deeds formally transferring land ownership.
 4. The delegate disbelieved the applicant, and found that the applicant did not have a well-founded fear of Convention-related persecution, and that there were no substantial grounds for believing, as a necessary and foreseeable of his removal to Nepal, that there was a real risk of significant harm. Accordingly, the delegate decided the applicant was not entitled to the grant of a Protection visa because he did not satisfy the protection criteria in s.36(2)(a) or (aa) of the *Migration Act 1958* (the Act).
1. The applicant applied for review of the delegate's decision [in] October 2012. The applicant is not represented in this matter.
 1. Having regard to the applicant's background and personal circumstances, and information before the Tribunal about the relationship between Nepal and India, the Tribunal has focused primarily on whether the applicant is excluded from Australia's protection obligations by s.36(3) of the Act, because of his rights with respect to India. In light of the Tribunal's conclusions on this issue, the Tribunal has found it unnecessary to reach conclusions as to the applicant's substantive claims with respect to Nepal.

MATERIALS BEFORE THE TRIBUNAL

2. The Tribunal has had regard to the materials listed at Appendix A. The relevant law is set out at Appendix B.

BACKGROUND

3. The applicant was born in [an area in the] Kathmandu District. Until 2007, he lived at several addresses [there]. He claims that he had various addresses in Nepal and India from 2007 until 2009.

¹ [Information deleted]

4. The applicant studied in Kathmandu from [years deleted], the last 3½ years at an [institute in] Kathmandu.
5. The applicant stated on the protection visa application form that he is unmarried. However, he has since advised that he is married. He came to Australia as a student dependant, and his wife has now returned to Nepal without him. He told the Tribunal that this was a genuine marriage. His wife went back to Nepal because she was frustrated with her career prospects as [a professional] in Australia. The couple last spoke about three months earlier, and are now officially separated. The applicant commented that in Nepal, both parties need to be present to initiate divorce proceedings. The applicant later told the Tribunal that his family would like him to marry a Nepalese woman in [Europe].
6. The Tribunal has significant doubts about the genuineness of the applicant's claimed marriage.
7. The applicant's Nepalese passport was issued in December 2006, and is valid for ten years. He travelled to [other countries] in March 2007, for business purposes.
8. The applicant claimed in his protection visa application to have a right to enter and reside in India. The applicant indicated in his protection visa application that he had also lived in India, for about two years before coming to Australia. He returned to Nepal regularly, about once a month, by train.
9. The applicant is unrepresented in this review. At the Tribunal hearing, he gave his evidence through an accredited English/Nepalese interpreter.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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.
11. 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).
12. 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').
13. However, subsection 36(2) of the Act is qualified by subsections 36(3), (4), (5) and (5A) which mean in effect that where a non-citizen in Australia has a right to enter and reside in a

third country, Australia will not have protection obligations in respect of that person if he or she has not availed himself or herself of that right unless the conditions specified in subsections 36(4), (5) or (5A) are satisfied, in which case the s.36(3) preclusion will not apply.

14. At the hearing, the Tribunal discussed with the applicant both his claims for protection (refugee and complementary protection) in Nepal, as well as whether he has third country protection in India.
15. The Tribunal has concluded that s.36(3) applies to the applicant and that the decision under review should be affirmed.

Third country protection

16. The issues that arise under s.36(3) in this case are:
 - whether the applicant has a right to enter and reside in India (s.36(3));
 - whether the applicant is at risk of Convention-related persecution or of ‘significant harm’ in India (s.36(4));
 - whether the Indian authorities might return the applicant to Nepal (s.36(5) and s.36(5A)); and
 - whether the applicant has taken all possible steps to avail himself of his rights in India.

Whether the applicant has a right to enter and reside in India

17. Under s.36(3), Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently, and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
18. In *SZRHU v MIMAC*,² which also concerned an applicant from Nepal, the Full Federal Court endorsed the view of Allsop J in *V856/00A v MIMA*³ that the term ‘right’ in s.36(3) should not be restricted to a right in the strict sense which is legally enforceable. Rather, it should include the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of enforcement; or a liberty, permission or privilege which does not give rise to any particular correlative duty upon the state in question.
19. For the following reasons, the Tribunal is satisfied that the applicant has a right to enter and reside in India within the meaning of s.36(3). There is nothing to suggest that the applicant has a right to enter and reside in any other third country, other than India.
20. The *1950 Treaty of Peace and Friendship* between Nepal and India, which remains in force, includes in the Economics and Commerce section the following provision: The two governments agree ‘to grant, on a reciprocal basis, to the nationals of one country in the

² *SZRHU v MIMAC* [2013] FCAFC 91

³ *V856/00A v MIMA* (2001) 114 FCR 408

territories of the other the same privileges in the matter of residence, ownership of property, participation of trade and commerce, movement and other privileges of a similar nature'.⁴

21. The Tribunal has found numerous sources indicating that, as a matter of common understanding and practice, Nepalese nationals can enter India without a visa or work permit, and may reside, work, and access services such as schooling and health.⁵ For instance, a BBC report from 2008 states: "Over five million Nepalese people work and own property in India. They do not need visas or work permits and instead have all the rights of an Indian citizen."⁶ In other words, while the *1950 Treaty* does not mention a right of entry for Nepalese nationals, its terms are generally understood to imply that such a right exists.
22. The Tribunal has considered the administrative or other arrangements that Nepalese nationals face at the border. It drew on the following recent advice from the Department of Foreign Affairs and Trade.⁷
 - 'A citizen of Nepal entering India by land or air does not require a passport or a visa for entry into India. Checks are conducted and client [sic] is required to show any of the following valid identity documents to establish his/her identity as a Nepalese citizen:
 - Nepalese passport;
 - Nepalese citizenship certificate;
 - Voter's identification card issued by the Election Commission of Nepal;
 - Limited validity photo-identity certificate issued by Nepalese missions in India when deemed necessary; and
 - For children between age group of 10-18, photo ID issued by the principal of the school, if accompanied by parents having valid travel documents. No such document is required for children below the age group of 10 years.'
 - The same arrangements apply for travel by land or air.
 - A citizen of Nepal travelling directly from Australia to Nepal must be in possession of a valid Nepalese passport, but there are no further visa or other requirements. The same applies if s/he travels from (or via transit in) another country. [The sole exception is for travel directly from China, in which case the Nepalese citizen must have both a valid passport and an Indian visa. However, there is nothing to suggest that the applicant would need to, or would, travel from Australia to India via China.]

⁴ Department of Foreign Affairs and Trade 2006, *DFAT Report 554 – RRT Information Request IND30728*, 23 October; also Subedi, S.P. 2005, *Dynamics of Foreign Policy and Law: A Study of Indo-Nepal Relations*, Oxford University Press, New Delhi, pp. 4 – 5 1, quoted in RRT Research Response NPL31374, 23 February 2007.

⁵ 'Parties tossed 1950 Nepal-India treaty to winds' 2010, *The Kathmandu Post*, 31 July; 'Raman, S. 2008, 'Nepal Maoists seek new order with India', *BBC News*, 15 September http://news.bbc.co.uk/2/hi/south_asia/7616316.stm - Accessed 24 September 2013; Immigration and Refugee Board of Canada 2008, ZZZ103009.E - *Nepal/India: Nepali citizens living in India; whether they are legally entitled to reside, work, attend school, and access health care services; whether there are any repercussions for "illegal" residence, or whether illegal status is tolerated or ignored by Indian authorities*, UNHCR website, 18 December <http://www.unhcr.org/refworld/country,COI,IRBC,,NPL,,49b92b310,0.html> - Accessed 23 August 2010.

⁶ BBC News, 15 September http://news.bbc.co.uk/2/hi/south_asia/7616316.stm - Accessed 24 September 2013

⁷ IND42609, dated 18 September 2013. This summarises, and is consistent with, country information that the Tribunal discussed with the applicant at the hearing.

- Nepalese nationals may be excluded from entry into India if the Nepalese government has issued a 'look out' notice advising that the person must not be allowed to enter India.
 - Nepalese nationals have unlimited stay in India, and there are no restrictions on their ability to remain, reside or work in India.
23. The applicant's account of his own experiences in travelling to India around 2007, and living there for two years, is consistent with the above country information:
- He claims to have first stayed in [City 1] for about three months during 2007 or 2008, studying meditation and yoga.
 - He then went to [a district in Delhi] for the remaining of about a two year period. The applicant was, in the Tribunal's view, evasive about his activities in India. He initially said that he was doing 'nothing' in Delhi, just living off the funds that his parents sent him. Pressed for detail, he said that he spent much of his time doing computer [research].
 - The applicant advised that, in his experience, there were no formalities or paperwork needed for him to travel from Nepal to India, 'nothing'. He only knew that a photo ID was needed for on-line train travel bookings.
24. The applicant said that during his two years' residence in India, he travelled back to Nepal about once a month, by train. He made these comments by way of explaining how he sustained a relationship with his girlfriend/wife, whom he claimed to have met some four years before the couple came to Australia. Given the Tribunal's doubts about the genuineness of that relationship, it considers it possible that the applicant did not return to Nepal as frequently as claimed, or for those reasons. The applicant said that he finally moved back to Nepal, just before his departure for Australia, because he wanted to see his parents and his girlfriend, and he was worried about the disputed land.
25. Relevantly, the applicant has not claimed, and there is nothing to suggest, that he left India in early 2009 or on any of his other return trips to Nepal, due to any restrictions on his ability to reside there. This is consistent with country information that no such restrictions exist.
26. The Tribunal draws the following conclusions from the above:
- Based on the terms of the bilateral Nepalese-Indian treaty, commentary, and country information about the administrative and other arrangements that apply in practice – as well as the applicant's own account of his experiences in India – Nepalese nationals have a right to reside in India, temporarily or permanently.
 - Although the bilateral Nepalese-Indian treaty does not expressly mention the entry by Nepalese nationals into India, commentary on the treaty, country information about the administrative practices at the Nepalese/Indian border (including the lack of checks and controls), and the applicant's own experiences, also indicate that Nepalese nationals have a right to enter into India.
27. The Tribunal finds that the applicant, as a Nepalese national, therefore has a right to enter and reside in India, within the meaning of s.36(3) of the Act.

Whether the applicant is at risk of Convention-related persecution or of 'significant harm' in India

28. Under s.36(4), subsection (3) will not apply in relation to a country in respect of which (a) the applicant has a well-founded fear of being persecuted for one or more of the Convention reasons; or (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the applicant will suffer significant harm in relation to the country.
29. For the reasons that follow, the Tribunal finds, based on the applicant's claims and his past experiences that he does not have a well-founded fear of Convention-related persecution in India, and that there are no substantial grounds for believing that, as a necessary for foreseeable consequence of him availing himself of his right to enter and reside in India, there would be a real risk that he will suffer significant harm.
- The applicant has already lived there for about two years, from about 2007 to 2009, in two locations. Although the Tribunal is not satisfied that he has given a full and frank account of his circumstances, particularly in Delhi, it considers significant that he did not claim to have experienced any targeting, harm or threats that amount to serious or significant harm, for any reason.
 - At the Tribunal hearing and in the post-hearing submission, however, the applicant contended that he did not feel safe in India. He said that Nepalese there face discrimination. 'Indians control everything', he claimed. Nepalese cannot open bank accounts, or own property. Even though official reports might be upbeat, the situation for Nepalese on the ground is very difficult. The applicant referred to recent reports from the *Kathmandu Post* that Indian police had pursued alleged terrorists into Nepalese territory, thereby violating Nepalese sovereignty,⁸ as indicative of the unequal relationship between the two countries.
 - The applicant told the Tribunal that he had been lucky during his stay in India. The people there dislike Nepalese, and there are high levels of crime. He cited the example of the recent rape in New Delhi of a Nepalese girl, commenting that it had not even made the press.
 - The applicant said that he had been unable to open a bank account, relying instead on funds that his parents provided in person. In the post-hearing submission, he highlighted some on-line comments made by Nepalese living in India, on the Nepalese Embassy's website, indicating that some Nepalese do not have bank accounts there, or that they are uncertain about the ID documentation needed for other purposes, such as obtaining SIM cards. In the Tribunal's view, these inconveniences do not amount to 'serious harm' or 'significant harm'. Furthermore, the applicant does not lack a Nepalese passport or other ID, and therefore would not face the kinds of problems that some Nepalese evidently do.
 - The Tribunal places weight on the applicant's stay in India for about two years, and his return trips between there and Nepal, as evidence that he did not fear for his safety or have any other significant problems in India.

⁸ The applicant did not give details of the report, but it appears to be based on reports that in late August 2013, Indian police authorities arrested Yasin Bhatkal, a founder of the Indian Mujahideen, from the Indian-Nepalese border area of Sunali, although it is disputed whether or not they apprehended him on Nepalese territory: see *The Kathmandu Post*, 29 August 2013, http://www.ekantipur.com/the-kathmandu-post/2013/08/29/related_articles/indian-terrorist-held-from-sunauli-border/252979.html

33. It is also necessary to consider whether the applicant has a well-founded fear that India will return him to Nepal and if so, whether he has a well-founded fear of being persecuted in Nepal for one or more of the Convention reasons or there are substantial grounds for believing that he would be at risk of significant harm in relation to Nepal, such that s.36(3) does not apply (s.36(5) and (5A)).
34. The Tribunal is not satisfied that the applicant has a well-founded fear that India will return him to Nepal, his country of nationality. First, he has not identified any grounds that would cause him to fear expulsion from India.
35. Second, recent DFAT advice states that Nepalese nationals already in India can be forcibly removed if convicted of a crime in either Nepal or India. "If a Nepalese national commits a crime in Nepal and travels to India, the Nepalese police can request the assistance of the local Indian Police to arrest the person. The Nepalese Police will then travel to India to escort the Nepalese national back to Nepal. This process would be similar to that between Indian states. Note, however, there is no extradition treaty between Nepal and India. If a Nepalese national residing in India commits a crime in India, they can be tried and sentenced under the Indian legal system. There are provisions which allow for the deportation of convicted Nepalese nationals from India after the completion of their sentence in India." The applicant has not claimed to have committed any crime in Nepal or India, and there is no suggestion that he would do so in the future. There is nothing to suggest that the Indian authorities could, or would be motivated to, refole him to Nepal, for any other reason.
36. Nor is there anything to suggest that the Indian authorities would 'return' or send the applicant to any country other than Nepal, his country of nationality.
37. As the Tribunal is not satisfied that the applicant has a well-founded fear that the Indian authorities will return him to Nepal (or any other country),¹² it is unnecessary for the purpose of s.36(5)(b) and (5A)(b) to assess whether he would be subject to a real chance of persecution or a real risk of significant harm in Nepal.

Whether the applicant has taken all possible steps to avail himself of his rights in India

38. For the reasons given above, the Tribunal is satisfied that the applicant has a right to enter and reside in India, and that he is not subject to the qualifications in s.36(4), s.36(5) or s.36(5A) of the Act. The applicant indicated at the hearing that he had not thought about going to India recently, and had therefore not turned his mind to what 'possible steps' he might take to avail himself of his rights in that country. He therefore had not purchased plane tickets or made other arrangements. Instead, he commented that he had been unable to return to Nepal when his mother had been sick recently. He impressed on the Tribunal that he wanted to return to Nepal, but felt that it was too dangerous for him to do so until the outcome of elections later this year were know.
39. On the available material, the Tribunal finds that the applicant has not taken all possible steps to avail himself of his rights in India.

Summary

¹² Section 36(5)(a), and section 36(5A)(a)

40. The Tribunal finds that pursuant to s.36(3) of the Act Australia is taken not to have protection obligations in respect of the applicant, as he has a right to enter and reside in India, and has not taken all possible steps to avail himself of that right, and the conditions specified in s.36(4), (5) and (5A) (relating to Convention-related persecution or 'significant harm' in India, or the risk of being returned from there to Nepal) do not apply.

Refugee protection and complementary protection

41. At the hearing, the Tribunal drew the applicant's attention to its concerns about his substantive claims and evidence. These included his failure to mention in his original statement the alleged land dispute with the Maoists; why the Maoists are targeting him, rather than his father, in relation to land that they can easily access and seize in the local area; and the significant delay of more than three years between his arrival in Australia and his application for protection. On the last point, the applicant commented that he was able to remain on his 'spouse's' student visa for at least several years, and also that he was hesitant to seek protection because there is a stigma attached to such an application.
42. However, in the circumstances of this case, because the Tribunal has found that the applicant has third country protection in India pursuant to s.36(3) of the Act, it is unnecessary for it to undertake an assessment of the substantive merits of the applicant's claim for protection under s.36(2) and make definitive findings.

43. CONCLUSIONS

44. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

James Silva
Member

APPENDIX A: RELEVANT MATERIALS

The Tribunal has had regard to relevant material from the following:

- The applicant's protection visa application and accompanying papers, including a partial photocopy of his Nepalese passport. The applicant presented the passport at his DIAC interview, and a complete photocopy of it appears on the Department file.
- A recording of the applicant's Department interview [in] September 2012 is on the Department file; the Tribunal has listened to the CD. (An earlier interview [in] August 2012 did not proceed, as the arrangements for a telephone interpreter proved unsatisfactory.)
- A recording of the applicant's Department interview [in] September 2012.
- The delegate's decision record, which included a range of country information, including on Nepal's human rights situation, the RPP and the activities of Maoists.
- The applicant's oral evidence at a Tribunal hearing [in] September 2013.
- A post-hearing submission dated [in] September 2013. In this, the applicant presents information to support his claim that it is unsafe for Nepalese people to live in India. This consists of a copy of a report: *Open borders, closed citizenships: Nepali labor migrants in Delhi*,¹³ and several printouts from the Embassy of Nepal in New Delhi on-line chat room, in which Nepalese residents report problems in India, such as being unable to obtain a SIM card without proof of identity; difficulties in obtaining a work permit with only a citizenship card; and some problems that Nepalese students were facing in Simla. [The Tribunal allowed the applicant until COB [on a date in] October 2013 for further submissions. Apart from the submission dated [in] September 2013, the Tribunal has received no further correspondence as of [a later date in] October 2013.]
- [Note: the Tribunal obtained Department file 2008/019815, which contained the applicant's student visa application. He is included in the application of [name deleted], as her spouse, and there are several photographs (folio 105) purporting to show a wedding ceremony. The Tribunal has not found any further information on this file directly relevant to the applicant or his protection claims.]

APPENDIX B: RELEVANT LAW

Migration Act 1958

Subsection 36(2) of the Act, which refers to persons in respect of whom Australia has protection obligations, is qualified by subsections 36(3), (4), (5) and (5A) of the Act. They provide as follows:

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is

¹³ Bhattarai, R 2007, 'Open borders, closed citizenships: Nepali labor migrants in Delhi', Conference paper, *International migration, multi-local livelihoods and human security: Perspectives from Europe, Asia and Africa*, Institute of Social Studies, The Netherlands, 30-31 August. See also: <<http://www.mtnforum.org/sites/default/files/publication/files/1139.pdf>>.

expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that

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

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

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.