

**1219221 [2013] RRTA 594 (22 August 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1219221  
**DIAC REFERENCE(S):** CLF2012/104778  
**COUNTRY OF REFERENCE:** Nepal  
**TRIBUNAL MEMBER:** Amanda Goodier  
**DATE:** 22 August 2013  
**PLACE OF DECISION:** Perth  
**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**

### **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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Nepal applied to the Department of Immigration for the visa on 23 May 2012 and the delegate refused to grant the visa on 21 November 2012.
3. The relevant law is attached in Attachment "A". All independent country information referred to in the decision is attached in Attachment "B".

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

#### **Country of reference**

4. The applicant claims that she was born in [District 1], Nepal and is a citizen of Nepal. She provided a certified copy of her valid Nepalese passport in support of her Nepalese citizenship. The Tribunal finds that she is a citizen of Nepal and has assessed her claims against Nepal as her country of nationality and receiving country.

#### **Background**

##### *Protection visa application*

5. The applicant claims to fear returning to Nepal as she was pressured by her parents [in the 1990s] into marrying a man 15 years older than her who subjected her to years of family violence before her sister and brother-in-law assisted her to flee Nepal to Australia in July 2009. She claims that her sister and brother-in-law assisted her by paying an agent to make all the travel and visa arrangements. She states it was the agent who organised the documents, including the false marriage certificate. She claims her husband was violent towards her, gambled and drank heavily. She was a daughter-in-law in her husband's home and treated poorly. She was assaulted verbally and physically by her husband. She has [children] from the relationship. The applicant stated that she told her father and siblings about the abuse but they did not believe her as her husband acted as a good husband in front of others. She claims her husband would kill her if she reported the abuse to the authorities and in any event, her husband's family are wealthy and have good connections with the police. She claims that in Nepal, domestic violence is tolerated and she is required to have witnesses to the violence.

##### *Delegate's Decision*

6. The applicant attended an interview with the delegate who found her not to be a credible witness. A copy of the delegate's decision was attached to the application for review. The delegate found that the applicant had provided fraudulent documents to support her application for protection. The applicant arrived in Australia as a dependent on a student visa [in] July 2009. She subsequently applied for a temporary skilled visa which was refused [in] April 2012, lodging her protection visa application on 23 May 2012.

7. The delegate referred in the decision to the application for protection where the applicant stated that her husband's name was [name deleted], and she has [children]. She provided a translated marriage certificate and birth certificates for the children. The applicant claimed that the visa she used to enter Australia was acquired with false documentation. She claimed that her sister and brother-in-law arranged everything through an agent. She does not know how the documents were made, just that she paid the agent the money and he took care of everything. The delegate noted that the documents were checked by the New Delhi post who were well aware of the ease of obtaining fraudulent documents in Nepal and verified as being evidence of the identity of and the relationship between the applicant and [Mr A] for the student visa which was granted. The delegate also referred to the applicant subsequently applying while in Australia for another visa. As part of that process, it was found that fraudulent documents had been provided in support of the application. The applicant told the delegate that she paid an agent to assist her to stay in Australia and all she did was pay the money and provide documents.

#### *Tribunal hearing*

8. The applicant appeared before the Tribunal on 13 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages. The Tribunal began by explaining to the applicant the criteria for a protection visa and in particular the definition of a Refugee as set out in the United Nations Convention and also Australia's complimentary protection obligations.
9. The applicant told the Tribunal in relation to her protection application that she wrote everything down in Nepalese and a friend translated it into English for her. She confirmed that everything in her application for protection was true and accurate. She saw a friend's application to check everything and that she was sending all the paperwork. She stated that she had nothing to add to her claims or statement.
10. The applicant told the Tribunal that she had read the delegate's decision but did not understand it. The Tribunal explained that the delegate had refused her application, as it did not find her a credible witness, that is did not believe her claims.
11. The applicant told the Tribunal that she arrived in Australia [in] July 2009 as a dependent on a student visa. She did not want to stay in Nepal anymore and wanted to leave. Her sister and brother-in-law assisted her to leave. Her sister's friend's friend, [Mr A], wanted to leave Nepal as well but he did not have enough money but she did through her sister. They approached a consultant who organised everything and all she did was meet with [Mr A] and the agent to pay him and sign a few documents. When they arrived in Australia, [they went to different cities].
12. The applicant provided her address in [District 1], which was consistent to the addresses provided in all previous applications to the Department. She stated that her parents still live in [District 1] with [some of her siblings]. She has [other siblings who are married]. Her [children] live with her parents. She stated [both her parents work] from the family home. She sends money home for the support of her children. The applicant stated that her husband does not provide anything for the children. She claims that no-one cares for her children in her husband's home. She stated that she left them with her parents when she fled Nepal.

13. The applicant confirmed that she received [schooling] in Nepal and has never enrolled in or completed any educational course in Australia. She has worked as a cleaner since her arrival in Australia.
14. The applicant told the Tribunal that all the visa and travel arrangements were made through an agent. Her sister and brother-in-law knew someone who also wanted to leave Nepal who wanted money. She wanted to leave so the arrangements were made for both of them to leave together. The agent did all the work and prepared the documents. Her sister and brother-in-law paid for everything, but she has now paid them back. All she did was pay the money to the agent and signed a few documents. She stated they met in a motel to do all the paperwork.
15. The applicant told the Tribunal that she paid a friend to make the visa application for her to stay in Australia. He told her he could get her a working visa and all she had to do was provide him with a couple of passport photographs and pay him the money. He has now disappeared. The applicant claims she did not know anything about the visa application and what it was until her interview with the delegate. All she knew is that he said he could get her a working visa to stay in Australia. She stated that she did not give him any other documents. The Tribunal asked why then was the name of her husband in the protection visa application the same as that given in the skilled visa application as her father. The applicant stated she did nothing for the visa application other than pay money and provide passport photographs.
16. The applicant told the Tribunal that her visa expired in August 2011 and she only found out through a call from her work to tell her that her visa had expired and she could not work anymore.
17. The applicant was asked why she feared returning to Nepal. She replied that she wanted to leave as her husband threatened to kill her if she leaves him, he calls her children and tells them to tell their mother to return and he will kill her. She stated that her father arranged her marriage to him when she was [age] as he was a rich man who lived in the same area as her family. She stated he did nothing but lived off the sale of his family's land. His parents are alive, have given their land to their children, especially her husband who sells it to live on. His siblings have their own successful careers and live in Kathmandu. She stated lots of his family and extended family live in Kathmandu.
18. The applicant stated that her marriage was fine for the first 4 to 5 years but then her husband started drinking and had many girlfriends. He would come home and beat her when he was drunk. She claims she did not tell anyone because her husband had two faces and no-one would believe her. He was very different to her when they were home compared to when he was out. She claimed to have told her parents and sisters but they did not believe her. Only she knows what he is really like and he can do anything. She stated that if her parents do not believe her, then how would others, to give her the protection needed.
19. The applicant told the Tribunal her concern was her children because she does not care what happens to her but if he kills her, who will care for her children. She stated that her husband is selling her children's inheritance for him to live on. She is not educated and if she returns it will be hard for her to find a job to be able to support them and it is expensive to provide them with an education. If she stays in Australia, she can continue working and send money home. Later she can bring them to Australia. She claims her husband has never accepted responsibility for the children and his family cannot help. She claims that he does not love

his children. The applicant claims that he only provided the basics for her and the children and if they needed anything extra, she asked her family for help. She told the Tribunal that he will kill her if he returns as she left him with the children causing him embarrassment in their community. He has a social image to maintain and it is important culturally and socially for her not to have left him. The Tribunal asked why he had not divorced her given she had been absent for 4 years, she claims he has many girlfriends, one of who he is currently living and she responded that she did ask in the beginning but he told her that if you are not here what is the use of divorce. She claimed that her husband did not love her and made her work like a slave, when he came home just wanted sex, and her children are a result. She lived with his parents but they did nothing to support her and accused her of nagging him causing him to become an alcoholic. If he came home drunk, she would avoid him and lock herself away with the children. She stated he came home maybe twice a week.

20. The applicant told the Tribunal that she could not relocate anywhere, as her husband would find her as he has good connections and is wealthy. She could not seek the protection of the authorities as her husband drinks with the police. She claimed she could not move back to her family as they lived close to her in-laws. She stated her father could not do anything to protect her, as he is old and frail. The Tribunal asked then how is he supporting her [children] and her two siblings and she responded that her sister and mother cook and she sends money home.
21. The applicant told the Tribunal that it took about 6 to 7 months for her husband to notice she had left. When queried on this she stated that he drove a truck around and when he returned he just dropped in to change, did not talk to his parents and then left again. She stated that at first he thought she had gone to her parents and that she would return. The Tribunal queried that he did not notice especially as the children had also gone and why did her in-laws not catch him to let him know that she had left. She responded that at first, she was living between [District 1] and Kathmandu for about 4 months and he thought she would come home. The applicant told the Tribunal her children were living with her parents in [District 1] and she would return to visit them. Her husband's sister told him that she was in Kathmandu but he did not chase her, as he was scared of her [brother-in-law].
22. The Tribunal queried why then could she not get protection from her sister and [brother-in-law] and was told that they could not protect her 24 hours a day as he had to [work] and she could not get work in Kathmandu. She stated her parents and sister helped her financially during that time. She stated that when her husband did go to her house looking for her he fought with her parents about them sending her way without his permission.
23. The Tribunal asked about the violence she experienced from her husband and was told that she did not require hospital treatment as he did not break any bones. The Tribunal asked about the beatings and was told that she avoided the situation and would leave when he was drunk. She did claim that once her husband poured boiling water over her arm but it only left a red mark, nothing else. In her written statement, she claimed he wanted her to work as a prostitute but she refused and told him she wanted to separate from him. As a result, he beat her, forced her to have sexual intercourse with him and threatened to kill her if she left. She claims he also told her that he would kill her if she divorced him.
24. The Tribunal asked why she did not seek protection if she was so fearful of her husband and returning to Nepal when she first arrived in Australia. She responded that she had no idea and only found out when [a friend] told her as they had a friend who had applied. The Tribunal asked why apply for another temporary visa if she was so fearful of returning to

Nepal and she responded that this person helped her. She continued that if she had known it was fraudulent, she would not have applied.

25. The Tribunal put to the applicant that she has told the Tribunal that she arrived on a visa obtained through fraudulent documentation, she subsequently applied for another visa using fraudulent documentation and has now applied for a protection visa giving a different version of her family membership including providing supporting documents. The Tribunal stated that it appeared that she was willing to obtain a visa through fraudulent means so how did the Tribunal know that the version in the protection visa application was the truth. The Tribunal referred to the untranslated documents provided at the beginning of the hearing as well as the photographs provided. The applicant claims that one photograph is of her wedding and the other of her [children] taken about 2 years ago. The Tribunal asked the applicant how it could be sure that these photos were of her husband and children as attached to her student visa application was another photograph that was claimed to be her husband and child. The applicant responded that the child in the other photograph was [Mr A]'s child, not hers.
26. The Tribunal put to the applicant independent country information that it was easy to obtain fraudulent documents in Nepal, including identity documents like Passports and birth certificates so how does the Tribunal know that the documents provided by her to support the protection visa application are genuine documents.
27. The applicant responded that she could obtain verification from the Village Committee as to her true family composition. The Tribunal referred to the delegate's decision that stated she had provided a document from the Village Development Committee to verify her relationship to support her student visa application and she now claims that relationship was false. The applicant stated that particular document came from [Mr A]'s village development committee, which was a different village to her village and she could obtain one from her village development committee. The Tribunal referred to the delegate's decision that stated that the documents provided in her student visa application had been verified as true documents by the New Delhi post, so how could the Tribunal be satisfied that any documents she provided now were true and accurate. The applicant responded that it was a religious festival now and for those reasons, she was telling the truth.
28. The Tribunal put to the applicant the following information under the provisions of s424AA of the Act. The applicant was given an opportunity to respond to the information the Tribunal considered would be the reason or part of the reason for affirming the decision under review and advised she could have additional time if needed. The Tribunal explained the possible adverse effect of the information on the Tribunal's assessment of her credibility as a witness and ensured that she understood the particulars of information sought and why it was being sought in that this may lead the Tribunal to conclude that her claims for protection were not genuine and were aimed at remaining in Australia.
  - Information as to the inconsistencies between the evidence in relation to her family membership/structure in the student visa application lodged in New Delhi, the skilled visa application subsequently lodged in Australia and that contained in her application for protection. Particularly, her husband and children are listed as being different in the student visa application to the protection visa application and that the name of her husband in the protection visa application is the same as her father in the previous visa applications.

- The provision of fraudulent documents for the previous visa applications to enter and remain in Australia.
29. The applicant chose to respond immediately. All she responded was that that she had told the Tribunal everything and it was the truth.
  30. The applicant told the Tribunal that the main reason she needed protection was for her children's security.

### **Assessment of claims**

31. In assessing the applicant's claims, the Tribunal has taken into account the information in the Department's files relating to the applicant, including the student visa application, the skilled visa application and the application for the Protection visa, records of her interview with the delegate and the delegate's decision, which was attached to the application for review. The Tribunal has also taken into account the independent country information in Attachment B and the information referred to in the delegate's decision as relevant to the application.
32. In order to satisfy the Convention definition of a refugee, the applicant must have a well-founded fear of persecution. She must have a subjective fear, and that fear must also be well-founded when considered objectively. There must be a real chance that the applicant will be persecuted for a Convention reason if she returns to Nepal. The Tribunal accepts that the applicant does not want to return to Nepal. The question for the Tribunal is whether the applicant's fear of persecution is objectively well-founded within the criteria of the Refugees Convention.
33. The Tribunal accepts that the process of seeking protection and the giving of evidence can be stressful and consequently the applicant may have difficulty providing her evidence in a concise and contextual manner. The Tribunal accepts that sometimes timelines can be inconsistent as a result. The Tribunal has noted that a person should not be required to provide an unrealistic degree of precision and detail in statements and accepts that an experience of trauma may affect a person's ability to recall specific events and details.
34. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the applicant's claims. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims. For the following reasons, the Tribunal does not find the applicant a credible witness. The Tribunal finds that the applicant has fabricated her claims to enhance her protection visa application.
35. The applicant claims that she entered Australia on false documentation. When put to her that the name of her father in the skilled visa application is that of her husband in her protection visa application, the applicant stated that she does not know how that happened as she had nothing to do with the skilled visa application. When asked how the Tribunal could be satisfied that the documents identifying her family in her protection visa application were genuine and that she had correctly identified her family in this application, the applicant told the Tribunal she could obtain confirmation from the Village Development Committee. When pointed out to her that a confirmation of family composition by the Village Development Committee was provided with the student visa application, which she now states is

fraudulent, the applicant stated she could get one from her Village Development Committee, which is different to the Village Development Committee that provided the other confirmation of family composition. When put to her the ease of obtaining fraudulent documents in Nepal, the response was that she could obtain a document verifying the relationship from her Village Development Committee.

36. The applicant claims that she engaged an agent to prepare and lodge the visa application and that he did everything, including obtaining the relevant documentation. She again claims that she paid another person to apply for a skilled visa for her to remain in Australia and she was not aware of the details of the application or that fraudulent documents were provided until told by the delegate at the interview. The applicant asks the Tribunal to believe that what she is claiming now is the truth and that because it is a religious holiday, she is telling the truth.
37. The applicant states she provided false information in order to obtain a visa to enter Australia. She again sought a further visa to remain in Australia that was found to be based on fraudulent documentation. When that application was refused, the applicant applied for a protection visa application claiming to fear harm from her husband because of family violence, that the authorities could not protect her and she was unable to relocate to avoid the harm feared.
38. The Tribunal has considered the explanations provided by the applicant in relation to the provision of fraudulent documents. The Tribunal does not accept the explanation that she was unaware of the false documentation because a third party did it all. The Tribunal is satisfied, based on the evidence that the applicant was complicit in the provision of false documentation in that she was aware that false documentation was to be provided, even though she may not have actually obtained the documentation herself. The Tribunal is of the view that the significance of the fabricated information together with the provision of fraudulent documentation and the on-going nature of the fabrication and omissions, which were only disclosed when confronted by the information, indicates that the applicant is prepared to tailor her evidence to suit her purpose. The Tribunal is of the view that this indicates that she is not a credible witness.
39. The Tribunal notes its concern based on the applicant's evidence that she arrived in Australia in July 2009 but did not lodge any claim for protection nearly three years after her arrival. The applicant explained this delay by claiming that she did not know that she could seek protection in Australia and that that she had sought assistance to obtain another visa. The applicant told the Tribunal that she only found out about protection visas when visiting a [friend] as one of her friends had made an application. The Tribunal notes the applicant has claimed that she came to Australia to avoid harm in Nepal. While the Tribunal accepts the difficulties faced by a person in the applicant's circumstances who may be unfamiliar with Australian immigration and legal processes, it does not accept that a person genuinely fearing harm if they were to return to their home country would not take steps to seek advice about their immigration status in Australia at an earlier stage. The Tribunal finds that this delay casts further doubt on the genuineness of her alleged fears of persecution in Nepal.<sup>1</sup>
40. The Tribunal does not accept the applicant as a witness of truth. She has clearly demonstrated that she is prepared to lodge fraudulent documents in order to obtain a visa to enter and remain in Australia. The Tribunal is unable to accept that the documents purporting to be genuine lodged in support of her protection visa application as genuine, especially as

---

<sup>1</sup> *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347 per Heerey J.



her husband's details in the marriage certificate appear to be the same as those of her father in her previous visa applications. The Tribunal has considered the photographs provided at hearing and cannot be satisfied that they are actually photographs of her husband or of her children. The Tribunal does not accept the applicant's explanation that she does not know how this happened, as she had nothing to do with the preparation of either application.

41. The applicant has stated she provided fraudulent documents in relation to her family membership for her student visa application including a photograph of a man and a child claimed to be her husband and son. She then provided fraudulent documents for a skilled visa application. She has provided identity documents including photographs of a wedding ceremony she claims is evidence of her marriage to the man named as her husband and a photograph of [children] she claims are her children, named in the protection visa application. Her husband's name in the protection visa application is the same as the name given as her father in the previous applications. When asked how the Tribunal could be satisfied that the family membership in her protection visa application was truly her family given the prior applications indicating a different family membership previous claims with supporting identity documents for her previous claims of family members, the applicant stated she was now telling the truth.
42. The Tribunal does not accept the applicant's claims to fear her husband will kill her or to fear any other harm from him or that he has ever threatened her with harm. Firstly, the Tribunal does not accept the applicant is a witness of truth. Secondly, based on the reasons stated above, the Tribunal does not accept that she is married to the person to whom she claims to be married. For the same reasons, the Tribunal also does not accept that the children claimed as her children in the protection visa application are her children.
43. Overall, when the Tribunal considers the omissions and inconsistencies in the applicant's evidence together with the delay in making the protection visa application and the provision of fraudulent documentation, it does not accept that she is a witness of truth and does not accept that she has provided a truthful account of her circumstances in Nepal, her reasons for leaving and her claimed fear of harm if she were to return.
44. The Tribunal does not accept that there is a real chance that the applicant will be threatened, harmed or otherwise persecuted by any person if she returns to her home in Nepal now or in the reasonably foreseeable future.
45. Having considered the applicant's claims singularly and cumulatively, the Tribunal finds that there is no real chance that the applicant will be persecuted for any Convention reason, or a combination of reasons, if she were to return to Nepal now or in the reasonably foreseeable future. The Tribunal finds that the applicant does not have a well-founded fear of persecution. Therefore she does not satisfy the requirements of s.36(2)(a) of the Act.

### **Complementary protection**

46. Having found that the applicant is not a refugee, the Tribunal has considered whether the applicant meets the complementary protection criterion for the grant of a visa.
47. As set out above, the Tribunal does not accept that the applicant is a witness of truth. It does not accept that she has given a truthful account of her circumstances in Nepal, her reasons for leaving or her fear of harm should she return now.

48. Having regard to the findings of fact above the Tribunal does not accept on the available evidence 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 she will be arbitrarily deprived of her life, that the death penalty will be carried out on her, that she will be subjected to torture, that she will be subjected to cruel or inhuman treatment or punishment or that she will be subjected to degrading treatment or punishment as defined.
49. Having considered the applicant's claims singularly and cumulatively, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to Nepal, there is a real risk that the applicant will suffer significant harm. The Tribunal therefore finds the applicant does not satisfy the criterion set out in s36(2)(aa).

*Conclusion*

50. 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 Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
51. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
52. 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**

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

Amanda Goodier  
Member

## ATTACHMENT “A”

### RELEVANT LAW

54. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. 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 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), or on other ‘complementary protection’ grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

55. 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 Refugees Convention.
56. 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.
57. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
58. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
59. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
60. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve ‘serious harm’ to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression ‘serious harm’ includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a

member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

61. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
62. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
63. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
64. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
65. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of 'practicable', to expect him or her to seek refuge in another part of the same country. What is 'reasonable' in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18

and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.

66. Harm from non-state agents may amount to persecution for a Convention reason if the motivation of the non-State actors is Convention-related, and the State is unable to provide adequate protection against the harm. Where the State is complicit in the sense that it encourages, condones or tolerates the harm, the attitude of the State is consistent with the possibility that there is persecution: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [23]. Where the State is willing but not able to provide protection, the fact that the authorities, including the police, and the courts, may not be able to provide an assurance of safety, so as to remove any reasonable basis for fear, does not justify an unwillingness to seek their protection: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [28]. In such cases, a person will not be a victim of persecution, unless it is concluded that the government would not or could not provide citizens in the position of the person with the level of protection which they were entitled to expect according to international standards: *MIMA v Respondents S152/2003* (2004) 222 CLR 1, per Gleeson CJ, Hayne and Heydon JJ, at [29]. Harm from non-State actors which is not motivated by a Convention reason may also amount to persecution for a Convention reason if the protection of the State is withheld or denied for a Convention reason.
67. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

#### **s.499 Ministerial Direction**

68. 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 – to the extent that they are relevant to the decision under consideration.

#### **Complementary protection criterion**

69. 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').
70. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

71. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Credibility**

72. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169 70.)
73. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant’s country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

## ATTACHMENT “B”

### INDEPENDENT COUNTRY INFORMATION

#### Document Fraud

In May 2012, the US Department of State (USDOS) reported that “government officials were often complicit in falsifying travel documents and overlooking recruitment violations by labor contractors” when dealing with recruitment agencies arranging to import workers from overseas. USDOS noted, however, that the government “began a number of initiatives to raise awareness and make the recruitment process more transparent”.<sup>2</sup>

A 2009 USDOS cable published by Wikileaks provided a summary of the prevalence of document fraud in Nepal. According to the cable:

Nepal is a country with high levels of fraud. Corruption is a way of life in government institutions and beyond. Counterfeit educational, government-issued, bank, and employment documents are readily available for purchase. Genuine but fraudulently-obtained documents are also available, including passports and national ID cards, although these are significantly more expensive than counterfeit documents.<sup>3</sup>

The USDOS cable identified key areas of concern with regard to document fraud, including: visa applications, particularly non-immigrant visas, student visas, religious visas and temporary worker visas; US passport fraud; adoption fraud; asylum and other benefit fraud; people smuggling/trafficking, organised crime and terrorist travel; and host country passport, identity documents and civil registry fraud.<sup>4</sup>

In 2008 the Immigration and Refugee Board of Canada noted comments made by an official at the Canadian High Commission in New Delhi:

My experience is that any Nepalese document can be obtained by fraud. These may include falsely obtained, forged or complete counterfeits. I have personally seen and seized counterfeit passports, driver’s licences and company identification cards that are complete counterfeits or are altered.<sup>5</sup>

In 2007, *eKantipur* reported that three officials publicly apologised for taking bribes in return for issuing two citizenship certificates for an individual. One of the officials admitted receiving Rs 40,000 as a bribe from the individual, and said that he gave 40 per

---

<sup>2</sup> US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – Nepal*, 24 May, Section 7.d

<sup>3</sup> US Department of State 2009, ‘Fraud Summary – Kathmandu, Nepal’, Wikileaks website, 5 October <<http://wikileaks.org/cable/2009/10/09KATHMANDU910.html>> Accessed 1 June 2012

<sup>4</sup> US Department of State 2009, ‘Fraud Summary – Kathmandu, Nepal’, Wikileaks website, 5 October <<http://wikileaks.org/cable/2009/10/09KATHMANDU910.html>> Accessed 1 June 2012

<sup>5</sup> Immigration and Refugee Board of Canada 2009, *Nepal: Prevalence of forged, fake or falsely acquired documents, including identity documents, professional certifications, membership cards and employment records*, NPL103010.E, 26 January <[http://www.irb-cisr.gc.ca:8080/RIR\\_RDI/RIR\\_RDI.aspx?id=452196&l=e](http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=452196&l=e)> Accessed 4 May 2010

cent of this to the Chief District Officer (CDO), 30 per cent to the assistant CDO, and shared the remaining 30 per cent among other staff in the office.<sup>6</sup>

---

<sup>6</sup> 'Officials admit taking bribe for citizenship' 2007, Sanjeev Baniya blog, source: *eKantipur*, 11 June  
<<http://sanjeevbaniya.blogspot.com.au/2007/06/officials-admit-taking-bribe-for.html>> Accessed 15 June 2012