

1206669 [2012] RRTA 1054 (26 November 2012)

DECISION RECORD

RRT CASE NUMBER:	1206669
DIAC REFERENCE(S):	CLF2011/208011
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Paul Millar
DATE:	26 November 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration 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 [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2011.
3. The delegate refused to grant the visa [in] April 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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 to 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 to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

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

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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 *SZF DV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.

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

Complementary protection criterion

16. 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 to 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').
17. '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.
18. 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.

CLAIMS AND EVIDENCE

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

Primary application

20. The following claims were made in the primary application documents.
21. The applicant was born on [date deleted: s.431(2)] in Chitwan, Nepal. The applicant holds a Nepal passport issued [in] May 2005. The applicant lodged copies of pages from his Nepal passport (folios 1-10). He departed Nepal [in] June 2009 and he arrived in Australia [in] June 2009 as the holder of a student visa issued [in] May 2009 and which was valid until [date deleted: s.431(2)] November 2011.
22. In that part of the application form where required to give reasons for claiming protection, the applicant put forward the grounds of his protection claims. They can be summarised as follows:
 - The applicant was a member of the Congress Party and, in 2008, he was arrested by Maoists for protesting about human rights and political freedom. The Maoists threatened to seriously harm the applicant if he continued to protest.

- The applicant would not obey or fulfil their demands; he suffered significant trauma which was tormenting him and he is afraid the Maoists will harm him if he returns to Nepal. The authorities will not protect him because they are controlled by Maoists.
23. In a decision made [in] April 2011 the delegate refused the application on the basis that, although invited to attend an interview with the delegate, the applicant did not respond. In the absence of an interview, the delegate was not satisfied that the applicant's fear of persecution was well founded and was not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal (the receiving country), there was a real risk the applicant would suffer significant harm.

Review application

24. The applicant did not nominate a registered migration agent, authorised representative or recipient in relation to the review.
25. The applicant subsequently lodged a statement handwritten in Nepali with an English translation in which he provided further detail about his protection claims as summarised above.
26. The applicant appeared before the Tribunal [in] August 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
27. The following is a recitation of evidence given by the applicant at the hearing.
28. The applicant comes from a village in the district of Chitwan. His parents, brothers and a sister all live there. His wife and their children live with his parents in their home. The applicant has another sister who lives in Kathmandu. The applicant's wife works in [Business 1] which the applicant himself owned and operated when he lived in Nepal. His children attend school in the village.
29. After leaving school in year 10, the applicant commenced [Business 1]. Sometime after that the applicant also obtained work as a distributor and dealer of certain products.
30. The applicant supported the Congress Party. He became a member of the party in 2061 in the Nepal calendar. The applicant's father had been an active member for the party on the village committee. Before he became a member of the party, the applicant said that he undertook various activities. After becoming a member the applicant would participate in party programs and also tell people at his shop to support the Congress Party.
31. In addition, from 2061, when the party leader came to the area the applicant would accompany that person and again tell people he met to vote for the Congress Party. He attended rallies, as a [role deleted: s.431(2)], was able to make people laugh and by that means attract them to him when he would then tell them about the Congress Party. The applicant would assist with organising big gatherings for the party and give speeches as well.
32. The applicant said that from 2054 Maoists began to cause trouble for him because of activities he undertook for the party before he became a member. In that respect, they would come to his shop and ask for donations. He said he could name the person involved. In

addition, it was from that time that Maoists would come in groups and demand that the applicant provide shelter and food. When asking for donations, they began asking for sums of approximately 5000 or 10,000 Rupees.

33. Sometime later they began asking for large amounts, the largest being the sum of 125,000 Rupees which the applicant could not pay. For that reason, the Maoists threatened the applicant with harm if he did not pay. The applicant thought that the demand for that amount of money was made to him in approximately 2063 in the Nepal calendar.
34. The Tribunal asked the applicant if he was ever physically attacked by Maoists. In response, the applicant said that in the year 2064 in the month of Ashad he had organised a small program in the evening. On his way home, Maoists approached and beat him and he fell down sustaining a scar on his head and other injuries for which he needed medical treatment.
35. The Tribunal asked the applicant whether this event occurred after the constitutional elections. In response, the applicant said that this event occurred before those elections. He said the program he had attended, on the evening he was assaulted, was about preparing for those elections.
36. The Tribunal asked the applicant whether this was the first time he had been assaulted by Maoists. The applicant said that was correct. He said that one week later Maoists came to [Business 1], pulled out the grille of the door and demanded to be allowed to come in. The applicant refused to allow them entry and then stood behind his wife who spoke to them. The applicant gave them food and said that they did nothing else.
37. The Tribunal asked the applicant if he was attacked by Maoists after that occasion. The applicant said they did not attack him after that but they continuously demanded money from him and threatened harm if he did not pay.
38. In June 2009 the applicant left Nepal and came to Australia to save his life. He also left because he thought that if he was absent Maoists would not come to his shop or home and bother his family. However, he said that after he came to Australia in contact with his family they told him that Maoists were coming looking for him. The applicant said that a Maoist leader lived only one kilometre from the applicant's home and would come and visit the applicant's family. When Maoists came they said that when the applicant returned to Nepal they would kill him.
39. Approximately six months after he arrived in Australia, the applicant obtained work. For some period he worked in Queensland picking vegetables, injured his eye and received medical treatment for that in Melbourne. Once he had recovered he returned to Queensland to undertake further work.
40. The applicant returned to Nepal in September 2010 for approximately six weeks because his son was seriously ill in hospital in Kathmandu. He kept this journey a secret from Nepali friends who lived in Australia. He did not return to his village but his family came to see him in Kathmandu. He stayed there with his sister. He did not have any difficulties with Maoists in that period because he said the Maoists in his native village did not know he had returned to Nepal.
41. The Tribunal asked the applicant why, nevertheless, he would take the risk of returning to Nepal when he said he had taken the step of leaving the country to save his life. In response,

the applicant said that the Maoists in his village knew he was in Australia and if they did not know he was back in Nepal then he would be safe. He said they knew he had gone to Australia because Nepali people he knew here would tell people in his village that he was in Australia and the Maoists would know by that means.

42. The Tribunal asked the applicant whether there was not a risk that news of his return to Nepal could be leaked to the Maoists he feared either by people here who had noticed he was absent or by the movements of his family out of the village to Kathmandu to see him. In response, the applicant said that Maoists in the native village would only think that his family had gone to Kathmandu to see a sick child (not him).
43. When asked how they would even know that, the applicant said that his father would have told people in the village they were going to Kathmandu to see the sick child and the Maoists would find out by that means. He said that he did not tell anyone in Australia he was going back to Nepal except a god sister who lives here. He said that his son was seriously ill and at great risk.
44. After returning to Australia, the applicant continued to work. When asked why he applied for protection in December 2011 the applicant said that he came to Australia as a dependent in a student visa application made by a woman from Nepal. They falsely represented that they were married to facilitate his inclusion in that application.
45. This woman told the applicant that she planned to marry in Australia and he understood that he could no longer remain in Australia as her dependent with a student visa. As he wished to remain in Australia and not return to Nepal where there would be danger for him, he then "started" his application. When asked how he found out about protection visas, the applicant said that he did know that there were refugees in Australia but he did not know where he would get and submit an application.
46. He said that one day a friend from Nepal who had refugee status in Australia told him about applying for a protection visa and that he should do it. When asked how long before he made his protection visa application he found out about applying for that, the applicant said it was at about the time his student visa was to expire.
47. The Tribunal asked the applicant to confirm its understanding of his evidence to that point that when his student visa was about to expire he began making enquiries as to how he could stay in Australia. In response, the applicant said that was correct; when his visa was about to expire he searched for a solution to be able to stay in Australia legally.
48. The Tribunal put to the applicant that in his statement he said he was "arrested" by Maoists in April 2008 when he was protesting about human rights and political freedom. The Tribunal asked the applicant if that was correct (as he had not mentioned this in his evidence to the Tribunal when asked what his difficulties were with Maoists). The applicant said that was a reference to the occasion on which he was beaten and wounded by Maoists when coming home from the meeting as described to the Tribunal and narrated above. He said that perhaps he had forgotten the date and month of that event but it did happen.
49. The Tribunal put to the applicant that in his statement he said that, in addition to that occasion, he was attacked and beaten by Maoists [in] February 2009 on his way home after a meeting for his party in the village. In response, the applicant said that "whatever [he]

mentioned before; so that's the time". He said that maybe he mixed up dates. He might have forgotten the date but "the incident is that".

50. The Tribunal asked the applicant whether, in his statement, he was claiming that if there were two occasions on which he was beaten by Maoists (April 2008 and February 2009). The Tribunal reminded the applicant that he had told the Tribunal of only one occasion when Maoists beat him. In response, the applicant said that the one time he was beaten he was on his way home and the second time was when Maoists came to his home. In that respect, he said that they hit the grille of his store, demanded entry and the applicant hid behind his wife.
51. The Tribunal put to the applicant that this latter incident was not mentioned in his statement. In response, the applicant said that he could not mention so many things; he was in panic at the time but the incident did occur.
52. The Tribunal put to the applicant that in his initial evidence he told the Tribunal of only one occasion on which he was attacked by Maoists and he said that it occurred before the constitutional elections (in April 2008 in the western calendar). Further, it was put to him that, according to his statement, he was attacked and beaten by Maoists returning home after a meeting but he had stated that this was in February 2009 and after the elections.
53. In response, the applicant said that the evidence he had given to the Tribunal about that event and when it occurred was the correct account and possibly he had made a mistake in his statement. The Tribunal asked the applicant why he would be so confused over the date of being attacked and beaten by Maoists. In response, the applicant said that Maoists asked him for money many times; they gave him so many "tortures" (threats or demands); things like this and beatings he could not recall exactly; he could remember how many people there were and their names.
54. The Tribunal asked the applicant why it was that he made no enquiries about how he could stay in Australia until the time of the expiry of his student visa when he said he had come to Australia two years earlier to save his life. In response, the applicant said that at that time he thought he had his student visa and the woman with whom he travelled to Australia would look after him and that she would stay here forever but later on she left him; he gave her money (700,000 Rupees); she left him and then he struggled to be able to stay here legally.
55. The Tribunal asked the applicant why he would be willing to remain in Australia on the basis of a student visa which he would have well-known was temporary and did not give him the right to reside permanently. In response, the applicant said he was totally unaware at that time; he did not know how he could survive; he had never been to a foreign country; he did not know what to do; he was probably unaware of the legal things and status; if he had known he could "submit that" he would have submitted that in that way.
56. The Tribunal asked the applicant if he lived together with the woman with whom he travelled to Australia. He said that he just took help to come here from her; she knew everything about him; so he did not intend to stay with her and she did not like to stay with him. For a period they stayed in the same house but they did not stay in the same room. The applicant said he worked for periods in Queensland and she did not go with him there.
57. The Tribunal put to the applicant it had difficulty accepting that the applicant would have been willing to remain in Australia on the basis of holding a student visa and make no enquiries about how he could stay here permanently until close to the time that his student

visa expired if, at the same time, he claimed to be in fear of harm in Nepal and to have come to Australia to save his life.

58. In response, the applicant said that there was a language problem; he did not know where he could go or how to talk to people; other people from Nepal here were not willing to help him because they have their own problems and some of them are isolated. He tried a lot and when he came to know then he tried to solve.
59. When asked why, after he arrived in Australia he did not try to find someone who could actually give him advice about his situation and the need to remain here permanently, the applicant said that he was sourcing a way of how he could stay in Australia before and after the expiry of his student visa. He said that his visa expired and then, later on, he found a person who was a refugee and who could give him advice about that. Otherwise the applicant did not know where to go or to whom he should talk about this.
60. The Tribunal put to the applicant it had difficulty accepting that he would return to Nepal in September 2010 if he had taken the step of actually leaving the country to save his life. In response, the applicant said he stayed in Kathmandu with his sister who had a house near the airport. Maoists in his village did not know that he had returned and Maoists in Kathmandu would not know who he was. They might know his name but they would not know his face. For that reason, he thought that he could stay in Kathmandu to see his son.
61. The applicant said he has not undertaken any political activities in Australia. When asked what he was afraid would happen to him if he returned to Nepal, the applicant said he was afraid Maoists would harm him. He referred to a lack of security, instability and the government being dissolved with elections to be held at a later time. However, when asked what harm he feared as a result of those matters, the applicant said these matters would enhance the risk of Maoists harming him because of the events he claims occurred before he left Nepal. He said he only feared harm from Maoists and only on those grounds.
62. At the hearing the applicant submitted photographs of him with his wife and children in Nepal; his marriage certificate; birth certificates for his children and documents regarding his education in Nepal. He said that he misses his family in Nepal.

FINDINGS AND REASONS

63. The Tribunal finds that the applicant is a national of Nepal. He produced his Nepal passport at the hearing.
64. The Tribunal has the following concerns about the applicant's credibility.

Inconsistent evidence about harm from Maoists

65. The applicant has given inconsistent evidence about when he was attacked by Maoists. He told the Tribunal in his initial evidence that he was on his way home from a meeting for the party when Maoists came and assaulted him. He said that this incident occurred before the elections (held in April 2008). When asked if there was any other occasion he was attacked, the applicant referred to an event occurring one week later when Maoists came to his shop and he stood behind his wife who spoke to them but he did not mention them actually assaulting him on that occasion.

66. In his statement, the applicant referred to being "arrested" by Maoists in April 2008 and then being assaulted by them on his way home from a meeting in February 2009. When this was put to him, the applicant first claimed that being arrested by Maoists in April 2008 was a reference to him being beaten by them when he was coming home from a meeting but he had perhaps been confused about when that occurred.
67. When reminded that in his statement he had also claimed to have been beaten by Maoists in February 2009 on his way home after a meeting, he gave a confused response but indicating the incident occurred. When asked to confirm that, according to his statement, he was claiming there were therefore two occasions he was beaten by Maoists the applicant tried to claim he was attacked twice, the first time, on his way home after the meeting and then made reference to the occasion when Maoists came to his home demanding entry but he again did not actually say they assaulted him.
68. When asked to explain the inconsistency between him telling the Tribunal that he was attacked by Maoists on his way home from a meeting before the elections in Nepal and claiming in his statement that this occurred in February 2009 after those elections, the applicant then said he made a mistake in his statement.
69. The applicant omitted from his statement any mention of the occasion when the Maoists came to his shop demanded to see him and his wife spoke to them. His explanation for that was that he could not mention many things in his statement and he was in panic when he did that. At another stage of his evidence the applicant said he thought he could give more information when interviewed and if he told the Tribunal all of the details of his protection claims it would take six hours.
70. The Tribunal rejects those responses as the applicant specifically mentioned this incident to the Tribunal when discussing what harm he received from Maoists. It was this incident and the occasion on which he was beaten when coming home from a meeting that appeared to be the prominent events in the applicant's account to the Tribunal as to harm from Maoists. Accordingly, if he was relating a truthful account, the Tribunal does not believe the applicant would fail to mention this incident in his statement (including for any of the reasons he puts forward).
71. Overall, the Tribunal found the applicant's evidence and responses when confronted with the content of his statement to be confused and not credible. The applicant tried to explain this claiming that Maoists made threats and demands for money many times; he could remember the names of the Maoists and how many there were but could not recall exactly the beatings.
72. Even if he was threatened and demands were made of him for money many times, that still does not excuse or explain the applicant's inconsistent evidence about when and how many times he was beaten by Maoists. Even if the applicant could say the names of the Maoists who approached him or how many there were, as he claimed, that still does not excuse or explain his inconsistent evidence about being beaten by Maoists.

Returning to Nepal in September 2010

73. The applicant said that he left Nepal in 2009 and came to Australia to save his life. After his arrival, he was told Maoists were still looking for him and they would kill him if he came back to Nepal. As that is the case, the Tribunal does not believe that the applicant would have risked returning to Nepal in September 2010. The applicant claimed he did so because

his son was ill; he stayed in Kathmandu the whole time; Maoists in his local area would not have known of his return and would have believed he was in Australia; Maoists in Kathmandu would not have known his face.

74. Even if he remained in Kathmandu for that period and Maoists were not aware of his return, no matter how concerned he was for the health of his son, the Tribunal does not believe the applicant would still have taken the risk of going there when he took the step of fleeing the country (not just his native area) to save his life and, after doing so, was told that Maoists still came to his family to find him and threatened to kill him if he came back to Nepal.
75. While he claimed he did not tell anybody in Australia about his plan to return to Nepal (except a god sister) and that his father would have told people in the village that they were going to Kathmandu to see a sick child, given the applicant also said that a Maoist leader lived very close to the family home and they were continuing to go to the family to find him, there was always the possibility that Maoists may have followed his parents to Kathmandu or found out the real reason they were going there.
76. The Tribunal does not believe the applicant would take that risk and return to Nepal in the circumstances as claimed. The fact that he returned to Nepal, in the Tribunal's view, is evidence that the applicant is not genuinely in fear of harm in that country.

Delay in seeking protection

77. The applicant told the Tribunal that he came to Australia in June 2009 to save his life. After he came here family told him that Maoists were still looking for him in his village. He returned to Nepal in September 2010 for approximately six weeks and did not remain there. Instead he chose to come back to Australia eventually applying for a protection visa in December 2011 claiming to be in fear of Maoists in Nepal.
78. The applicant told the Tribunal that he made no enquiries whatsoever as to how he could remain here on a permanent basis and avoid having to return to Nepal where he could be harmed until his student visa was about to expire (in November 2011 as he claimed in his protection visa application form). It was not until then that he made enquiries and a friend told him about applying.
79. The applicant's explanation for his inaction in making enquiries about seeking protection from the harm he feared in Nepal was that he was content to remain here on the basis of holding a student visa granted to him as the dependent of a woman from Nepal who was to undertake studies here and whom he expected would assist him to stay here.
80. If his life was in danger as he claimed, the Tribunal does not believe the applicant would have been willing to remain in Australia on that basis and choose to make no enquiries as to how he could remain here until his student visa was about to expire.
81. The applicant was granted the student visa on the false premise that he was married to this woman. While he paid her money, he said there were periods when they did not live at the same residence and he would have been well aware of the risk of the department finding out that they were not in fact married. The applicant would have been well aware that, as the holder of a temporary visa, there was no guarantee he could stay in Australia permanently and avoid the harm he claims to fear in Nepal.

82. The applicant claimed also that he was ignorant about his status in Australia; he was from another country and did not speak English; he did not know what to do to enquire about protection; other people from Nepal were not willing to help him. The Tribunal does not believe the applicant would have been unaware that the student visa he held gave him the right to stay here only temporarily. While he claimed to come from another country and referred to an English language problem, that did not prevent him from finding work in Australia and seeking medical treatment when he was injured.
83. While he claims to have been ignorant about applying for protection and other people from Nepal being unwilling to help him, considering the applicant was able to find employment in Australia as well as accommodation the Tribunal considers the applicant to have been sufficiently able to make enquiries with an appropriate professional about how he could remain here permanently if his life was truly in danger in Nepal.
84. Further in his evidence, when pressed to explain his inaction, the applicant changed his evidence and said that before and after the expiry of his student visa he had been trying to find out how he could stay in Australia. The Tribunal rejects that claim as the applicant clearly stated earlier in his evidence on this issue that it was not until the time of the expiry of his student visa that he began to make enquiries about how he could stay here permanently and about seeking protection.
85. Overall, the Tribunal finds the applicant's inaction in seeking protection and the delay between his first arrival in Australia and the lodgement of his protection visa application to be a strong indication that he is not genuinely in fear of harm in Nepal.

Conclusions on credibility

86. The Tribunal's concerns about the applicant's credibility as discussed above, considered cumulatively, lead the Tribunal to find that the applicant is not a witness of truth and the account of events on which his protection claims are based is false.
87. Accordingly, the Tribunal disbelieves the applicant's claims that the applicant or any member of his family supported or was a member of the Congress Party and undertook activities for that party (including rallies where the applicant acted as a comedian); that the applicant was involved in protests or rallies of any kind in Nepal; that the applicant was threatened, beaten, maltreated or harmed by Maoists and that he suffered trauma or torment (as he claimed in his application form) or that he has trouble with his mind, brain or memory as he claimed to the Tribunal; that Maoists approached him at any time and that they demanded shelter, food or money from him; that Maoists have gone to his home to find him and that they have any interest in him; that the applicant left Nepal in 2009 and in 2010 for his safety and that he is genuinely in fear of harm from Maoists.
88. In his evidence, the applicant told the Tribunal he could name the Maoists who he says harmed him but the Tribunal does not believe the applicant was ever harmed by Maoists in the first place. He offered to demonstrate to the Tribunal his [role deleted: s.431(2)] that he did in Nepal to help the Congress Party. The Tribunal did not ask him for a demonstration and is satisfied from the discussion above as to the Tribunal's concerns about his credibility that the applicant did not undertake any activities for the Congress Party in Nepal.
89. The applicant said that he had scars from the beatings he received from Maoists in Nepal. The Tribunal did not ask to see the scars and, assuming he has them, there is no credible

evidence before the Tribunal as to how they were sustained. The applicant also claimed at the hearing that because of beatings he received from Maoists he had trouble with his mind, memory and psychological power. In his protection visa application he referred to suffering significant trauma from being harmed by Maoists which was tormenting him. The Tribunal disbelieves the applicant's claims about his mental state as the Tribunal does not believe the applicant was ever harmed by Maoists in Nepal.

90. The applicant also referred to a lack of security, instability and the government in Nepal being dissolved with elections to be held at a later time. However, he then said that this was more reason why he would suffer harm from Maoists if he returned to Nepal. The Tribunal does not believe the applicant was ever harmed by Maoists and that Maoists or anyone else in Nepal wishes to harm him.
91. The Tribunal had access to the department file relating to the application for a student visa in which the applicant was included as a dependent. The fact that the applicant obtained this visa on the false basis of being married to a woman from Nepal does not demonstrate that the claims he has made to the Tribunal about being harmed by Maoists are true.
92. In line with the various documents he produced to the Tribunal regarding his wife and children in Nepal, the Tribunal accepts that he has a wife and children in Nepal. The Tribunal accepts that he comes from Chitwan and that he operated businesses there.
93. There is no credible evidence before the Tribunal as to the true reasons the applicant left Nepal in 2009 and 2010 and there is no credible evidence as to why he does not want to return there. There is no credible evidence that there is a real chance the applicant will suffer persecution for any convention reason in Nepal. There is no credible evidence that he has a well founded fear of persecution for any convention reason.
94. As regards the complementary protection criterion, for the reasons given above, the applicant has been found not to be a witness of truth. The Tribunal disbelieves his claims about being harmed by Maoists because of political activities undertaken in Nepal, the sole basis on which he claimed to fear harm in Nepal. There is no credible evidence before the Tribunal as to why the applicant twice left Nepal and why he does not want to return there.
95. Accordingly, there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal from Australia to the receiving country, Nepal, there is a real risk that he will suffer significant harm.

CONCLUSIONS

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

DECISION

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