

1219655 [2013] RRTA 407 (14 June 2013)

DECISION RECORD

RRT CASE NUMBER:	1219655
DIAC REFERENCE(S):	CLF2012/199192
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Chris Keher
DATE:	14 June 2013
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 the Tribunal accepts is 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] September 2012 and the delegate refused to grant the visa [in] December 2012.
3. The applicant appeared before the Tribunal [in] March 2013 to give evidence and present arguments. The applicant's wife also appeared and gave evidence. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The [migration agent] attended the Tribunal hearing.
5. A preliminary issue in this matter is that the applicant's wife is not an applicant for review in this application. The applicant's agent in a submission dated [in] June 2013 has submitted in part: "The Member has advised correctly that our office, when applying to the Tribunal for a Review of the Delegate's decision, referent only to [the applicant]" Whilst the applicant's wife did lodge a Form C with the Department and was included in the Delegate's decision as a member of the family unit, no review was sought by her; she is not listed on the review application form and has not signed it. The covering letter dated [in] December 2012 from the applicant's agent in relation attaching the application for review refers only to [the applicant]. The Tribunal cannot remedy the situation and has no jurisdiction in relation to the applicant's wife.

RELEVANT LAW

6. 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.

Refugee criterion

7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

9. 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.
10. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
11. 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)). Examples of 'serious harm' are set out in 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.
12. 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.
13. 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.
14. 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 '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.
15. 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.

16. 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.

Complementary protection criterion

17. 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').
18. '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.
19. 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

20. The issue in this case is the credibility of the applicant; whether on his accepted claims he meets the refugee' criterion, or complementary protection criterion and whether he has effective protection in India. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
21. In his original application the applicant claims as follows. The applicant is [name deleted: s.431(2)]. He was born in [District 1], Nepal, on [date and age deleted: s.431(2)]. He is a citizen of Nepal. He is Hindu. He held a Nepalese passport issued in his name by the Nepalese government [in 2012] and valid to [a date in 2022]. He fears harm in relation to Nepal and India. He is married. His wife is named [name deleted: s.431(2)]. They have [children] residing in [Town 2 in India]. His parents are living and reside in Kathmandu. He has [a number of siblings] who also reside in Kathmandu. [Details regarding qualifications history of residence and employment deleted: s.431(2)]. He arrived in Australia as an irregular maritime arrival [in] July 2012.
22. In a statement dated [in] September 2012 attached to the application the applicant claims that he was born in the [remote village] in [District 1] in eastern Nepal. The largest nearby centre was [Town 3]. In the village his family were landowners. When he was [young] his father obtained a position as a lawyer with [a government department] and they moved to [Town 3]. He gives some detail of his education and the history of Nepal, including the formation of a Maoist group known as the Madisha Janatandri Forum led by Professor Upendra [details deleted: s.431(2)].

One of its aims was land redistribution “and tried to take land from people who had been in possession for generations”. He claims he was a member of the Khotany Sewa Samag “a social organisation against this redistribution”. He also claims he was “a supporter of Democratic Political Party who also opposed this policy”. He claims that “my family estate was threatened, my [relative]’s property burnt down. We were threatened and then forced to leave the area and went to Kathmandu. After a year [a government minister] joined hands with [Mr A] who was responsible for smuggling [goods] illegally into China as it is an extremely lucrative business”. He claims he was approached by [Mr A] “[in a certain capacity], to use my property to store the contraband [goods]. I refused because I knew that I stood to lose everything. This resulted in them demanding money from me in the form of a donation to their political union. Which I did. I made several payments over the next 12 months usually around 100,000 rupee (\$1000)”. He claims that at the end of 2011 “my business was not going well at the time due to power restrictions and my wife was in hospital. A [policeman] came to the hospital when I was visiting my wife and demanded \$300,000 from me. He said he had been ordered to collect the money from me and that I had a week to do it otherwise I would be killed. I talked to my father to see if he could help but he said that to pay them would not solve the problem. He advised me to leave the country as [a comrade of his], had just been killed as a result of a dispute with the government. I went back to the hospital the next night and the police came and physically beat me and slapped my [child] in order to try and force me to pay their demands. I asked the doctor to [release] my wife] so that we could escape. We left the capital and went to [a town] which is on the border with India and connected to the rail to any (sic) in India. While there I spoke with my father who told me my house had been taken over by the smugglers. I was frightened that they would catch up with me and kill me and harm my family so I left for India and tried to find a place to settle but was not able to. Even in India I was frightened because I was conscious of the fact this group did business all through every part of India and they spend half of the year in India” He claims to fear harm in Nepal and India as he would be “tracked down by the Minister and his group. They have a very extensive network in Nepal and India as a result of their [goods] smuggling. I fear (sic) because I refused to do business with them and pay them and they would have no hesitation on killing me and my family”. He claims “that the authorities in Nepal will not protect him as it is [a government minister] he fears harm from and he “is the most powerful member of the Nepalese Government”.

23. At interview with the delegate the applicant repeated his claims concerning his fear of harm in Nepal from the [Minister’s] party, being asked for a donation, which he did not give and their being involved in [goods] smuggling, and relevantly also detailed the following. The applicant said in relation to India he could not settle there as there are too many people and not enough opportunity, and this was why he left India. He thought instead that he and his family could settle in [Country 4 or Country 5]. He said that he could go to any part of India, did not need a visa to enter India as “anyone can go” and required only a photo identity. He claimed he could not work there as Nepalese are not trusted. In India his children reside with his wife’s parents who have moved to [India] to care for his and his wife’s children and while they left to seek work in [Country 4]. The applicant and his wife returned to Nepal from India to obtain their new Nepalese passports in June 2012.
24. The applicant provided to the Department copies of medical reports from New Delhi and [[Town 6]] (folios 78 to 82. They are dated in January 2012 and March 2012 and relate to treatment of [the applicant’s child]. They also provided a copy of an internet search [about the death of his father’s comrade].

25. The Delegate found that the applicant had effective protection in India and did not assess the applicant's substantive claims relating to Nepal.
26. The applicant's migration agents provided a written submission dated [in] March 2013 and attached a copy of a prior submission to the Department dated [in] October 2012. The earlier submission claims that the applicant fears harm in Nepal for reasons of his membership of a particular social group – "A member of a wealthy family with large landholdings being targeted by operatives of the ruling Maoist party and his imputed political opinion which is opposed to the philosophy of the ruling Maoist Party". The applicant's claims in the most recent submission are repeated and it is claimed the applicant fears harm in relation to both Nepal and India from the "[Minister] and his collaborators" who have "extensive political and criminal networks" It is claimed his fear of harm is "for reasons of political opinion (imputed and actual opposition to the Maoist Party and its policies)". The Delegate's findings are discussed and it is submitted the delegate's decision concerning effective protection in India "is wrong in law and that India does not provide effective protection to our client". An RRT decision is referred to.
27. At hearing before the Tribunal [in] March 2013 the applicant repeated his claims and added and clarified the following. It was noted by the Tribunal that the applicant's wife had completed a form C. [The representative] advised the applicant's wife had no separate claims of her own and this was confirmed by the applicant and his wife.
28. The applicant's wife's form C provides some history including that her father is [retired]. She [works in a certain profession]. She repeats the history as given by her husband of being threatened and harmed at the hospital by a group of men demanding money and that the police were implicated.
29. In relation to his work history and documents (work references) on the Department file, the Tribunal raised with the applicant that this seemed to indicate he had other jobs than as disclosed in his application. He said he had only ever worked for [Company 7] in Kathmandu and that company is now closed. It last operated when he left from Nepal in 2011. He operated it for one year before its closure in December 2011. The 10 staff left when he closed the office and he believes they have now found other positions. The company was previously called [name deleted: s.431(2)]. It operated under that name for 2 years prior to [Company 7]. The reference documents on the Department file he said were false and made by a friend. He had them as "maybe I thought I would get a better job with having this experience" It was put to him why he wouldn't just give his actual work experience of running a [business] and employing 10 people. He said "in a place like India how would they believe this and I applied for jobs in [Country 4] as well" He had applied for jobs through an agent [in Delhi] - such as work at a call centre in India and in [Country 4] "any work". When pressed for detail he said he had a consultation with the agent but never applied for any job. He claimed he didn't have much time to apply for jobs in India. In [Country 4] he and his wife stayed 10 days. He didn't have a work visa and said he couldn't get such a visa as Nepalese couldn't get one. He went to an agency in [Country 4] and asked what jobs may be available. He was advised to make false Indian papers, though didn't want to take the risk as he was scared and wanted to "settle my kids". They then travelled to [Country 5] and stayed 14 days before returning to [Country 4] by bus. In [Country 5] an agent gave 2 options – one for Australia which he thought was "quite good ... he told me to get a transit visa for Australia ... saying I was going to [another country] ... and we would apply for a protection visa at the airport itself" Their application was rejected as it was said their application could not be checked. They stayed in [Country 4] 5 days to obtain an Indonesian visa; they travelled to Jakarta and stayed in Indonesia for 20 days. He claims that he met the smuggler who arranged the trip to Australia in [Country 5].

30. The applicant said he had returned to Nepal after departure in late 2011. He said he had been to other parts of Nepal, and in particular to [Town 3] to renew his passport. The applicant said all his documents (citizenship certificate, birth and marriage certificate, and passport) were obtained on the same day from the municipal office, and he and his wife and [children] returned to Nepal for 4 or 5 hours to obtain them. This was about 45 days prior to the issuing of his passport [in] March 2012. They were obtained from [Town 3] in the east of Nepal.
31. In relation to India he said that he had been in and out of India twice. In relation to his return trip to Nepal he said he had travelled on an Indian registered vehicle and went on days when Nepal was “closed” meaning when there was a strike. He had lived in [one town] in India for 2 months. His wife’s parents had lived there looking after their [children] and moved from there to [Uttarkhand] in India in November or December 2012. They still reside there. His wife’s father is retired and they have rented accommodation. In [the first location] the applicant and his wife lived in [Town 2]. While there his wife developed [a physical ailment], and the applicant had called his mother-in-law to come to India to look after her. This condition had developed one month after they had arrived in India. This followed on [from where his] wife had been in hospital for [a number of days]. He claimed he and his family arrived in India 11 days after [she was released from hospital].
32. The applicant said that he left Nepal “for my security and my life”. He claims that his ancestral house is in [District 1]. His father is currently [a] lawyer with [a government department] in Kathmandu and “is going to be a [position] ... his position is quite senior”. The applicant’s [siblings are married]. His family “has a lot of pressure ... as the [government minister] was after me”. He claims that this was because he and the [government minister] were “on the same party before from [in Town 3]. He demanded 30 lakh rupee about 4 or 5 years ago in 2064 or 2065 (it is now 2069), his [relatives] house was burned. He and his family moved at that time to Kathmandu and “everything as alright” He claims that [the minister] came to power again and with [Mr A] and one day “I was in the office and 4 or 5 guys came inside and said we have a meeting with [Mr A] and you need to come and meet him. They had guns and all” This was about 14 months before he left Nepal. They “put a black hood on my eyes”. When asked why they would do this he said “maybe they don’t want me to identify the place”. It was put to him that [Mr A] was [an assistant] to [a government minister]. He said he had many jobs at that time. He claims [Mr A] said that he wanted his house in [Town 3] as it was empty and wanted this in writing. He said that it was wanted as “your father has a reputation and no one would question this”. He said the house belongs to his father though has “been given into my name as a gift 8 or 9 years earlier” It was [reasonably close to] the Indian border and they wanted to use it as a warehouse for [goods] smuggling. He described that it was a house with a large garage and “at least 2 trucks of [goods] could be put inside”.
33. The Tribunal put to the applicant that articles relating to [Mr A] indicated he was well known and had property worth [a great value], and hence why would he need the applicant’s property. He claimed this could be for political reasons “or for the gang to survive”. He said he did not agree to the proposal, and said he wouldn’t enter into any illegal work. He was told that if he didn’t agree his wife may not find him returning from work, or his child would not return from school. This was 13 or 14 months prior to his departure from Nepal. He was dropped off back where the men picked him up from. They met somewhere in Kathmandu, though he does not know where.
34. He claims about 11 days later men came to his house and asked him for a donation of 1 lakh rupee. He told them he could only pay once and he gave them the money. He claims they “came again and again” and he paid them 20 to 25 times over a 13 or 14 month period. He claims they came so many times as “it was like a milking cow they came again and again”. He said his

[business] was making about 2 – 2.5 lakh rupee a month (about \$300 per month). At this time there was an electricity problem in Nepal and his business was also “going down”. His wife was [admitted to hospital]. The doctor prescribed [“total bed rest”]. The applicant claims at that time “I didn’t have much money and a group of guys came to my home and they said they were from the Minster and there is advice that you should give a donation of 25 lakh (rupee)”. He told them he didn’t have the money, and couldn’t give it as his wife was [incapacitated], and his [child] was ill. The men left. A week later he claims his wife was admitted to hospital, and that night 10 to 15 men came to the hospital with guns. In the room “they sent the nurse outside and locked the room and gave me 2 slaps ... hit me ... with an open hand ... and hit my kid as well ... and they said you have to give 25 lakh in 3 days if you want your life and your kid to be healthy”. I said “who are you why should I give you money I will report it to the police and one showed me an identity card and his name was [name deleted: s.431(2)] ... I couldn’t see his surname only his first name ... he showed me (his police ID card) as I said I would report it to the police”. The Tribunal put to the applicant that there was difficulty in accepting this as true. The applicant said in response “why there is difficulty in accepting this as true ... people are dying in the country ... three days ago the Hotel Radisson owner was attacked in Kathmandu”. He said it was “the order from [a government minister], and anywhere you go you will not get any justice ... they targeted on my wife and said if you want your husband to be alive you have to arrange this in 3 days. After this they left and I called up my father and told him what had happened. My father was a lawyer and he checked if it was the same inspector or not and he confirmed ... whether he was an inspector or not ... when do I lead my life like this by selling my life ... my father said you can’t lead your life like this so you have to do something ... I discussed with the doctor [about the wife’s condition] I told him I didn’t have time to wait you have seen what has happened and the nurse has seen as well ... he decided to undertake a certain procedure] ... the same day another group of men the same men ... 10 to 15 armed men came to the hospital”. He claimed [specific details of hospital deleted: s.431(2)]. The doctor was [name deleted: s.431(2)]. His wife was [incapacitated] at the time. He claims the men then “took me out and the [child] as well and threatened her again like they did before”. After this he claims he asked for 15 days’ time in which to pay the money and they said “we will only give you 12 days and if you don’t pay we will kill your [child] ... your [child] goes to school on this bus and has these friend’s ... they knew everything about my [child] ... your husband goes to the office and you can’t be sure if he comes back or not” He claims that the doctor was at the hospital on the first occasion but was not on the second”.

35. He claims after this he took his wife home and arranged some money, on the 11th day there was a “ceremony for my kid ... and on the same day we left from Kathmandu ... and went to a border [town] in Nepal ... near the border with India ... made a ticket and from there a train via [to Town 2]” He claims that they went to [[Town 6]] as “I had no options and hadn’t travelled anywhere ... we had [a young child] ... and whatever first ticket I got it”. He claims they first went to [was near Town 2] “as we think it is a good place for Nepalese people and stayed there 2 days”. He claims they did not stay there as “even the rickshaw wallahs said your kid has a fair complexion and they don’t worry about you luggage they steal your kid” After this he said that “my brain was not working” and so we went to [[Town 6]] and stayed 2 months, and then after this moved to Delhi and stayed 3 months.

36. The Tribunal put to the applicant that from the applicant’s own experience he would be aware that as a Nepalese citizen he could travel to India whenever he wanted, and he could live and work in India. He claimed this was false for Nepalese. It was put to him that there were about 10 million Nepalese living in India. He said there were people in [[Town 6]] but they “are living there for ages ... there is a large amount of woman trafficking from Nepal to India and the UN

has said this many Nepalese women have been sold in India”. Apart from this the applicant claimed in relation to India that “the people I was scared with may turn up in India ... the party is a pro-Indian party and they may have a network as well ... my life isn’t in a room and I have to go out as well and my [child] has to go to school and they are threaten and we are scared of being killed at any time ... by the group of [Mr A] and [the minister]”.

37. He claims that if he returns to Nepal now he would be “killed straight away”. To evidence this he referred to a recent incident of a woman returning from Dubai being raped and she is now pregnant as a result. Another person “also had a problem with Maoists and he returned from Dubai and has been missing as well ... kidnaping and killing are a common thing in Nepal ... my father’s friend has been kidnapped from [Town 3] and he is [a prominent businessman] and he they demanded a ransom of 2 crores and after 21 days he was killed and his dead body was found in India ... If I go back I will be killed and it will be in the news” The Tribunal put to him that if they wanted to kill him they could have while he was in Nepal. He said he was giving them what they wanted. The Tribunal put to the applicant why would they target him rather than other members of his family. He claimed that they didn’t touch his father as “he is employed as a government employee”. In India he claimed that his life would not be in a room, he would have to work and his [child] goes to school “the same thing would happen and Nepalese women are regarded as whores”. He claimed his wife had been “sexually harassed by a Delhi doctor ... in that kind of place how can I live”. He said he had come to Australia to “get a good life and a peaceful life. Our country is worse that Iraq Iran and Afghanistan people are dying and there is bloodshed”.
38. The applicant’s wife said “we want to survive here ... please don’t take us out of Australia ... the whole of my life ... I am not coming here for anything ... I left my house and children ... I only came to Australia for safety ... after you have been killed what is the justice for ... we want to live here to survive ... 9 months here I have been dying here every day ... I [had an ailment] and they gave me an injection for this ... Nepal is a good country but the people there are not good and India is worse than Nepal ... about India I am not happy and I am dying every day”.
39. The applicant’s advisor’s made submissions dated [in] March 2013, [in] April 2013 and [in] June 2013. I note in particular the submissions relating to complimentary protection and supporting evidence relating to [the] hospital including statement from [name deleted: s.431(2)], [March] 2013. [This person] is a nurse at [the hospital] and attests to the incidents claimed by the applicant. Country information also details the rate of incidents occurring at hospitals. Attached to the submission [in] March 2013 is a submission dated [in] October 2012. This was not on the Department file and is not referred to in the Department decision. Country information attached to that submission includes reports of police corruption and involvement in extortion and reports on the arrest in Nepal of several police officers for extortion.

CONSIDERATION OF CLAIMS AND EVIDENCE

40. I have taken account of the Tribunal’s guidelines ‘Guidelines on the assessment of Credibility’ Credibility is difficult to assess and in my view should not be made on demeanour or reaction at interview. However, where there are clear inconsistencies or where some claimed history is far-fetched or unrealistic it may be that those claims, after careful consideration, cannot be accepted as being true.
41. I have carefully considered the applicant’s claims in relation to Nepal, and whilst I have some doubt as to aspects of those claims (such as why the applicant would be targeted and not his father or other family members, and why anyone would want his particular building in his home

village) I am prepared to give him the benefit of the doubt and accept that his claims in relation to Nepal are true.

42. I accept that the applicant was targeted for extortion in Nepal by [a government minister], and this person through his agents including [Mr A] – and others working for him including a [police officer who] sought to demand money and the applicant's building in his home village. I accept as true that as a consequence the applicant and his family were threatened and assaulted and have left Nepal as they feared they would be killed. The Minister's motivation to harm him is clearly to extract money and to obtain his property. The Minister has according to the applicant's father taken over the property. Whilst there is some element of a political background in the relationship between the applicant and the [Minster], this does not of any necessity mean that the motivation of the [Minster] is for reasons of political opinion or membership of any political group. I find that the essential and significant reason is extortion. I find that the motivation to harm the applicant is not *for reasons of* a Convention ground.
43. In considering the complimentary protection criterion it is apparent that if the applicant were to return to Nepal he would again be targeted. I am reasonably satisfied that as he is known to the [government minister], to [Mr A] and his associates that they would see him as someone they could again threaten and seek money from. I am reasonably satisfied that in doing so they would be aware that he has run off from them in the past and not paid what was demanded. I am reasonably satisfied that as a as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that he will suffer significant harm. I accept that he and his wife and children will be threatened, assaulted, and again have money extorted from them. I also accept in such circumstances there is a real risk he will be killed.
44. Having made this finding however I am reasonably satisfied that the applicant has effective protection in India.
45. As discussed with the applicant at hearing and if he has concerns about return to Nepal for any reason, relevant to this application is what rights he has in relation to India. Both the applicant and his wife have visited India and lived there for about 5 months prior to leaving India to find work in [Country 4] The applicant's children reside in India and are cared for by applicant's wife's parents. The applicant's wife's parents have moved to India. They first came specifically to care for her and the children as she was ill. They remained to care for the children when the applicant and his wife left to seek work in [Country 4].
46. Of relevance on this issue is the *India-Nepal Treaty of Peace and Friendship of 1950*. (CX296177: Nepal/India: Open border and India's security concerns; Telegraph Nepal, 27 September 2012. Indian Bureau of Immigration at immigrationindia.nic.in NPL31679: *Nepal 1950 Treaty of Peace and Friendship*; CX291955: *Nepal/India: Identity of a Nepali in India*, Darjeeling Times, 10 August 2011). This Treaty details special relations that exist between India and Nepal. The provisions of the Treaty allow Nepalese citizens the ability to live and work in India, and avail themselves of facilities and opportunities at par with Indian citizens. There are reportedly between 3 million and 13 million Nepalese citizens living in India. Over the years Nepalese governments have sought to review the Treaty. India has said it is willing to examine all such treaties with a view to strengthening relations. As to specifics:
 - Nepalese citizens are able to cross the land border without a passport though they are required to possess proof of their identity.
 - If they enter India from a place other than their country they must possess and enter with a passport.

- Nepalese citizens do not require a visa to enter India.
- Nepalese citizens are not denied entry into India unless they are on the lookout list of agencies, are suspected of involvement in terrorist activity or under instruction from the intelligence agencies.
- There is reporting of targeting of small sections of the Nepalese communities living in Assam, Manipur and Meghalaya.

47. I have carefully considered the above in the context of the applicant and his wife having lived in India for about 5 months and the applicant's wife's parents living there now with the applicant's children in rented accommodation. The applicant is a Nepalese citizen and has a Nepalese passport. The above law is an international treaty. It is apparent it does allow Nepalese citizens the right to enter in and reside in India, and that this is true is evident from applicant's and his family's travel history to India and their having lived there, and the wife's parents residing there now and having done so for over 16 months. No claim has been made that they have suffered any harm or have any concern about living in India. I am reasonably satisfied that as such the applicant does have a presently existing right to enter and reside in India as meant by section 36(3) of the Act.
48. In relation to India, as detailed above the applicant has lived there, and the reason he left was to seek work in [Country 4]. He had not attempted in any meaningful manner to seek work in India, and given his education and work background and family situation it is reasonable to conclude he would be able to find work in India. In India the applicant claims that he and his family may be followed in India by the people who threatened them in Nepal. I do not accept that this is reasonable to believe as true. There is no evidence that the Nepalese [Minster] or his group has any influence in India or that they undertake any activities in India. Given that the applicant and his wife and family resided in India for 5 months without being of any adverse interest to any such group, and give that the wife's parents reside there now and have done so for over 16 months without any concern indicates to me that the applicant would also be able to do so without fear of harm.
49. The applicant has said that he felt unsafe in India and has referred to his wife being sexually harassed by a doctor in Delhi. Whilst I accept that may have occurred it was not expanded on by him and there is no reason to think this would again occur. I also accept that the applicant has a general concern about the way Nepalese women may be regarded in India and also about light coloured children being kidnapped, however such concerns are not of sufficient seriousness as could be considered as persecution as meant by the Convention nor do I accept given the absence of any supporting country information that such concerns are well-founded.
50. I have carefully considered these concerns relating to India. These claims and concerns however are not of the type of harm, or of a seriousness, as could be considered as persecution as meant by the Convention definition or section 91R of the Act, or as could be considered as significant harm as meant by s.36(2)(aa). I find that the applicant's fear of harm in India is not well-founded. I find that for the same reasons there is not a real risk that he will suffer significant harm in India.
51. There is no evidence to suggest that the authorities in India would return the applicant to another country where he may face persecution or significant harm. I find that the provisions of section 36(4), (5) and (5A) are not met by the evidence in this case.
52. Accordingly, the application fails on this basis and I find that Australia is taken not to have protection obligations in respect of the applicant.

53. For the reasons given above the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that he is also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

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