FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGXK v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 822*

MIGRATION – RRT decision – Nepalese applicant claimed fear of persecution and forced recruitment by Maoists – Tribunal found a right of entry and residence in India – no evidence of such a right under 1950 treaty of Nepal and India – whether finding supported by other evidence – alternative finding by Tribunal that applicant could live safely in Kathmandu – no material jurisdictional error – application dismissed.

Migration Act 1958 (Cth), s.36

Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326
Attorney-General for Canada v Cain [1906] AC 542
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Gunaleela & Ors v Minister for Immigration & Ethnic Affairs (1987) 15 FCR 543
Minister for Immigration & Multicultural Affairs v Applicant C (2001) 116 FCR 154
Musgrove v Chun Teeong Toy [1891] AC 272
NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 222 CLR 161
Neilson v Overseas Project Corporation of Victoria Ltd (2005) 223 CLR 331
Nishimura Ekiu v US (1892) 142 US 651
Povey v Qantas Airways Limited (2005) 223 CLR 189
Re East; Ex Parte Nguyen (1998) 196 CLR 354
Simsek v McPhee (1982) 148 CLR 636
SZEAS v Minister for Immigration [2005] FMCA 1776
SZFKD v Minister for Immigration [2006] FMCA 49
SZGME v Minister for Immigration and Citizenship [2008] FCAFC 91
SZLAN v Minister for Immigration [2008] FCA 904

Applicant:	SZGXK
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2859 of 2007

Judgment of:	Smith FM
Hearing date:	20 March 2008
Date of Last Submission:	24 April 2008
Delivered at:	Sydney
Delivered on:	10 July 2008

REPRESENTATION

Counsel for the Applicant:	Mr I Newman
Solicitors for the Applicant:	Newman & Associates
Counsel for the First Respondent:	Mr S Lloyd
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2859 of 2007

SZGXK
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a national of Nepal, who was studying in Brunei. He came to Australia in December 2004 to watch a cricket match, and on 13 January 2005 he applied for a protection visa. He claimed that he was at risk from the Maoist insurgents if he returned to Nepal.

2. In a statement attached to his visa application, he said that his family came from a region affected by Maoist activities, and that his grandfather had been tortured by them and was recovering in Kathmandu. The Maoists had seized family property and killed his uncle. They had demanded from his father, a doctor working for the government, that he pay them money and send his son to them for training. His parents and siblings had moved to Kathmandu, but his parents considered that the applicant was unsafe and sent him overseas to study.

3. A delegate refused the application on 21 January 2005, upon the ground that *"as a matter of practical reality, the applicant as a citizen of Nepal, can enter, re-enter, and live in India, with all the rights and*

privileges available to nationals of India without any fear that he will be forced to return to Nepal."

4. This reasoning applied an interpretation of the Refugees Convention, as adopted by the Migration Act, which was subsequently overruled by the High Court in *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 222 CLR 161. The delegate's finding as to entry to India as a "practical reality", was insufficient to exclude Australia's obligations under the Refugee Convention, and also insufficient under the legislated 'safe third country' provisions in s.36(3), (4), and (5) of the Migration Act to exclude the applicant's qualification for a protection visa under s.36(2).

5. The statutory exclusion only applies if the applicant *"has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia …"*. On Full Court authority which is binding on me, the reference to *"a right to enter and reside in"* the other country means *"a legally enforceable right"* of the applicant recognised under that country's domestic laws. This was the effect of Stone J's judgment in *Minister for Immigration & Multicultural Affairs v Applicant C* (2001) 116 FCR 154 at [62], with whom Gray and Lee JJ agreed, where she approved the interpretation of the primary judge set out at [35] and [36]. Doubts have been expressed by other Federal Court justices in relation to this interpretation, most recently by Graham J in *SZLAN v Minister for Immigration* [2008] FCA 904 at [60]-[67], but I have not been able to identify any subsequent opinion which I am bound to prefer (cf. *SZGME v Minister for Immigration and Citizenship* [2008] FCAFC 91 at [42]).

6. As I shall discuss below, there continues to be uncertainty in the Tribunal whether all citizens of Nepal generally possess a legal right to enter and reside in India. The present Tribunal appears to find that they do, and I shall consider below whether this was open to it. It was not suggested by the Tribunal that the applicant had such a right specifically granted to him under an Indian immigration visa or other entry permission.

7. On appeal to the Refugee Review Tribunal, the applicant explained his claimed history at a series of hearings held by the member first constituting the Tribunal in May and July 2005, and to the member

who last constituted the Tribunal in July 2007. He also submitted some corroborative documents, including a statement from his father. Between those hearings, two decisions of the Tribunal were set aside by consent orders of this Court, based on concessions that there were jurisdictional failures of procedures required under s.424A(1) of the Migration Act. Similar failures are not now alleged to vitiate the third decision, which is currently under review before me.

8. The Tribunal handed down its last decision on 23 August 2007, affirming the delegate's decision. In its 'findings and reasons', the Tribunal accepted that the applicant's family had suffered significantly from the Maoists in their home district. However, it did not accept that the Maoists had sought to recruit the applicant while he was living in Kathmandu for eight years, and it said that his fears were inconsistent with independent evidence.

9. It concluded: *"I consider that Kathmandu is as safe as the information referred to above indicates"*. It said: *"I am reinforced in this conclusion by the fact that … he could have moved to India if he had genuinely considered that he was in danger of being persecuted by the Maoists in Kathmandu"*. It referred to the applicant's concession that *"it was possible to go, and that he had been there himself"* twice *"for cricket matches"*. It concluded:

> *I do not accept that there is a real chance that, if the applicant returns to Kathmandu now or in the reasonably foreseeable future, he will be forcibly recruited, physically harmed, killed or otherwise persecuted by the Maoists.*

10. The Tribunal also made findings, that the applicant came within s.36(3) of the Migration Act, because he *"has the right, in accordance with the 1950 Treaty of Peace and Friendship between India and Nepal, to enter and reside in India on presentation of his passport"*, and because there was not a real chance that he would be persecuted for Convention reasons in India.

11. The applicant now asks the Court to set aside the Tribunal's decision and to remit the matter for further consideration. I can only make these orders if I am satisfied that the decision was affected by jurisdictional error. I do not have power myself to decide whether the applicant qualifies for a protection visa nor any other permission to stay in Australia.

12. The application was set down at its first court date on 9 October 2007 for final hearing on 20 March 2008. At the hearing, a solicitor appeared for the applicant, and informed the Court that he had only recently been instructed, and had not yet fully digested the material in the Court Book. After some discussion, it was agreed between the legal representatives of the parties that the hearing would be completed on written submissions, unless I considered it necessary to recall the parties for further oral submissions. Full written submissions have now been exchanged, and I have not found it necessary to recall the parties.

13. The applicant's amended application has one ground of jurisdictional error:

> *The Tribunal erred in law and failed to exercise its jurisdiction by:*
>
> *1. taking into account irrelevant material making erroneous findings and reaching mistaken conclusions contrary to law.*
>
> *Particulars*
>
> *a. The Tribunal accepted the applicant's factual claims excepting the claim that the Maoists sought to recruit him while he was living in Kathmandu for the reason that it did not accord with the independent evidence available to the Tribunal to wit that the Maoists recruit children in the west and far west of Nepal (see p 13 of the said decision) and that Kathmandu is safe and by so doing took into account irrelevant material and fell into jurisdictional error.*
>
> *b. The Tribunal said it was reinforced in its conclusion that Kathmandu was safe by the fact that if the applicant had held genuine fears of harm he could have exercised his rights under the 1950 Treaty of Peace and Friendship between India and Nepal by moving to India. In reaching this finding the Tribunal misread and misconstrued the treaty which contrary to the Tribunal's finding gave no such right of entry and in so doing made an erroneous finding and reached a mistaken conclusion contrary to law and fell into jurisdictional error.*

14. As I understand this ground as addressed by the applicant's written submission, it presents two steps: (i) the Tribunal arrived at a finding which was not open to it as to the applicant's 'right' to enter and reside in India under the 1950 Indo-Nepal Treaty, thereby vitiating its application of s.36(3); and (ii) this finding also infected its conclusion that the applicant was not at risk of persecution by Maoists if he returned to live in Kathmandu. That conclusion was also challenged as inconsistent with country information which was, or should have been, considered by the Tribunal.

15. As I shall explain, there is some substance to the applicant's contention that it was not open to the Tribunal to make a finding on the evidence before it that the applicant had a right described in s.36(3), as construed by the Full Court. However, I do not accept that the Tribunal's alternative conclusion as to the risk of the applicant returning to Kathmandu was affected by that error, nor by any other jurisdictional error.

16. The Tribunal expressly based its conclusion under s.36(3) upon the terms of the 1950 Treaty of Peace and Friendship between India and Nepal, and upon comments upon the Treaty's effect and implementation found in two 'reports' from the Australian Department of Foreign Affairs and Trade dated 11 April 2006 and 23 October 2006.

17. The English text of the treaty, as published in the United Nations Treaty Series for 1951, contains the following 10 operative articles:

> *Article 1*
>
> > *There shall be everlasting peace and friendship between the Government of India and the Government of Nepal. The two Governments agree mutually to acknowledge and respect the complete sovereignty, territorial integrity and independence of each other.*
>
> *Article 2*
>
> > *The two Governments hereby undertake to inform each other of any serious friction or misunderstanding with any neighbouring State likely to cause any breach in the friendly relations subsisting between the two Governments.*
>
> *Article 3*

In order to establish and maintain the relations referred to in Article I the two Governments agree to continue diplomatic relations with each other by means of representatives with such staff as is necessary for the due performance of their functions. The representatives and such of their staff as may be agreed upon shall enjoy such diplomatic privileges and immunities as are customarily granted by international law on a reciprocal basis : Provided that in no case shall these be less than those granted to persons o£ a similar status of any other State having diplomatic relations with either Government.

Article 4

The two Governments agree to appoint Consuls-General, Consuls, Vice-Consuls and other consular agents, who shall reside in towns, ports and other places in each other's territory as may be agreed to.

Consuls-General, Consuls, Vice-Consuls and consular agents shall be provided with exequaturs or other valid authorization of their appointment. Such exequatur or authorization is liable to be withdrawn by the country which issued it, if considered necessary. The reasons for the withdrawal shall be indicated wherever possible.

The persons mentioned above shall enjoy on a reciprocal basis all the rights, privileges, exemptions and immunities that are accorded to persons of corresponding status of any other State.

Article 5

The Government of Nepal shall be free to import, from or through the territory of India, arms, ammunition or warlike material and equipment necessary for the security of Nepal. The procedure for giving effect to this arrangement shall be worked out by the two Governments acting in consultation.

Article 6

Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, in its territory, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts, relating to such development.

Article 7

> *The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.*

Article 8

> *So far as matters dealt with herein are concerned, this Treaty cancels all previous Treaties, agreements, and engagements entered into on behalf of India between the British Government and the Government of Nepal.*

Article 9

> *This Treaty shall come into force from the date of signature by both Governments.*

Article 10

> *This Treaty shall remain in force until it is terminated by either party by giving one year's notice.*

18. The Tribunal's application of s.36(3) of the Migration Act in the present case requires the Court to consider whether it was open to the Tribunal to conclude that the treaty confers on Nepalese nationals such as the applicant *"a right to enter and reside in [India], whether temporarily or permanently and however that right arose or is expressed"*.

19. In *SZLAN* (supra), Graham J at [68] referred generally to my judgment in *SZFKD v Minister for Immigration* [2006] FMCA 49, and suggested that I had erroneously held that s.36(3) contemplated the existence of two separate rights, a right to 'enter' and a right to 'reside' in the safe third country. He pointed out in a Nepalese case that *"the issue is simply whether there was a right to 'enter and reside' in India"*.

20. I did not intend to suggest the contrary in my reasoning in *SZFKD* at [40] to [45]. Rather, the point which I attempted to make was that the right which is in contemplation in s.36(3) must involve a right held by a person outside the safe third country to be permitted under that country's immigration controls to enter the country and then to reside

in it, *'whether temporarily or permanently'*. The word 'enter' in the description of the relevant right in s.36(3) must have this effect, particularly in a context addressing safe haven in a third country, where an applicant for an Australian protection visa is normally not present in that third country.

21. In *SZFKD*, and in *SZEAS v Minister for Immigration* [2005] FMCA 1776 at [35]-[40], I expressed the opinion that it was not open to the Tribunal to find such a right being conferred on a Nepalese national (nor reciprocally to an Indian national) under Article 7 of the 1950 Indo-Nepal Treaty of Peace and Friendship. This was because the article bound each of the respective governments only *"to give to the nationals of one country* ***in the territories of the other*** *the same privileges in the matter of residence, ownership of property …etc"* (emphasis added). Article 7 did not address the giving of any rights in relation to entry and residence in India to Nepalese who were not *'in the territories'* of India. Similarly, it did not address giving rights to Indians to enter and reside in Nepal. In its terms, it did not address the exercise of each country's immigration controls at their borders. If Article 7 was a source of anything which could be identified as a 'right' conferred on nationals of Nepal in relation to their residence in India, it was only the right to be treated equally with Indians after they had been given a permission to enter.

22. I remain of this opinion, after considering the whole text of the treaty, even when addressing its effect in the context of the evidence which was before the present Tribunal, and when approaching the effect of the treaty in the context of a judicial review application. That context requires the Court to consider whether a contrary interpretation would be reasonably open to the present tribunal of fact on the evidence before it, when addressing the applicant's rights to 'enter and reside' in India within the meaning of s.36(3) of the Migration Act.

23. In my opinion, the language of the Treaty, and of Article 7 in particular, clearly does not purport to confer on citizens of either Nepal or India a 'legally enforceable right to enter and reside' in the other country. Nor does its language impose any obligation on either of the governments to confer such rights under their domestic immigration laws. Given the relative geographies, populations and histories of the two countries, it

would appear surprising to have found such rights, at least, if given to the whole Indian population.

24. It would not be a proper construction of such a treaty to draw from its terms obligations in relation to the exercise of each country's border controls going beyond the specific agreements. Rather, as an agreement between the governments of two independent and sovereign nations (see Article 1), it is to be understood in a context where it is inherent to sovereignty under international law that each country generally can control movement into its own territory, and that an alien has no right to compel it to admit him or her into its territory (see *Musgrove v Chun Teeong Toy* [1891] AC 272 at 282-283, *Attorney-General for Canada v Cain* [1906] AC 542 at 546, *Nishimura Ekiu v US* (1892) 142 US 651 at 659, and *Gunaleela & Ors v Minister for Immigration & Ethnic Affairs* (1987) 15 FCR 543 at 558).

25. Article 7, far from requiring either government to permit the entry and residence of the nationals of the other country, does not concern a right of entry and residence at all. It only requires equality of treatment 'in the matter of residence, etc' once permission to enter has been given. The groups of persons whose rights could be concerned in Article 7 are only the two groups of each country's nationals who have been permitted to enter the other country. Some obligations in relation to movements for other purposes, such as trade, diplomacy, or defence, might be implied by the other articles. However, these would be far from an obligation on India or Nepal to allow a general right to all the nationals of each country freely to settle in the other country, whether temporarily or permanently. If, indeed, India has conferred such a right on Nepalese nationals, the right must be found in some source other than the 1950s Treaty.

26. Moreover, in its terms the treaty does not purport to confer enforceable rights on the nationals of either country, and such an effect cannot be assumed. It would be inconsistent with the principle of Australian law, inherited from and shared with the British Empire, that governmental obligations under treaty are incapable themselves of giving rise to rights and obligations under domestic law without the intervention of the domestic legislature. As Lord Atkin said in *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 at 347:

> *Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing law, requires legislative action. Unlike some other countries, the stipulations of treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of parliament to the necessary statute or statutes.*

27. This principle has repeatedly been affirmed in the High Court. In *Simsek v McPhee* (1982) 148 CLR 636 at 641-642 Stephen J said:

> *Accepted doctrine in this Court is that treaties have "no legal effect upon the rights and duties of the subjects of the Crown" –* Chow Hung Ching v. The King *(1948) 118 CLR 449 at 478; aliens are in no different position –* Bradley v. The Commonwealth *(1973) 128 CLR 557 at 582. The applicant wishes, however, to argue before a full bench that when what is in question is not an obligation imposed upon an individual by a treaty but, rather, a right conferred upon the individual by a treaty, the Commonwealth being subjected to a corresponding obligation towards the individual, the position is otherwise. This, it is said, is a quite different proposition from that for which Chow Hung Ching and Bradley, properly understood, are authority. In my view those authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law: Wade & Phillips, Constitutional Law, 8th ed. (1977), p. 277. Were it otherwise "the Crown would have the power of legislation": Mann, Studies in International Law (1973), p. 328.*
>
> (see also *Re East; Ex Parte Nguyen* (1998) 196 CLR 354 at [68]; and *Povey v Qantas Airways Limited* (2005) 223 CLR 189 at [59])

28. When forming factual opinions on the effects of the treaty under Indian Law, the Tribunal would have been required to assume that no different legal principle would apply in India unless it was satisfied otherwise (see *Neilson v Overseas Project Corporation of Victoria Ltd* (2005)

223 CLR 331 at [125]). However, the evidence before the Tribunal, to which I shall refer below, tended to confirm that this remains a principle of Indian law, and in the absence of any evidence to the contrary before the Tribunal it could not assume the contrary

29. In any event, in my opinion, the language of the present treaty, and of Article 7 in particular, did not allow the Tribunal to conclude that it gave any locally enforceable rights to nationals of either country, since it was expressed purely in terms of the reciprocal obligations of governments, and did not purport to address private rights.

30. I do not consider that the two DFAT reports relied upon by the Tribunal, gave evidentiary support for the Tribunal's finding that the applicant had a right "*in accordance with*" the Treaty "*to enter and reside in India on presentation of his passport*".

31. The DFAT report of 11 April 2006 contained statements that:

- "*the Post (*i.e. the relevant Australian Embassy*) advised that they are unaware of hindrances to Nepalese citizens availing themselves of access to India under the 1950 Treaty*"
- "*Nepali nationals are required to show some evidence to support their identity as Nepali nationals when they cross the Indo-Nepal border*"
- "*Nepalese nationals enter India freely*", and
- "*the conflict in Nepal was leading to an increasing number of Nepalese coming to India to settle*".

32. None of these statements provide evidence of the legal basis upon which such movements of Nepalese across the Indian border occur. The author of the report appears to assume that the Nepalese were "*exercising their legal rights under the 1950 Treaty"*. However, as I have indicated, the language of Article 7 itself clearly suggests that no legal right to enter and reside was conferred under that treaty. Where the Tribunal had before it the terms of Article 7, it could not ignore those terms in preference for an apparently inconsistent and unexplained opinion of the author of a DFAT report.

33. The second DFAT report of 23 October 2006 appears to have been prepared in response to further inquiries by the Tribunal, attempting to clarify the legal basis upon which Nepalese nationals were permitted to enter and reside in India. However, it only repeated the terms of Article 7, and did not give any opinion or information directly confirming that a Nepalese national outside India had a legal right of entry and residence which was enforceable against the Indian government, whether under the treaty or otherwise. It tended to suggest that that Nepalese were being allowed to settle in India upon individual discretionary decisions made in each case by Indian immigration officials at the border.

34. In this respect, the report gave the equivocal information that an Indian government lawyer had advised that treaty obligations on India were *"implemented as a matter of course"*, and that *"the practice was for the conditions of the treaty to be met by India without the passage of domestic legislation"*. This information from DFAT tends to suggest that invocation of the treaty as the explanation for the settlement of Nepalese in India is a feature of discretionary immigration or foreign policy on the part of the Indian government, rather than reflecting its legal obligations. I do not consider that the second DFAT report gave support for giving Article 7 a meaning which its language does not support.

35. However, the second DFAT report also gave the following information about Indian immigration practices, which might imply some unexplained source of a right of entry and residence:

- "Nepalese citizens do not require a visa to enter India", but "it is necessary to produce" an identity document, and
- "currently, Nepalese nationals were not denied entry into India" unless they were of security concern.

36. Considering all of the evidence which was before the present Tribunal concerning the movement of Nepalese persons such as the applicant to settle in India, I would maintain in the present case the opinions which I have previously given in other cases. This is that it would not be open to the present Tribunal to have found that a Nepalese national had a right such as is referred to in s.36(3) of the Migration Act, arising from the operation of Article 7, or any other article, of the 1950 treaty between India and Nepal.

37. In my opinion, the present Tribunal made an error of law in this respect when concluding:

> *I find that, as a Nepalese national, the applicant has the right, in accordance with the 1950 Treaty of Peace and Friendship between India and Nepal, to enter and reside in India on presentation of his passport.*

Assuming that the effect of the treaty under Indian law was a question of fact for the Tribunal, an error of law occurred when the Tribunal arrived at an opinion on the effect of the 1950 Treaty which was not open to it (*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, per Mason J at 355-356).

38. The error by the Tribunal as to the legal effect of the treaty under Indian law might, however, not have jurisdictional implications, if the Tribunal's ultimate conclusion as to a right coming within s.36(3) could be supported by the other evidence cited by the Tribunal from the DFAT reports. As I have identified above, some of the information given in the DFAT reports might possibly support a finding that, independently of the legal effects of the treaty, India generally gave Nepalese persons in the position of this applicant, who are outside its territory, a right to enter and reside in its territory. Even if the evidence was highly equivocal as to the existence of an underlying "right to enter and reside" which explained the settlement of large numbers of Nepalese in India, a court on judicial review should be slow to find that it was not open to the Tribunal to infer the existence of such a right enforceable under Indian law. Particularly, since current authority, which is binding upon me, placed on the visa applicant the evidentiary burden of proof to the contrary (see Graham J in *SZLAN* (supra) at [58]).

39. This issue is not easily decided in the present case, and I have concluded that it is unnecessary for me to arrive at a firm opinion whether the present Tribunal's conclusion that Australia's protection obligations to the applicant were excluded by s.36(3) was sufficiently supported by any evidence before the Tribunal. This is because I consider that the Tribunal gave an independent alternative reason for not being satisfied as to the criteria referred to in s.36(2), in its conclusion that the applicant would be safe if he returned to live in

Kathmandu. On this conclusion, issues of a 'safe third country' under s.36(3) did not need to be addressed by the Tribunal.

40. I do not accept the applicant's submission that the Tribunal's misapprehension as to the legal effects of the 1950 treaty was part of its reasoning which supported its alternative conclusion. It expressly referred to its conclusions about s.36(3) as being provided *"furthermore, and in the alternative"*, and nothing in its reasoning causes me to think otherwise. Its alternative reasoning was firmly based only upon its assessment of the applicant's evidence as to his and his family's history in Nepal.

41. In the course of its assessment of the applicant's evidence, the Tribunal drew support for its rejection of the applicant's claimed fears in Kathmandu from the fact, as it found, that *"he could have moved to India if he had genuinely considered that he was in danger"*. The applicant submits that this shows that it was influenced in this part of its reasoning by an incorrect understanding of the effect of Article 7 of the Indo-Nepal treaty.

42. However, in the light of the material before the delegate and Tribunal suggesting that in fact a Nepalese person in his position would probably have been permitted by the Indian government to settle in India, I do not read this part of the Tribunal's reasoning as depending upon its subsequently expressed opinion that his resettlement could occur pursuant to 'a right to enter and reside' which was legally enforceable. The applicant did not contend that there was no evidence before the Tribunal suggesting the practical possibility of his being permitted to resettle in India, as distinct from a legally enforceable right of entry.

43. The applicant's submissions also separately challenged the Tribunal's alternative conclusion upon the ground that it relied upon country information which was "irrelevant" when concluding that Kathmandu would be safe for the applicant. It was submitted:

> *10. Firstly, the applicant's credibility was not in doubt by this Tribunal which accepted that his family had problems with the Maoists and as they were wealthy Brahmins they were targeted by them and that senior family members had been killed or injured and that they had political connections- see CB 247. The Tribunal when dealing with the fact that the*

applicant had lived in the capital of a country in the midst of a civil war with ruthless men on both sides omitted to make mention of the claim that it was not until July 2004 three months before he left Nepal that he was personally approached by the Maoists and given an ultimatum to join up by January 2005 or else – see CB 240…He entered Australia on 13/12/04 – see CB 222. His claim was rejected by the Tribunal as it 'did not accord with the evidence available to the Tribunal…indicates that the Maoists have recruited children in the areas firmly under their control…and that they have recruited heavily among lower caste Nepalese'. The Tribunal used as its source a report from Human Rights Watch – "Children in the Ranks". The Tribunals assertion however was not contextual. The report used these words -

> *"While no exact figures are available, local groups estimate that at least 3,500 to 4,500 Nepali children are part of the Maoist fighting forces. Tens of thousands of Nepali children have been forced to flee their homes to avoid recruitment by the Maoist, or to seek better lives away from already impoverished communities further damaged by the conflict and the governments brutal responses"*

strongly suggestive that cadres and operatives were drawn from other strata of society as well- the applicant was a national cricketer and his membership of the group might well have been a political coup for them. In any event the Tribunal seeking to justify its findings on the basis of available evidence could have looked at the report of the International Crisis Group no. 104, 27 October 2005, 4 pages of which are annexed. Of particular interest is section B of pages 14-15which describes the membership aspirations of the group hopeful of recruiting not just the poor but also 'the petty and national bourgeosie'.

44. Essentially, I consider that this argument only engages the Court in a merits review of the evidence before the Tribunal. I have not been persuaded that it raises any jurisdictional error, and certainly not that it establishes such an error. I accept the particular points made in the Minister's written submissions:

> *7. The applicant's submissions observe that the applicant's credibility was not "in doubt by this Tribunal". This was premised upon the fact that it had accepted that some of the*

applicants claims. While the Tribunal accepted some matters that the applicant advanced, it disbelieved others (as it was entitled to do). No error is disclosed.

8. *The applicant says that the Tribunal "omitted to make mention of the claim that it was not until July 2004 three months before he left Nepal that (the applicant) was personally approached by the Maoists". On the contrary, the Tribunal's statement of reasons reveal that it was aware both of the time of the applicant's departure from Nepal and of the time of the alleged approach by the Maoists. It is simply wrong to say that the Tribunal omitted to make mention of these matters.*

9. *The applicant then contends that the Tribunal's conclusion took the Human Rights Watch out of context. This would be at most an error of fact (unless it is suggested that it was done intentionally which has not been suggested). In any event, the Tribunal's conclusions are entirely supported by the report and the pages referred to by the Tribunal. The passage extracted by the applicant is taken from a different overview chapter and is more general. It does not contradict the conclusions of the Tribunal in any event.*

10. *Finally, the applicant contends that the Tribunal might have looked at other country information which might possibly be construed as supporting a different conclusion. A copy of such a report is included. The Minister objects to the tender of this report as it was not clearly before the Tribunal. In any event, that report does not speak of what were the Maoists' practices but of some political assessment of where recruits and support might possibly come from when the armed struggle commenced. The report is irrelevant.*

45. For the above reasons, I am not satisfied that the Tribunal's decision is affected by a jurisdictional error for which relief should be given. I therefore must dismiss the application.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Michael Abood

Date: 10 July 2008