

0800870 [2008] RRTA 143 (14 April 2008)

DECISION RECORD

RRT CASE NUMBER: 0800870

DIAC REFERENCE(S): CLF2004/60232

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Andrew Jacovides

DATE DECISION SIGNED: 14 April 2008

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 and Citizenship 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, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant sought review of the delegate's decision and the Tribunal,.

RELEVANT LAW

5. 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. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
6. Section 36(2)(a) of the Act 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 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).
7. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

8. 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.
9. 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 and *Applicant S v MIMA* (2004) 217 CLR 387.

10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
14. 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.
15. 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 persecution 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.
16. 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.

17. 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.

CLAIMS AND EVIDENCE

18. The Tribunal has before it the Department file CLF2004/060232, with the protection visa application and the delegate's decision and the Refugee Review Tribunal (RRT) files.
19. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages.
20. The applicant was represented in relation to the review by a registered migration agent.

Department file CLF2004/060232

21. The applicant stated in his protection visa application that he was a citizen of Nepal. He stated he was born in Nepal. He stated that he was fluent in Nepali, Hindi, and English; and he described himself as a Hindu Brahmin. He stated he completed his education in the mid 1980s and he worked as a trades person before he came to Australia. He stated he was married with children. He indicated that his wife and children lived in Nepal.
22. The applicant submitted a statement in Nepali without a translation. His adviser essentially claimed on his behalf that he was an active member of the Communist Party of Nepal - Maoists [CPN(M)] and he was targeted by the authorities for his political opinion. He claimed that he was accused of involvement in a bomb attack against his employer and the authorities suspected him of being a Maoist cadre. He claimed that he was not safe in Nepal due to human rights conditions and the adverse interest of the authorities.
23. The delegate found that the applicant could avoid harm in Nepal by relocating to India under the *Treaty of Peace and Friendship*.
24. The applicant did not provide any new claims with his review application.
25. The Tribunal received a submission from the applicant. He provided documents relating to his family background; evidence that he belonged to the CPN-M and the a union; a letter from his former employer, to indicate that he worked as a tradesperson and he was a sincere and hard working employee; information from external sources that Maoists were targeted in India.
26. The applicant attended a hearing with the Tribunal. The following is an accurate summary of the evidence presented by the applicant at that hearing:

The hearing was conducted with the assistance of a Nepalese Interpreter. The Applicant presented his passport and several other documents to the Tribunal. The Applicant was asked about his passport. He stated that it was his second passport and that he had not travelled on his first passport. The Applicant stated that he had been granted a visa to come to Australia but that he had applied some some months previous to this for the visa. The Applicant stated that

although the visa was issued from India he did not himself need to travel to India for the visa to be issued.

The Applicant was asked if he had difficulties leaving Nepal via the airport. The Applicant stated that he did have some difficulties. The Applicant was asked to elaborate on these difficulties. He stated that the police are searching for him so that he needed to pay some money to the police security at the airport in order for him to be able to depart from the airport.

The Applicant was asked about the various documents that he had submitted to the Tribunal. The Applicant stated that one document, untranslated related to his membership of a union and that it stated that he was the an office holder of this trade union in his workplace. The interpreter translated this document. The Applicant stated that the other documents are already on his file but that he was submitting two new documents to the Tribunal. The first document- Communist Party of Nepal (Maoist) states that the Applicant is a member of this particular party. The Applicant stated that he had obtained this document some two weeks ago from Nepal. The second document is the Applicant's membership card of the Union.

The Tribunal asked the Applicant about the document which states "they are sponsoring their son [name] who is going to Australia on the way to travel if he needs financial support. He is the son who has to look after their parents' property and farming or so his job on the [position] so that we are sure he will definitely come back to Nepal after his [relative's] treatment."

The Applicant was asked whether he could explain to the Tribunal about his relative's treatment and what this statement referred to. The Applicant stated that his relative required medical treatment and she had initially had some treatment in country A but had come to Australia for treatment and had since returned. The Applicant stated that he had accompanied that relative to Australia.

The Applicant was asked about the current whereabouts of his family. He stated that his wife and children are currently in Kathmandu but that his parents are in the village B.

The Applicant was asked what he feared upon returning to Nepal. The Applicant stated that he has fear from both sides. He stated that he fears the security forces but he also fears the Maoists. The Applicant was asked if he could elaborate on why he had fear of the security forces. The Applicant stated that after the bombing of of his work place he came under suspicion from the authorities. The Applicant stated that he knew that the Maoists were planning a bomb attack because they had told him earlier about their plan. He also stated that they had been encouraging him to get involved with their organisation and to leave his work and become completely committed to Maoists. The Applicant stated that he had resisted. The Applicant stated that they had promised or had encouraged him to leave his job and they would provide better income for him if [he] was an activist with the Maoist.

The Applicant stated that he had joined the party back in the late 1990s but that he did not wish to become fully involved with the group. The Applicant stated that they had used him as [a] person working at the location to gain inside information on the place and its activities. The Applicant stated that he was a member of the union and that he had been advocating for the workers'

conditions and better pay. He stated that the administration of the workplace were not very happy with him because of these activities.

The Applicant stated that they knew he had involvement with the Maoist but they had no proof by which to sack him. He stated that after the bomb attack on his work place, the administration reported him as the main person responsible. The Applicant was asked how he knew the administration had done this. The Applicant stated that some of his friends had informed him. He stated that he normally works the night shift and that the bombs had gone off at some time in the afternoon. He stated that his friends had been questioned and one of them had rung him to warn him about his name being raised as a possible suspect and that because of this he did not go work but instead fled to village B. The Applicant stated that after the bomb attack he was placed on a wanted list and that he stayed some days with his parents in village B before he returned for one night to Kathmandu to stay with his family and that he made arrangements then to leave the country and come to Australia because he was in fear of arrest and that he would be tortured or killed.

The Applicant was asked for more specific details as to how he knew that he was a wanted person. He stated that his friend who was doing the day shift had been questioned by the authorities who realised that the Applicant's name had been given to the authorities by the administration. He stated that his friend warned him about this and for this reason he left town. The Applicant was asked how the administration would know that he had been involved in this bomb attack. The Applicant stated that they suspected him because he had been active in the union and they wished to pay him back.

The Applicant stated that he stayed for a number of days with his parents in village B before he then return to Kathmandu. He stated that at this stage he also received his passport back with his visa. He then collected some money and left for Australia. He stated that at the airport he bribed the police in order that he could safely leave.

The Applicant was asked whether his family had come under investigation. The Applicant stated that his wife had been visited by the police and asked about his whereabouts. The Applicant stated that they continue to look for him now and that his wife has been questioned. The Applicant was asked if he was in trouble with the police prior to this bomb attack. The Applicant stated that he had not been arrested but he had a reputation as being a Maoist. The Applicant stated that he had fear before but that he had not encountered any difficulties.

The Applicant was then asked if he could explain to the Tribunal why he feared the Maoists. The Applicant stated he feared the Maoists because he did not follow their orders and duties in that he had not asked permission to leave the country or to leave Kathmandu and go to village B. He stated that one needs permission from the party to change one's plans or move around. He stated also that the Maoists wished him to become more involved in their activities and party but he had not wanted to do that. He stated that they wanted him to join their activities on a full time basis but he had declined this. He stated that he therefore feared that they would take reprisals against him.

The Applicant was asked when he joined the Maoist party. He stated that it was some years previous, in about the late 1990s. The Applicant stated that when he first joined the party it was involved in activities for the poor, but since that time they had become a more violent organisation and he had not agreed with these

activities but was not in the position to leave or disassociate himself from the party.

The Applicant was asked about some details in his protection visa application, in particular he [was] asked whether when he listed in his ethnic group that he was [Brahmin] he meant by this that he was of the Brahman caste. The Applicant stated this is the case. The Applicant was asked was he referring to the Brahman caste which is the highest caste in the Hindu caste system. The Applicant stated that this was the case.

The Applicant was asked about the schooling of his children. The Applicant stated that they attend was a private school. The Applicant was asked whether as stated in one of the written documents submitted to the Tribunal his parents owned property. The Applicant stated that this was the case.

The Applicant was asked whether the union to which he belonged was affiliated to any other union. The Applicant stated that it was.

The Tribunal then raised with the Applicant some of his concerns about the Applicant's claims, in particular the Tribunal pointed out to the Applicant that he had presented to the Tribunal a reference letter from his place of work, which stated the Applicant was in fact a person who was hard working and sincere. The Tribunal stated that given that this document was from his employer and signed by a senior administrative person, the Tribunal had difficulty reconciling this with his claim that he was disliked by his employers and seen as a trouble maker. The Applicant stated in response that the person that had given him this document was in fact a friend of his who was something like a sister to him and that she had organised this personal letter for him to assist him for future employment. The Tribunal pointed out to the Applicant that the letter was on the company's letterhead indicating that it was an official as opposed to a personal letter. The Applicant reiterated his claim that the person had written this letter for him as a personal [favor].

The Tribunal then raised with the Applicant country information from the UK Home Office and the Belgium fact finding mission to Nepal which indicated documents with the letterhead Communist Party of Nepal Maoist cannot be verified given the fact that it is an illegal and underground organisation and there would be no way of verifying this to be a genuine document. The Tribunal pointed out to the Applicant that country information indicated that people applying for asylum from Nepal have in the past presented fraudulent documents such as membership of the Communist Party. The Applicant stated that he had acquired this document after he had come to Australia because he needed more evidence to present to the Tribunal.

The Tribunal then raised with the Applicant the fact that given that he was from the high caste and given the fact that his parents own property and his children are in a private school, he did not appear to have the profile of a person who would be a Maoist activist involved in terrorist type activities.

The Tribunal also raised with the Applicant the fact that from the documentation it was clear that the Applicant was already planning to come to Australia that is he had been granted his visa to Australia prior to the bomb blast and had made his application for this visa some months prior. The Applicant stated that he was planning to come to Australia but this event made it more necessary for him

to come and that he had to pay a bribe at the airport in order to avoid being arrested by the authorities.

The Applicant reiterated his claim that he feared persecution on returning to Nepal, that he could possibly face torture and/or death and he stated that in Australia people live safe and free and that he wished to live safe and free. He stated that he missed his country and his family and he would return there if it wasn't for the fact that he feared for his safety. The Applicant stated that perhaps in some years' time he would be able to return.

27. The Tribunal received a submission from the applicant's adviser. He provided information from external sources indicating that the King of Nepal had declared a state of emergency. He argued that the applicant could not return to Nepal under the state of emergency or be safe in India where Nepal Maoists were at risk of arrest and deportation to Nepal.
28. The Tribunal received a further submission from the applicant's adviser. He submitted further evidence that the King of Nepal was continuing to rule without any sign that he was willing to return to a democratic system of government. The adviser argued that under those circumstances the applicant genuinely feared for his life and he argued that the applicant will be targeted by the authorities for being a Maoist.
29. The Tribunal sent the applicant a letter in accordance with s.424A of the Act, essentially indicating to him that it had doubts as to whether his claims were credible. The applicant attended a second hearing with the Tribunal. After the hearing, the Tribunal sent him a second letter, in accordance with s.424A of the Act, raising further issues regarding the credibility of the applicant's claims. The Tribunal put the applicant on notice that it may reject his claim that he was involved with the Maoists or that he was implicated in the bomb attack in Kathmandu.
30. The Tribunal retired before proceeding to a decision. The matter was reconstituted to another Member.
31. The Tribunal received a response from the applicant regarding the two s.424A letters he received. He stated that all the documents he submitted were genuine and his claims were credible. He stated that he joined the Maoists in the late 1990s but he later wanted to disassociate himself from the party because it became increasingly reliant on violence. He stated that his request to renounce the party was denied. He claimed that he was threatened by the Maoists and he was forced to assist with the bombing. He stated that he had to provide information regarding activities at his workplace.
32. The applicant claimed that he worked for a separate employer which was part of the main workplace but had different administration. He stated that his Manager, a friend, gave him a good reference despite the workplace management's suspicion that he had something to do with the bombing
33. The applicant claimed he wanted to flee the country after he decided to quit the Maoists. He stated that he was not able to leave before the bombing because his flight and security clearance could not be arranged in time.
34. The applicant stated that he feared the Maoists who were running the parallel government. He claimed that if the Maoists fulfill their commitments according to the

peace agreement, he would be happy to return to Nepal where he can be with his family. He stated however, that the Maoists were still committing atrocities and he feared that he will be targeted by Maoists in Nepal for effectively renouncing the party when he fled the country. He claimed that Maoists consider him a traitor. He stated that the authorities will not be able to protect him from the harm he anticipates.

The hearing

35. The applicant attended another hearing without his adviser. He essentially repeated his claim that he will be targeted by the Maoists in Nepal because he renounced his membership and fled the country. The Tribunal commented that the applicant's claims have changed over time and with changing conditions in Nepal. The Tribunal commented that initially he feared the authorities for being a Maoist and now he feared the Maoists because he renounced his membership. The applicant responded that his claims have remained the same throughout the processing of his application. He stated that his primary fear related to the Maoists and how they might treat him for renouncing his membership and fleeing the country. He stated that the Maoists have always targeted former members suspected of being traitors.
36. The applicant provided details of his involvement with the Maoists and the difficulties he had with them in the months prior to his departure from Nepal. He stated that they wanted him to work for them exclusively and when he declined they began to threaten him.
37. The Tribunal commented that he had a privileged background and he did not seem to fit the profile of a Maoist. He stated that many prominent Maoists are privileged Brahmins. He named several well-known Maoists who are Brahmins.
38. The Tribunal commented that his claims were not presented consistently. He stated that he had a copy of his original statement and he clearly and consistently raised all the claims he was providing to the current Tribunal.
39. The Tribunal noted that he submitted a ten page statement in Nepali with his protection visa application. The Tribunal commented that the statement has never been translated and the delegate, essentially relied on his adviser's submissions and his own evidence.
40. The Tribunal asked the interpreter to assist in translating the applicant's original statement submitted to the Department. The statement provides details regarding the applicant's involvement with the Maoists, the difficulties he had with the Maoists when he decided to renounce it, and his fear that he will be harmed or killed by the Maoists because he was considered a traitor.
41. The applicant claimed that his wife in Kathmandu is still harassed by the Maoists regarding his decision to flee. He claimed that members of his family have told him not to return to Nepal. He stated that the Maoists can now do whatever they want and they target their opponents, or those perceived to be opponents, with impunity. He stated that the Maoists use their youth wing to effectively silence their opponents.
42. The Tribunal noted that he received a favorable reference from his employer before he left Nepal, despite his claim that he was suspected of being involved with the Maoists.

and the bomb attack. He stated that the letter was written by a friend who wanted to assist him to leave the country.

43. The applicant stated that he has endured psychological hardship since he arrived because he misses his family, and particularly his young children. He stated that with political developments in Nepal, and the ceasefire, he hoped that it would be safe for him to return there. He stated that members of his family continue to urge him not to return Nepal because they fear that he will be harmed or killed by the Maoists.

Information from external sources

44. The Tribunal considered information from external sources relevant to the applicant's claim that Maoists in Nepal continue to target opponents with impunity.

Political developments

45. King Gyanendra Bir Bikram Shah Dev used constitutional emergency powers to exert direct control over the government until 27 April 2006. The King stated that emergency powers were required to fight the Maoist insurgency. In April 2006, due to a popular uprising, the King restored parliament and ceded power to a government headed by Prime Minister Girija Prasad Koirala and run by the Seven Party Alliance (SPA). On 21 November 2006, the coalition SPA government and the Maoists signed a Comprehensive Peace Agreement (CPA) ending a decade-long insurgency (US Department of State 2007, Country Reports on Human Rights Practices 2006 – Nepal, March www.state.gov/g/drl/rls/hrrpt/2006/78873.htm – Accessed 8 March 2007; US Department of State 2007, 'Background Note: Nepal', May <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 16 July 2007).
46. The current interim government has 329 members including 83 Maoist representatives. On 1 April 2007 the ruling eight party government formed an interim Council of Ministers which included five Maoist ministers. The interim parliament will exercise legislative powers until the election of the formal Constituent Assembly (International Crisis Group 2007, Nepal's Constitutional Process: Asia Report No128, 26 February, p.7-8 http://www.crisisgroup.org/library/documents/asia/south_asia/128_nepal_s_constitutional_process.pdf – Accessed 30 May 2007).

The internally displaced

47. The UN reported that over 100,000 people have been internally displaced during the civil war (BBC News, 2008, 'Country Profile: Nepal', 29 March, at www.news.bbc.co.uk, accessed on 31 March 2008). Many internally displaced persons in Nepal fled their villages after they were targeted for their political opinion by the Maoists. Many were cadres of mainstream political parties such as United Marxist-Leninists (UML), Nepali Congress (NC) and Rastriya Prajatantra Party (RPP) (Asia Centre for Human Rights 2006, Nepal: One Year of Royal Anarchy, 30 January, p.76).

Maoist activities since the ceasefire

48. The US Department of State reported that despite the 2006 ceasefire agreement, Maoists continue to be implicated in violent activities against opponents. The report states that political parties have complained of continuing threats and intimidation from Maoists:

After the April 2006 cease-fire announced by the government and the Maoists, incidents of human rights violations by the government declined substantially while incidents of human rights violations by the Maoists remained relatively unabated. Even after signing a comprehensive peace agreement with the government in November 2006, Maoists' extortion, abduction, and intimidation largely remained uncontrolled. Although activities by other political parties have increased significantly in the rural parts of Nepal, political party representatives, police, non-governmental organization (NGO) workers, and journalists reported continuous threats and intimidation by Maoist cadres (US Department of State 2007, Background Note: Nepal, US Department of State website, May, <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 25 May 2007).

49. The UK Home office has also reported that Maoist rebels were implicated in human rights abuses in 2006:

Despite the signing of the ceasefire agreement and repeated pleas from the United Nations, there were reports in 2006 that the Maoist rebels continued to commit human rights abuses including killings, abductions, torture, and extortion. There were also reports that Maoist forces did not release the thousands of children under the age of eighteen believed to be serving in their ranks. In some instances, the rebels reportedly even continued to forcibly recruit child soldiers (UK Home Office 2007, Operational Guidance Note: Nepal, European Country of Origin Information Network website, 23 March, http://www.ecoi.net/file_upload/432_1175069868_nepalogn.pdf - Accessed 4 June 2007).

50. The Youth Communist League (YCL) has undertaken ongoing coercive activities against Maoist opponents, including intimidation and physical attacks. Sources claim that the YCL contains ex-Maoist combatants and is being used by the Maoists to maintain an intimidating presence throughout Nepal and outside the scope of United Nations scrutiny. The major political parties have raised concerns regarding the aggressive behaviour of the YCL. Concerns have also been raised regarding the potential use of force and intimidation by the YCL in the forthcoming elections ('Young Communist League, Nepal'(undated), Wikipedia, http://en.wikipedia.org/wiki/young_communist_league,_nepal – Accessed 31 May 2007; Rajat, K.C. 2007, 'Young Communist League Or Young Criminal League', Scoop Independent News, 24 May, <http://www.scoop.co.nz/stories/hl0705/s00430.htm> – Accessed 31 May 2007; Chandrasekharan, S. 2007, 'NEPAL: Law & Order should be restored first before CA elections are thought of, Update No.127', South Asia Analysis Group website, 26 May, <http://www.saag.org/%5cnotes4%5cnote385.html> – Accessed 31 May 2007).

51. On 24 May 2007 Scoop Independent News provided details of incidents of aggressive attacks allegedly committed by the YCL. The report also states that no strong pressure has been placed on the Youth Communist League due to fears of disrupting the peace process:

Despite the Maoists joining legislative parliament and government, the Maoists, in the name of Young Communist League (YCL), continue to engage in looting, vandalism, intimidation and hostility across the country.

Most of the members of YCL are hardcore militants who are not registered in a cantonment. Recently, Sagar, so-called in charge of Kathmandu valley bureau of YCL, mentioned on a TV program that he was valley brigade commander of the Maoists' rebel force before he assumed his present assignment. This statement indicates that the Maoists are deceiving even the United Nations' mission in Nepal (UNMIN) that the real combatants are outside the camps. It has been said that more

then sixty percent of rebel combatants are working as YCL cadres all over the country. Those who are kept in camps are mostly new or child soldiers, recruited during the post-ceasefire period.

YCL cadres are not only busy in criminal activity, but also are involved in anti-national activity by destroying historical monuments and statues.

...Despite of all these happenings, no strong pressures have been given to Maoists to stop YCL brutalities. The reason could be that nobody wants to displease the Maoists, fearing that, if the Maoists are annoyed, then the fragile peace process will be in jeopardy (Rajat, K.C. 2007, 'Young Communist League Or Young Criminal League', Scoop Independent News, 24 May, <http://www.scoop.co.nz/stories/hl0705/s00430.htm> – Accessed 31 May 2007).

52. An article by the South Asia Analysis Group describes the YCL as a lawless. According to the report YCL activities are a deliberate strategy by the Maoists to “create disturbance and to keep the country in an unsettled condition” The report states that YCL must be controlled in a firm manner in order for fair elections to be held in the near future (Chandrasekharan, S. 2007, 'NEPAL: Law & Order should be restored first before CA elections are thought of, Update No.127', South Asia Analysis Group website, 26 May, <http://www.saag.org/%5cnotes4%5cnote385.html> – Accessed 31 May 2007).

Security since the ceasefire

53. Jane's Intelligence Review reported that violence has increased in Nepal despite a Maoist pledge that “they will not be derailed from their peaceful oath”. The report continues,

However, questions remain over whether the Maoists are genuinely committed to joining the political mainstream and renouncing their former sources of power. There have been reports in the Nepalese press that Maoist cadres are continuing to demand ‘voluntary donations’ in the capital, extorting money from businessmen and kidnapping their children. In addition, Nepalese newspapers have claimed that the YCL has threatened their editors who publish critical articles (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', Janes Intelligence Review, 23 April).

54. The report goes on to indicate the following security concerns:

- Under the terms of the peace agreement, the Maoist militia called the People's Liberation Army (PLA) was placed in camps and its weapons locked up under UN supervision. However there is some doubt as to whether all the PLA members are in the camps, and whether all their weapons have been handed in.
- When elections are eventually held, there is the risk that the Maoists may win only a small number of votes “which might tempt them to return to the jungle to push for power militarily”.
- If the Maoists win a plurality of votes they may interpret this as “a mandate to seize control of government” in which case “the Nepalese Army, logistically and perhaps materially supported by India, could intervene...”
- The election polls are likely to be delayed. There are still many people displaced from their homes and “intimidation appears to be on the rise in a general atmosphere of lawlessness” October or November seems a realist estimate of when

they may be held (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', Janes Intelligence Review, 23 April).

55. Stratfor reported that there has been an “apparent lack of progress in disarming the Maoist rebels”. The UN mission which is overseeing the disarmament process “cites the discrepancy between the 35,000 combatants who have registered themselves and the 3,000 to 4,000 weapons that have been surrendered so far” The report also discusses the possibility that the country may move from being a monarchy to a republic, and the instability that might ensue as the various groups push for power ('Nepal: A prime minister's move against the monarchy' 2007, Stratfor, 13 March).
56. The BBC News reported that Nepal is entering a new chapter in its history, but that it is still unclear what form the new system will take, and there is the potential for further disunity when the time approaches for the new elections (Mishra, Rabindra 2007, 'Nepal's attention turns to the King', BBC News, 1 April http://news.bbc.co.uk/2/hi/south_asia/6515533.stm – Accessed 5 April 2007).
57. BBC News further indicates that the Maoists have refused to participate in elections until the other parties agreed to their political demands, in particular their demand that the monarchy be abolished (Mishra, Rabindra 2007, 'Is Nepal's democracy in danger', BBC News, 8 October, at http://news.bbc.co.uk/2/hi/south_asia/7033689.stm– Accessed 6 December 2007; BBC News, 2008, 'Timeline: Nepal', 29 March, at www.news.bbc.co.uk accessed on 31 March 2008).
58. The UNHCR has advised that security in Nepal has improved since the 2006 ceasefire except in the Tarai region where it has deteriorated (United Nations High Commissioner for Refugees, 2007, 'UNHCR's position on the international protection needs of asylum-seekers from Nepal, July, at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=46af032d2>).
59. The Tribunal has considered information regarding the *Treaty of Peace and Friendship* between India and Nepal, which allows citizens of one country to live in the other: The Norwegian Refugee Council's Internal Displacement Monitoring Centre, 'Nepal: IDP return still a trickle despite ceasefire – A profile of the internal displacement situation' 2006, Internal Displacement Monitoring Centre website, 16 October, pp.86-88 [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/6C8B65949B9B0229C12572090038DEE5/\\$file/Nepal+-October+2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/6C8B65949B9B0229C12572090038DEE5/$file/Nepal+-October+2006.pdf) – Accessed 18 January 2007.
60. Advice was sought from the Department of Foreign Affairs and Trade (DFAT) regarding the operation of the *Treaty of Peace and Friendship* and if the treaty has been incorporated into India's domestic law. DFAT has indicated that the treaty has not been incorporated into domestic law: Department of Foreign Affairs and Trade 2006, DFAT Report 554 - RRT Information Request IND30728, 23 October.

Latest developments in Nepal

61. The US Department of State has provided the following overview regarding the current political situation in Nepal:

The interim government twice postponed elections for the Constituent Assembly. The November 2006 peace agreement between the then-Seven-Party alliance and the Maoists ended the decade-long insurgency and called for the Nepal Police (NP) and

the Armed Police Force (APF) to enforce law and order across the country. Authorities re-established many police posts, but Maoists, or their subsidiary organization, the Young Communist League (YCL), prevented some from being re-established and subsequently forced others to close. Numerous armed groups, largely in the Terai region in the lowland area near the Indian border, formed and engaged in attacks against civilians, government officials, members of particular ethnic groups, each other, or against the Maoists. Lacking political backing, police were often reluctant to intervene, particularly against the Maoists or YCL members.

Members of the security forces committed some human rights abuses during the year, and the Maoists/YCL and members of other small, often ethnically based armed groups committed numerous grave human rights abuses... Maoists frequently employed arbitrary and unlawful use of lethal force, including torture and abduction. Violence, extortion, and intimidation continued throughout the year. Impunity for human rights violators, threats against the media, arbitrary arrest, and lengthy pre-trial detention were serious problems. The government also compromised the independence of the judiciary, and society continued to discriminate against persons with disabilities and lower castes. Violence against women and trafficking in persons, mainly women and girls, continued (US Department of State, 2008, Country Reports on human rights practices – 2007, ‘Nepal’, Introduction, 6 March, at www.state.com).

62. The Tribunal has considered recent reports regarding the election which was just held. The outcome and impact is unknown at this time.

FINDINGS AND REASONS

63. The applicant claims he is a citizen of Nepal He claims that he was an active member of the Maoists until he came to Australia He claims that when he decided to leave the party he was harassed and threatened. The applicant claims that he fled Nepal because he no longer wished to be associated with the Maoists and he feared that he would be harmed by the Maoists if he refused to co-operate with them. He claims that the Maoists consider him a traitor. He claims that members of his family continue to be harassed by the Maoists and that Maoists have demonstrated an interest in finding him. The applicant claims that he does not support the Maoists in Nepal and he is fearful that the Maoists will seek to harm him if he returns to Nepal. The Tribunal accepts these claims.
64. The applicant claims that the Maoists consider him a traitor. He claims that the Maoists will seek to harm or kill him for being a traitor. The applicant further claims that he does not support the Maoists in Nepal and if he expresses his political opinion he will face life-threatening harm by the Maoists, and in particular their youth wing. The applicant claims that he will not have access to meaningful protection by the state.
65. The Tribunal is satisfied that significant and positive political developments have taken place in Nepal since April 2006 when King Gyanendra restored parliament and ceded power to the SPA. The Tribunal is satisfied by evidence from external sources, summarised above, that the civil war in Nepal has ended. The Tribunal finds that with the signing of the peace and disarmament agreements, and the involvement of the United Nations in supervising the implementation of these agreements, human rights conditions have improved for most citizens of Nepal. The Tribunal is satisfied that Maoists and the authorities in Nepal are no longer commonly subjecting civilians to human rights violations as they did prior to the ceasefire in April 2006. The Tribunal finds that in general all sides have demonstrated a willingness to end the hostilities in Nepal and the Tribunal is satisfied that there is sufficient

evidence to support the view that security will continue to improve in the reasonably foreseeable future.

66. However, despite positive developments in Nepal since the end of the civil war, the Tribunal finds that the Maoists continue to target opponents, particularly by utilising the YCL. The Tribunal finds that persons such as the applicant who have expressed opposition to the Maoists, and are still opposed to the Maoists, are at risk of harm by Maoists.
67. The Tribunal is satisfied that the political violence is not widespread or common in Nepal. Nevertheless, the Tribunal accepts the applicant's claim that persons such as him, who have expressed view against the Maoists, are still at risk of harm in the current unstable political environment. The Tribunal is mindful that the security situation may improve in the coming months now that the elections have been held. However, the Tribunal is not satisfied that the applicant can currently, or in the reasonably foreseeable future, safely return to Nepal or express his political views in Nepal.
68. The Tribunal considered information from external sources, summarised above, regarding the government's ability to protect persons such as the applicant. The Tribunal has formed the view that the government has not been able to prevent violence against persons targeted by the Maoists despite the positive security developments since the ceasefire. The Tribunal accepts the applicant's claim that the government cannot provide him with a reasonable level of protection in the foreseeable future.
69. The Tribunal considered whether the applicant can avoid harm by relocating internally within Nepal. However, the Tribunal finds that the applicant cannot avoid the harm he anticipates in Nepal by relocating within the country as his views and reputation will attract the adverse interest of Maoists wherever he lives.
70. The Tribunal has considered whether the applicant can avoid persecution in Nepal by living in India under the terms of the *Treaty of Peace and Friendship* between India and Nepal. The Tribunal is satisfied that the applicant has a right to enter and reside in India under the terms of the treaty. Nevertheless, the Tribunal is not satisfied that this right is a legally enforceable right. Accordingly, the Tribunal cannot be satisfied that the applicant can avoid persecution in Nepal by living in India.
71. The Tribunal finds that the applicant is at risk of life-threatening harm in Nepal because he has been, and will continue to be, identified as an opponent of the Maoists. The Tribunal accepts the applicant's claim that the authorities will not be able to protect him from the harm he faces. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution in Nepal for reasons of political opinion.

CONCLUSIONS

72. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

73. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.
Sealing Officer's I.D. PRDRSC