

**071637020 [2007] RRTA 234 (24 September 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071637020

**DIAC REFERENCE(S):** CLF2007/64032

**COUNTRY OF REFERENCE:** Nepal

**TRIBUNAL MEMBER:** Andrew Jacovides

**DATE DECISION SIGNED:** 24 September 2007

**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**

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).

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 by letter.

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.

The applicant then applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

**RELEVANT LAW**

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.

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 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).

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'

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:

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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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**

The Tribunal has before it the Department file CLF2007/64032, with the protection visa application, and the Refugee Review Tribunal (RRT) file 071637020, with the review application.

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 and English languages.

*Department file CLF2007/64032*

The applicant stated in his protection visa application that he was a citizen of Nepal, born in a specific city. He stated he was fluent in Nepali, he could speak and read Hindi, and he could read English. He stated he was a Hindu. The applicant indicated that he had many years of education and he worked as a specific occupation in City 1 for some years before he came to Australia. He stated he married on [date] in City 1.

In support of his claim to refugee status, the applicant stated that he was compelled to leave Nepal due to the political situation. He stated that he was a supporter of the monarchy and he protested against the current government's plans to abolish the monarchy. He stated that he was threatened by political opponents and told to stop demonstrating. He stated that he feared for his life so he fled to Australia seeking shelter. The applicant claimed that the current government in Nepal will seek to kill him and members of his family because he supported the monarchy. He stated he could not afford to bring his wife and children to Australia so they hid in Nepal.

The applicant submitted a partial copy of his passport issued by the government of Nepal. He entered Australia with a Temporary Business visa issued in City 2 and valid for a one month stay from the date of arrival.

The Department wrote to the applicant essentially asking him if he can avoid the difficulties he anticipates in Nepal by residing in India under the *Treaty of Peace and Friendship*. The Department received a submission from the applicant. He provided the following documents:

- A COPS event number
- World Hindu Federation membership card issued in City 3
- A letter in Nepali without a translation
- An Amnesty International membership card
- A World Hindu Youth Council card
- A membership card in Nepali for the Rastriya Prajatantra Party (RPP)

The Department received a further submission from the applicant. He referred to minor errors in his application and he provided a response to the Department's letter regarding his rights under the *Treaty of Peace and Friendship* between India and Nepal. He stated that he had not studied the document but he knew that nationals between the two countries can live in either country without a visa. He stated however, that he did not want to enter and reside in India because of religious conflict between Hindus and Muslims in India; human rights were more honoured in Australia than in India; India intervened in Nepal's internal affairs; he could not be secure in India as there is an open border between India and Nepal; life is easier in Australia than in Nepal; and as he worked for an organisation for numerous years he is deeply influenced by Australia and her people.

The delegate essentially found that the applicant has a right to enter and reside in a safe third country, that country being India, and he has not taken all possible steps to avail himself of that right.

*RRT file 071637020*

The applicant did not provide any claims with his review application. He stated that he would submit documents when he obtained translations. The Tribunal received a submission from the applicant. He provided the following seven items:

- A newspaper article in Nepali with a translation of the *Samdhan National Daily*, 11 December 2004, 'Attacked in RPP Nepal Regional Meeting'. The article states that a group of students attacked member of the RPP during a party meeting held in Pokhara. The article states that the police attempted unsuccessfully to stop the students from entering the building where the RPP members were meeting. The article states that several RPP members were injured in the attack.
- A letter addressed to the applicant from the Nepal Trade Union Congress (NTUP) in City 1 dated 3 February 2007, in Nepali with a translation. The applicant is told that he must stop participating in pro-monarchy activities and live as a good citizen like others in the community. He is told that the NTUP will take strong action against him if he is found to be involved in pro-monarchy activities and it will be his responsibility if there is any financial loss, physical torture, loss of life, and loss of property.
- A letter from INSEC, previously submitted to the Department, this time with a translation, dated 8 April 2007, stating that the applicant has been threatened and harassed by various organisations many times due to his active and long term involvement with the RPP, his strong support of the monarchy, and his Hindu orthodoxy.
- An Amnesty International membership card submitted to the Department.
- An RPP membership card with a translation.
- A World Hindu Youth Council membership card with a translation.
- A World Hindu Federation membership card with a translation.

### *The hearing*

The hearing was conducted with the assistance of an interpreter.

The applicant essentially repeated his claims. He stated that he was a devout Hindu who supported the monarchy in Nepal. He stated that as a Hindu he considered the king to be a Hindu god and he did not believe that Nepal as a nation can survive without the monarchy. The applicant claimed that he was a committed and active member of the RPP. He described several incidents when he was attacked and injured by members of the Youth Communist League (YCL) while participating in RPP activities. The applicant stated that he made several attempts to obtain protection from the authorities in Nepal but he found the authorities to be either unable to assist him. He stated that on one occasion he was forced to seek shelter in an army camp, when he and other RPP members were under attack by the YCL, and the army let them stay there until the danger subsided. He claimed that he faced life-threatening harm in Nepal, because he actively expressed his views in support of the monarchy, so he hid his family in Nepal and fled to Australia. The Tribunal discussed with the applicant his involvement with the RPP and associated difficulties he had with political opponents. The applicant demonstrated sound knowledge of the party and he was able to describe in detail particular incidents when party members, including himself, were attacked. He stated that it is the intention of the current eight parties in government to

abolish the monarchy and establish a secular state in Nepal. He stated that he could not tolerate or accept such developments because he was a devout Hindu who revered the king. He stated that in Nepal he would be forced to defend the king but he was fearful that he would be killed by political opponents who wanted to abolish the monarchy.

[Two paragraphs were deleted in accordance with section 431 of the Act as they contained information about a third party.]

#### *Information from external sources*

The Tribunal also considered information from external sources relevant to the applicant's claims. Some of the information was discussed with the applicant during the hearing.

#### *Political developments in Nepal*

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](http://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).

Under the terms of the CPA a program for political transformation was agreed. This program includes an interim constitution, an interim legislature and elections of a constituent assembly. An interim constitution was completed by the SPA and the Maoists on 15 December 2006. On 15 January 2007, as outlined in the CPA, the Nepali parliament dissolved itself and established an interim parliament. 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 including five Maoist ministers. The interim parliament will exercise legislative powers until the election of the formal Constituent Assembly (Government of Nepal 2006, *Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist)*, ReliefWeb website, 22 November, Article 3.2 <http://reliefweb.int/rw/rwb.nsf/db900sid/vbol-6vshk8?opendocument> – Accessed 16 July 2007; 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](http://www.crisisgroup.org/library/documents/asia/south_asia/128_nepal_s_constitutional_process.pdf) – Accessed 30 May 2007; US Department of State 2007, 'Background Note: Nepal', May <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 16 July 2007).

The constituent assembly will have the function of deciding the future of the monarchy in Nepal (*Interim Constitution of Nepal 2007*, World Statesmen website,

Articles 63, 64, 82, 83 & 159 [http://www.worldstatesmen.org/nepal\\_interim\\_constitution2007.pdf](http://www.worldstatesmen.org/nepal_interim_constitution2007.pdf) – Accessed 1 June).

The election for the Nepalese constituent assembly has been set by the interim government for 22 November 2007. The interim parliament has adopted a resolution which allows for the removal of the king if the king attempts to sabotage or interfere with the Constituent Assembly. The removal of the king must be supported by a two thirds majority of parliament. Sources state that despite this legislation there are no current plans to depose the king whose future will be decided at the first meeting of the constituent assembly ('Nepal sets key national elections for November 22' 2007, *Reuters Alert*, 24 June – CISNET Nepal; Chandrasekharan, S. 2007 'NEPAL: Interim Parliament Empowers itself to Abolish Monarchy: Update No.128' South Asia Analysis Group, 16 June <http://www.saag.org/notes4/note388.html> – Accessed 16 July 2007).

#### *The Rastriya Prajatantra Party*

The International Crisis Group (ICG) states that the monarchy still has some supporters in Nepal. This support is in the form of small political parties, including the RPP, a few international sympathisers, a section of the army and the King's 3,000 strong palace guard. According the ICG:

A handful of small royalist parties have applied for registration with the Election Commission: the Rastriya Prajatantra Party (Nepal), Nepal Sadbhavana Party, Samajbadi Party and Janamukti Party (International Crisis Group 2007, 'Nepal's Maoists: purists or pragmatists?', ICG website, 27 April).

The *Political Handbook of the World 2007* describes the RPP as a "monarchist party comprised largely of former *panchayat* members and supporters" which "was formed in 1992" (Banks, A, Muller, T et al 2007, *Political Handbook of the World 2007*, CSA Publications, p.874).

The ICG states that the RPP has a marginal role in the current government:

The traditionally pro-palace Rashtriya Prajatantra Party (RPP) and Rashtriya Janashakti Party (RJP) are not part of the SPA [Seven Party Alliance] and have had only a marginal role in post-April 2006 events, despite being represented in parliament and seeking to operate as a constructive opposition. While they voted with the SPA to approve the interim constitution, both parties are pushing for amendments; the RPP has hinted that it will take a less palace friendly line but has yet to clarify new policies...Neither party opposed the interim legislature's condemnation of the king's 19 February 2007 Democracy Day address that sought to justify the royal coup... (International Crisis Group 2007, *Nepal's Constitutional Process*, 26 February, Asia Report N°128, p.1).

According to a report published in the Nepalese newspaper *Annapurna Post* in September 2006, an opinion poll coordinated by the American National Democratic Institute showed that "49 per cent of the people are for a republic while 48 per cent

are for monarchy with democracy”. The poll indicated that only five percent of voters support the RPP:

The opinion poll also shows that in the constituent assembly polls, Nepali Congress and Communist Party of Nepal (Unified Marxist-Leninist) will each poll 25 per cent of the vote, Maoists 15 per cent, Rashtriya Prajatantra Party five per cent, and Nepali Congress (Democratic) two per cent, while 18 per cent of voters remain undecided (‘Forty-nine per cent of opinion poll participants for republic in Nepal’ 2006, *Annapurna Post*, 22 September).

A December 2006 digest of Nepali news report mentions briefly that “Rashtriya Prajatantra Party Nepal has decided to launch a nationwide campaign for the protection of the monarchy” (‘Nepal press section list 3 Dec 06’ 2006, *BBC Monitoring South Asia*, 3 December).

### *Targeting of monarchists*

The Tribunal considered information indicating that monarchists in Nepal have been targeted since the interim government came to power in 2006. The majority of the reported attacks were undertaken by the Maoist student organisations and some have been linked to the Youth Communist League. Sources state that despite the current cease fire, Maoists have continued to use threats and intimidation against oppositional political parties as well as engaging in violent activities and human rights abuses. These are some incidents reported in the media:

- On 23 March 2007, *BBC Monitoring South Asia* reported that the Maoist-affiliated All Nepal National Independent Students’ Union-Revolutionary (ANNISU-R) were involved in vandalising and setting ablaze the office of the district working committee of the Rastriya Janashakti Party (RJP) in the Jajarkot district (‘Nepal mainstream parties’ activists vandalize royalist party office’ 2007, *BBC Monitoring South Asia*, 23 March).
- On 18 March 2007, *BBC News* reported that pro-royalists came under attack as their small party tried to hold meetings in two eastern towns. The royalists were ridiculed, had their faces blackened and were paraded around town with garlands of shoes around their necks. Five of the royalist party leaders were injured. Young Maoists are alleged to have been involved in the attacks (Haviland, C. 2007, ‘Political attacks flare in Nepal’, *BBC News*, 18 March, [http://news.bbc.co.uk/2/hi/south\\_asia/6463515.stm](http://news.bbc.co.uk/2/hi/south_asia/6463515.stm) – Accessed 24 May 2007).
- On 11 February 2007, *eKantipur* reported that Maoists attacked a party meeting of the Rastriya Prajatantra Party. The assailants are reported to have used bricks and rods during the attack and 18 people sustained serious injuries as a result of the attack. Pro-Maoist students are also reported to have attacked a Rastriya Janashakti Party’s program held in Damauli on the same day (Ghale, P.K. 2007, ‘Maoists attack RPP meet 18 injured’, *eKantipur* website, 11 February, <http://www.kantipuronline.com/kolnews.php?&nid=100368> – Accessed 24 May 2007).
- On 15 December 2006, *Indo-Asian News Service* reported a Maoist attack on a pro-monarchy march. The Rastriya Prajatantra Party organised the march which was allegedly overtaken by the Maoists’ student union. The



royalist's claim they were physically attacked resulting in 10 of their members sustaining injuries ('Royalists take to the streets in Kathmandu' 2006, *Indo-Asian News Service*, 15 December).

- On 23 September 2006, *Hindustan Times* reported the murder of Krishna Charan Shrestha, MP from the Rastriya Prajatantra Party. Another royalist party member was also killed in the incident. A splinter group of the Maoists was suspected of committing this crime ('Royalist MP among four killed in Nepal' 2006, *Hindustan Times*, 23 September).
- On 30 January 2006, *Hindustan Times* reported the shooting of royalist Janamukti Party candidate Dil Bahadur Rai. Maoists were suspected of perpetrating this incident as they issued an ultimatum beforehand warning all participants in the election to withdraw ('Nepal Maoists attack second poll contestant' 2006, *Hindustan Times*, 30 January).
- On 7 July 2007 King Gyanendra celebrated his 60<sup>th</sup> birthday. Approximately 1000 royalist supporters queued to enter the palace gates to pay respects to the King and two hundred royalists reportedly staged a procession supporting the King. Sources report that the Young Communist League held an anti monarchy rally on the King's birthday and attacked the monarchists in Durbar square, south of the palace. Dozens of supporters and opponents of the monarchy clashed and nine people were reportedly injured ('Pro and anti monarchy supporters clash over Nepal king's birthday' 2007, *Agence France Presse*, 7 July).

A 2006 report by the Asia Centre for Human Rights on Internally Displaced Persons (IDPs) in Nepal states that a majority of IDP'S are cadres from political parties opposed to the Maoists including the Rastriya Prajatantra Party:

The IDPs have fled their villages for a variety of reasons. A majority among the IDPs are cadres of mainstream political parties such United Marxist-Leninists (UML), Nepali Congress (NC) and Rastriya Prajatantra Party (RPP) whose political ideology and opinion are different from that of the Maoists (Asia Centre for Human Rights 2006, Nepal: One Year of Royal Anarchy, 30 January, p.76).

The US Department of State has reported that despite the current cease fire agreement, Maoist continue to be implicated in violent activities. The report states that political parties have complained of continued 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).

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](http://www.ecoi.net/file_upload/432_1175069868_nepalogn.pdf) - Accessed 4 June 2007).

The youth wing of the Communist Party of Nepal (Maoist), the Youth Communist League, 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](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).

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 than 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).

An article by the South Asia Analysis Group describes the YCL as a law unto themselves. 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*

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).

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).

A March 2007 *Stratfor* report notes the “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).

An April 2007 *BBC News* report states 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:

The first question is, whether the election will be held in time or not. Only two-and-a-half months are left to prepare. And almost all deadlines agreed by the political parties so far have been missed.

There are also sceptics who believe the election may not happen at all due to the politically sensitive issues involved.

On top of such issues is the country’s 240-year-old institution of monarchy.

The Maoists believe people will vote for a republican Nepal in the election.

The country’s second largest party, the Nepal Communist Party (United Marxist Leninist), has already decided to fight the election on the republican platform.

Other smaller communist parties will follow the same path.

The Maoists’ joining of the multi-party government in Nepal is a landmark event in the country’s decades-long struggle for stable and sustainable democracy (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](http://news.bbc.co.uk/2/hi/south_asia/6515533.stm) – Accessed 5 April 2007).

### *The Treaty of Peace and Friendship*

The Tribunal is mindful that under the *Treaty of Peace and Friendship* between India and Nepal, citizens of Nepal can live in India. The Norwegian Refugee Council’s Internal Displacement Monitoring Centre provides the following insights on how the scheme operates:

More than 8,000 people passed through the border with India during the week 4-11 December, the highest weekly figure that they have ever recorded. Many of the Nepalese end up as apple pickers in Simla, where they have friends. Others find work as construction crew, kitchen help in restaurants, or even rickshaw-pullers in cities of north India. Wealthier people from the northern districts have moved permanently to Nepalgunj, buying property and building houses on the outskirts of the city...

Between one million and five million Nepali citizens live in India. Major concentrations can be found along the border region, as well as in New Delhi, Calcutta, and Mumbai. Nepal and India have shared an “open border” since 1950, and Nepalis have the right to live and work in India without a visa. According to the 1950 Treaty of Peace and Friendship, the citizens of both countries are entitled to the realization of all rights while in each other’s territory, with the exception of voting rights. As a result, India claims that no Nepali in India qualifies for refugee status as per the 1951 Convention Related to the Status of Refugees...

There are concerns about potential linkages between left-wing insurgency groups operating in India and Nepali Maoists in India...

In addition, trafficking is becoming increasingly common, with criminal organizations moving IDPs to India under the pretence of restaurant or domestic employment, only to traffic them into the brothels of New Delhi and Mumbai (‘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).

Advice was sought from the Department of Foreign Affairs and Trade (DFAT) regarding the *Treaty of Peace and Friendship* and if the treaty has been incorporated into India’s domestic law or how it operates in this respect. DFAT provided the following response:

A. Please provide advice on the right of a citizen of Nepal to enter India and the basis of such a right.

2. Article 7 of the 1950 Treaty of Peace and Friendship between India and Nepal provides:

Start text

The Governments of India and Nepal agree to grant, on reciprocal basis, to the nationals of one country in the territories o [sic] 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.

End text

3. The full text of the treaty is available at [www.meaindia.nic.in/tahome.htm](http://www.meaindia.nic.in/tahome.htm). The Indian Bureau of Immigration (which is part of the Ministry of Home Affairs) notes in its Instructions for Foreigners Coming to India (available at [immigrationindia.nic.in](http://immigrationindia.nic.in)) that Nepalese citizens do not require a visa to enter India.

4. The Indian Ministry of Home Affairs website ([mha.nic.in/fore.htm#vp](http://mha.nic.in/fore.htm#vp)) notes that for Indian and Nepalese citizens travelling by air, it is necessary to produce as an identity document one of the following:

- valid national passport;
- valid photo identity card issued by the Government of India/State Government or UT (Union Territory) Administration/Election Commission of India
- emergency certificate issued by the Embassy of India, Kathmandu to Indians and by the Embassy of Nepal in Delhi in respect of Nepalese citizens.

B. Are there any circumstances under which India may decide not to admit a citizen of Nepal?

5. The FRRO representative said that, currently, Nepalese nationals were not denied entry into India unless they were on the look-out list of security agencies, suspected of involvement in terrorist activity or under instruction from the intelligence agencies.

C. What rights within India are afforded to a citizen of Nepal under the 1950 Treaty of Peace and Friendship? How can these rights be exercised?

6. In addition to the rights mentioned in Article 7 of the Treaty (see para 2), Article 6 of the Treaty provides:

Start text

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.

End text

7. Dr VD Sharma (Legal Division, Ministry of External Affairs) told us (Jones) that the provisions of the Treaty were implemented as a matter of course.

D. Please provide advice on how, if at all, these aspects of the 1950 Treaty have been incorporated into India's domestic law, or how it operates in this respect.

8. Dr VD Sharma said that treaties on a specific subject usually had their provisions brought into Indian domestic law through the passage of a bill with the same provisions as the treaty. Sharma said, however, that in the case of more general treaties, such as the 1950 Treaty of Peace and Friendship, the practice was for the conditions of the treaty to be met by India without the passage of the domestic legislation. Sharma characterised the operation of the 1950 Treaty as having been enacted for a long time (Department of Foreign Affairs and Trade 2006, *DFAT Report 554 - RRT Information Request IND30728*, 23 October).

## **FINDINGS AND REASONS**

The applicant claims to be a citizen of Nepal. He claims he is a devout Hindu, a committed monarchist, and a political activist with the RPP. He claims that he suffered ongoing harassment and physical attacks by political opponents in Nepal since King Gyanendra restored parliament and ceded power to a government initially

led by the Seven Party Alliance and later joined by the Maoists. He claims that on several occasions, while participating in RPP political activities, he was targeted by members of the Youth Communist League and during those attacks he was at risk of life threatening harm. He claims the authorities were unable to protect him during those attacks. The applicant claims he is a committed political activist, an RPP member, a monarchist, and a devout Hindu, who will seek to express his views in the foreseeable future. The Tribunal accepts these claims.

The applicant claims that if he expresses his political views in Nepal he is at risk of serious life threatening harm from political opponents and he will not have access to meaningful protection by the state.

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 and in part discussed with the applicant at the hearing, 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 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.

However, despite the positive developments in Nepal since the end of the civil war, the Tribunal finds that the applicant is one of a small group of citizens who have been severely disadvantaged, and are now at risk of harm, because of increasing sentiment against the monarchy. The Tribunal is satisfied that the applicant's views, as a conservative Hindu monarchist actively seeking to retain the monarchy's status in Nepal, are not currently popular views in Nepal. The Tribunal finds that the applicant's views are the antithesis of what the government is trying to achieve. The Tribunal is satisfied that violence against monarchists is not widespread or common but it does accept the applicant's claim that political activists such as himself, who are outspoken in their support of the monarchy, are the risk of harm in the current political climate. The Tribunal is mindful that the situation may improve in the coming months, when elections have been held and the issue of the monarchy has been settled. However, the Tribunal is not satisfied that the applicant can currently, or in the reasonably foreseeable future, freely and safely express his political views in Nepal.

The Tribunal considered information from external sources, summarised above, regarding the government's ability to protect RPP activists such as the applicant. The Tribunal has formed the view that the government has not been able to prevent violence against RPP activists despite positive security developments since 2006. The Tribunal accepts the applicant's claim that the government cannot provide a reasonable level of protection for an outspoken RPP activist, such as himself, in the reasonably foreseeable future.

The Tribunal considered whether the applicant can avoid harm by relocating internally within Nepal. However, it finds that the applicant cannot avoid the harm he anticipates in Nepal by relocating within the country as his views will attract the adverse interest of political opponents wherever he lives.

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. 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.

The Tribunal finds that the applicant is at risk of life-threatening harm in Nepal because he has been, and will continue to be, implicated in political activities. 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**

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.

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **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.