

1205034 [2012] RRTA 823 (9 October 2012)

DECISION RECORD

RRT CASE NUMBER:	1205034
DIAC REFERENCE(S):	CLF2011/196598
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Lesley Hunt
DATE:	9 October 2012
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Nepal, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2011.
3. The delegate refused to grant the visa [in] March 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant*

S395/2002 v MIMA (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb

of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file and the Tribunal's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] September 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.

Departmental file

21. In her application for protection submitted [in] November 2011, the applicant provided the following information.
22. She completed the application herself, with no assistance from another person. She was born in [Village 1], Nepal. She is of the Hindu religion and is a citizen of Nepal and no other country. She married [in July 2008] and travelled to Australia on a student dependent visa as her husband was intending to study in Australia. She was issued a

passport by the government of Nepal in September 2008 and first arrived in Australia [in] June 2009.

23. The applicant states that she lived from birth until January 2009 in [Village 1], Nepal. She completed [school] in April 2005. She claims that she left Nepal so that she could earn money to fulfil her family's needs. She cannot return to her old home village in [Village 1] because of problems with Maoists there.
24. She also claims that the people who betrayed her father are always looking to harm her and her family. Also, her family will suffer from hunger and poverty if she returns to Nepal because she would be jobless in Nepal.
25. The applicant states that in 2008 her father was like a political leader and he was against the Maoists. So the Maoists threatened to harm her family. Her father was betrayed and thrown into jail by his own friends and they might harm her also.
26. Her family consists of her mother, father, herself and 4 [siblings]. Her father was sent to prison through being betrayed by his friends. This meant there was no source of income in their home so the applicant had to come to Australia for income. She has many responsibilities towards her family. Her husband, who she travelled with to Australia, has left her. The people who betrayed her father always threaten her family saying they will hurt them if her father says anything against them to the police. She does not want to return to Nepal. She has to look after her family and if possible bring them to Australia to give them a better life. [One sibling] is in the UK. She went there 10 months ago.
27. She does not think the authorities will protect her. If they could, she would never have applied for protection in Australia. Everybody in Nepal takes a bribe. Her family are poor and cannot afford the bribe. Also, she is against bribes.
28. The applicant departed Nepal [in] June 2009 legally and had no difficulty obtaining a passport. She is in regular contact with her family by phone. She returned to Nepal in January 2010 to visit her sister who was badly injured.
29. At her interview with the delegate the applicant stated that her father is a member of the Rastriya Prajatantra Party (RPP) and is therefore targeted by prominent Maoists in Kathmandu. They have threatened the whole family. Her father was kidnapped by Maoists in 2005.
30. The applicant claims to be a member of a particular social group – “women in Nepal”, or “women in Nepal separated from their husbands” She clarified that her father was in prison for 2.5 years as a result of a business deal involving land. The person selling the land was a fraud and her father was blamed. He was in prison for longer than usual because her mother did not have the money to pay for a lawyer. Also, her sister suffered significant physical ill-treatment from the Youth Communist League (YCL). They attacked her because of her father and she was injured. The applicant fears she will be subjected to similar harm.
31. The applicant stated that she will not be able to support her family financially if she returns to Nepal. Her family currently live in Kathmandu, but she will have nowhere to live if she has to go back to Nepal and her family will starve.

Tribunal file

32. The applicant attended a hearing [in] September 2012 and gave the following evidence in support of her application for protection.
33. The applicant confirmed that she completed her protection visa application herself with no assistance. She clarified that she was aware of the contents of her application and the contents were true and correct.
34. The applicant confirmed her date and place of birth, her religion, and her citizenship. She confirmed that her parents and 3 [siblings] currently live in Kathmandu and 1 [sibling] lives in the UK as a temporary resident. The applicant clarified that she and her husband do not live together anymore and she has heard that he is living with another wife. She does not know if he is in Nepal or in Australia but she thinks he may be in Sydney.
35. The applicant stated that she and her family left [Village 1] and moved to Kathmandu in about 2007 or 2008. It was after she left school and before she married. She confirmed that she married in July 2008. She stated that she is not in contact with her husband as she only has his old phone number. She has been in contact with his mother who told her that he is living with another woman. The applicant clarified that she moved to Kathmandu with her family and that they still live in Kathmandu.
36. In response to questions from the Tribunal the applicant stated that she first arrived in Australia on a student dependent visa [in] June 2009. She returned to Nepal [in] July 2009 and arrived back in Australia [in] July 2009. She travelled to Nepal again [in] January 2010 and returned to Australia [in] February 2010. She confirmed that she contacted the Tribunal recently inquiring about the progress of her review application because she wanted to return to Nepal to see her family because her father needs an operation and she wanted to be there at that time. She clarified that her father is due to go to hospital in about 15 days from the date of the hearing.
37. The applicant stated that one of her [siblings] is studying for [a] Bachelor's Degree and one is in [high] school. The other [sibling] in Nepal wants to study nursing, and would prefer to study in Australia rather than Nepal, however at the moment it is too expensive and the family cannot afford for her to study in Australia. The applicant clarified that a person has to pay fees before they can study at university in Nepal.
38. The applicant stated that her father used to deal in land. This was the family's source of income when they lived in [Village 1] Her father has not worked since they moved to Kathmandu. The family rely on the income she sends them from Australia and the income her [sibling] in the UK sends them. The applicant confirmed that after she completed secondary school she worked in an office and her work involved answering phones, making tea and cleaning. She stated that in Australia she works in the fruit picking and harvest industry.
39. The applicant confirmed that she obtained her passport in 2008 because she was preparing to travel to Australia and that she had no problem obtaining her passport and no problem departing and re-entering Nepal. She stated that the costs of her travel to Australia and her and her husband's visa applications were all paid for by her husband.

40. The applicant stated that her father's problems with the Maoists occurred when the family lived in [Village 1]. She stated that when she was born her father [worked for] the Prime Minister at that time and he spent most of his time in Kathmandu. After she was born her mother was having difficulty managing and so her father left that job and came back to [Village 1]. Her father was a known member of the Rastriya Prajatantra Party (RPP) and he always went around the village trying to get people to join the RPP. In 2005 her father was kidnapped by Maoists and held for about one month. He was released and the Maoists warned him not to campaign for the RPP. They wanted him to promote the Maoist party and get people to join the Maoists. Eventually the family moved to Kathmandu.
41. The Tribunal asked the applicant why she does not want to return to Nepal. She responded that it would be very hard for her in Nepal. Before she was married, but now she is not married so she would have to live with her family and try making her own living there. Her husband's family have told her she cannot go back and live with them because her husband has another wife. Her husband's family live in Kathmandu and [Village 1]. They go back and forth between the two towns.
42. The applicant stated that she did not apply for protection until November 2011 because before that she was with her husband. But he has left her and he is with another wife and she is on her own now. He left her about 2 or 3 months before her visa was about to expire. He told her he did not want her anymore and she had to get her own visa. She asked friends what she should do and they suggested she apply for a protection visa.
43. The applicant stated that she could not remember the exact date she and her husband separated. Her in-laws told her parents that he was with another wife. She learnt this about 2 months ago. The applicant thinks her husband lives in Sydney. She and her husband are not legally divorced, but he is living with another woman. She does not have any contact with her husband now.
44. The applicant stated that her family still owns their home in [Village 1] but the house is locked. After she married she and her husband lived in Kathmandu. She has returned to [Village 1] a few times since her family moved to Kathmandu, but this was with her husband as his mother teaches in [Village 1]
45. The applicant stated that the Maoists have locked her family home in [Village 1]. The applicant clarified that her father was imprisoned in April 2009; it was the year she came to Australia. He was released in November 2011. She clarified that he was imprisoned because of a business deal involving land. Her father was not the main guilty person. Two months before she left Nepal a person involved in the land deal threatened her father with not letting her come to Australia. If she tried he would create problems at the airport for her. In response to questions from the Tribunal the applicant stated that this man could do this because he was a powerful man and a leader of the Maoist party. In response to questions from the Tribunal the applicant clarified that this was possibly just a threat, particularly as she had no difficulty obtaining a passport or exiting or re-entering Nepal.
46. The applicant stated that her sister had been beaten by members of the Youth Communist League (YCL) and needed to be treated in hospital for her injuries. She stated that her family are too afraid to return to [Village 1] because her father had to

pay a loan to a neighbour and their house is still locked. They would be too afraid to break the lock. Even though her father has been released from prison the people involved are still calling her mother and threatening her. The threats are about the land deal that resulted in her father going to prison.

47. In response to questions from the Tribunal the applicant stated that nothing else has happened to her father or other members of her family since her father was released from prison in November 2011. She stated that in Nepalese culture after a person has been in prison they are looked at very badly. She thinks this may be why she had problems with her husband.
48. The Tribunal asked the applicant what effect she thought her marriage breakdown would have on her life in Nepal. She responded that her parents have told her to look after herself as they will not be able to support her. Her life would be very hard. Her parents are finding it very hard to support her [siblings]. They have told her that it was her decision to marry the man she married, not theirs. She clarified that she would have to go and live with her parents and [siblings] in Kathmandu as she has nowhere else to go. The applicant stated that she used to send her in-laws money from her earnings in Australia but now she sends money to her parents instead. If she has to go back to Nepal she won't be able to give her parents money and they have come to rely on it. There will be a lot of financial difficulty if she has to go back to Nepal.
49. The applicant stated that it is very hard in Nepal for women who have separated. It is not like Australia. She has no skills useful for employment and society will look down on her. They will not see her as the same person she was before she was married. Nepalese society is not like Australian society and after a person has separated everyone gets to know about it. People will say bad things to her and they will speak badly about her behind her back. After a marriage breaks down the woman is blamed. They will say it is her fault. It will be very hard to find work. Her [sibling] is more educated than she is and she has no work. The applicant has only done farm work in Australia. She has not been able to save money as her husband's education in Australia was very expensive. Also they sent money back to his family. Now she sends money back to her family. So she has no money saved. If her husband had become qualified it would have been good for both of them. But now they are separated, she will not benefit from his education in Australia.
50. The applicant stated that she would like to obtain a qualification herself but she cannot. She only finished [grade deleted: s.43192]) at school and then left. She and her [sibling] work to support their family. She has no skills to be able to find good employment in Nepal. Her previous employer is no longer there. The office where she worked before is closed. She only earned about 3,000 Nepalese rupees a month anyway and that is not enough to pay rent, much less food and other expenses.
51. In response to questions from the Tribunal the applicant clarified that it would be hard to live and work in [Village 1]. It is a small village and there is no employment there.
52. In response to questions from the Tribunal the applicant stated that she does not think she will file for divorce in Nepal because her husband would be the stronger party and she does not think she could get anything from him as he and his family are more powerful than she and her family.

53. The applicant stated that if she had to go back to Nepal she would go back with nothing and have to start from zero. She does not want to go back to Nepal. Life will be a hard struggle for herself and her family. It will be very hard for her to survive now that she is no longer with her husband.

Independent Country Information

The Rastriya Prajatantra Party and Maoists

54. A number of information sources indicate that Communist Party Nepal-Maoist (CPN-M) and YCL cadres have employed violence and intimidation against their political opponents in areas of the country outside Kathmandu, including members of the RPP-N and the party it broke away from in the mid 2000s,¹ the Rastriya Prajatantra Party (RPP). A large proportion of these incidents appear to occur in regional Nepal.^{2 3 4 5 6 7 8 9 10} For example:
- In April 2011, four RPP-N members were injured in clashes with YCL cadres in Basantapur.¹¹
 - In July 2009, it was reported that YCL cadres attacked participants in a pro-monarchist campaign organised by the RPP-N in Kaski district, injuring 11 people, including six RPP-N activists.¹²
 - In March 2008, *Reporters Nepal* said that “Maoists and YCL activists” had stormed the RPP-N’s Rolpa district office, Chitwan, setting it on fire and prompting two RPP-N members to go into hiding.¹³
55. Reports indicate that some Maoist cadres, mainly those belonging to the YCL, engaged in sporadic acts of physical violence and brutality against opponents, including pro-

¹ Banks, A. et al. 2011, ‘Nepal’, *Political Handbook of the World*, CQ Press, Washington

² ‘Incidents of CPN-Maoist targeting other parties since the April 2006 cease-fire’ n.d., South Asia Terrorism Portal website <<http://www.satp.org/satporgtp/countries/nepal/database/targetingpartyceasefire.htm>>

³ ‘Four RPP-N Cadres injured in YCL’ assault’ 2011, *Nepal Mountain News*, 27 April <<http://www.nepalmountainnews.com/cms/?p=25286>>

⁴ ‘Abduction charge on YCL men’ 2010, *eKantipur*, 10 May <<http://www.ekantipur.com/2010/05/10/capital/abduction-charge-on-ycl-men/314039/#>>

⁵ Paudel, D 2010, ‘Local Administration impose curfew in Myagdi’, *MyRepublica.com*, 13 February <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=15094#>

⁶ Refugee Documentation Centre (Ireland) 2010, *Information on the Youth Communist League (YCL)*, 5 February <<http://www.unhcr.org/refworld/pdfid/4b8fcb1e1c.pdf>>

⁷ Paudel, D 2010, ‘Local Administration impose curfew in Myagdi’, *MyRepublica.com*, 13 February, <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=15094#>

⁸ South Asia Terrorism Portal 2011, *Young Communist League* <<http://www.satp.org/satporgtp/countries/nepal/terroristoutfits/YCL.html>> Accessed 4 July 2011

⁹ US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April, Section

¹⁰ South Asia Terrorism Portal n.d., *Incidents of CPN-Maoist targeting other parties since the April 2006 cease-fire* <<http://www.satp.org/satporgtp/countries/nepal/database/targetingpartyceasefire.htm>>

¹¹ ‘Four RPP-N Cadres injured in YCL’ assault’ 2011, *Nepal Mountain News*, 27 April <<http://www.nepalmountainnews.com/cms/?p=25286>>

¹² South Asia Terrorism Portal n.d., *Incidents of CPN-Maoist targeting other parties since the April 2006 cease-fire* <<http://www.satp.org/satporgtp/countries/nepal/database/targetingpartyceasefire.htm>>

¹³ ‘2 RPP-N Candidates in Hibernation in Rolpa’ 2008, *Reporters Nepal*, 22 March <<http://www.reportersnepal.com/newsbase/nid/6169>>

monarchists, in the lead up to and period following their election to government in 2008. These acts extended to abduction, torture, and murder.^{14 15 16 17}

56. However, according to the UN and International Crisis Group, the level of violent activity implicating Maoists or YCL members has decreased significantly since the 2008 elections.^{18 19} The 2008 elections saw the Maoists become the largest party in the Constituent Assembly, while the RPP and RPP-N won only 12 seats between them. It was a new situation for the Maoists and the RPP and RPP-N to be in government together, and without an outright majority, the Maoists were required to cooperate with other parties.²⁰ The US Department of State (USDOS) reported that, nationwide, Maoists and YCL members were involved in three politically-motivated killings in 2010.²¹ The USDOS also reported that, in 2011, a non-governmental organisation attributed 42 cases of torture to non-state actors during the period between January and June, including 25 cases to Maoists, one to the YCL, and one to the All Nepal National Free Students Union.²² In recent years, the Nepali Congress party (NC) and Communist Party of Nepal (Unified Marxist-Leninist) (CPN-UML) appear to have been more frequent targets for Maoist violence than the RPP or RPP-N, reflecting their status as major parties and more powerful political foes.^{23 24}
57. After the elections YCL rehabilitation centres were closed in 2009. These centres operated during the period of insurgency and were used as *ad hoc* punitive detention facilities where villagers who were perceived to be anti-YCL were detained.²⁵ Furthermore, in April 2012, *BBC News* reported that “Nepalese soldiers have moved into camps where thousands of former Maoist rebels have lived for more than five years” as part of an integration process of former Maoist rebels into the Nepalese army. Of an estimated 9,000 Maoists who have been confined to camps since 2006, 6,000 are to be integrated into the army, with the remainder to receive a financial settlement. *BBC News* quoted a Maoist military chief, who said that “It’s final now. The peace process is

¹⁴ South Asian Terrorism Portal 2011, *Young Communist League*

<<http://www.satp.org/satporgtp/countries/nepal/terroristoutfits/YCL.html>>

¹⁵ International Crisis Group 2009, *Nepal’s Faltering Peace Process*, Asia Report No. 163, 19 February, pp. 6, 8

¹⁶ United Nations Security Council 2009, *Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process*, United Nations Mission in Nepal (UNMIN) website, 2 January, pp. 2, 10 <<http://www.unmin.org.np/downloads/keydocs/2009-01-09-UNMIN.SG.Report.to.SC.ENG.pdf>>

¹⁷ US Department of State 2009, *Country Reports on Human Rights Practices for 2008 - Nepal*, 25 February, Section 1

¹⁸ International Crisis Group 2009, *Nepal’s Faltering Peace Process*, Asia Report No. 163, 19 February, p. 8

¹⁹ United Nations Security Council 2009, *Report of the Secretary-General on the request of Nepal for United Nations assistance in support of its peace process*, United Nations Mission in Nepal (UNMIN) website, 2 January, pp. 2, 10 <<http://www.unmin.org.np/downloads/keydocs/2009-01-09-UNMIN.SG.Report.to.SC.ENG.pdf>>

²⁰ Banks, A. et al. 2011, ‘Nepal’, *Political Handbook of the World*, CQ Press, Washington.

²¹ US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April, Section 1

²² US Department of State 2012, *Country Reports on Human Rights Practices 2012 – Nepal*, 24 May, Section 4

²³ Reporting indicates the NC and CPN-UML have sustained more attacks/intimidation efforts etc from Maoists – See ²³ South Asian Terrorism Portal 2011, *Young Communist League* <<http://www.satp.org/satporgtp/countries/nepal/terroristoutfits/YCL.html>>

²⁴ US Department of State 2010, *Country Reports on Human Rights Practices 2009 – Nepal*, 11 March, Section 1

²⁵ US Department of State 2009, *Country Reports on Human Rights Practices for 2008 - Nepal*, 25 February, Section 1

over. The armies have merged now” According to the article, however, some Maoist hardliners have criticised the move, and see integration as an effective surrender.²⁶

58. An article in the Wall Street Journal, May 27, 2012 reported the following.

Nepal dissolved its four-year-old Constituent Assembly at midnight Sunday and set new elections after political parties failed to agree on the model of federalism the country should adopt in a new constitution. In a televised midnight address to the nation, Baburam Bhattarai, prime minister of Nepal's Maoist-led national government, said the government has set Nov. 22 as the date for fresh elections to a new Constituent Assembly...The announcement ushered in yet another period of political crisis for the tiny Himalayan nation. Nepal elected a 601-member Constituent Assembly, which also worked as its parliament, in April 2008 following a popular revolution against the monarchy in the spring of 2006. The assembly was part of the United Nations-backed peace process that brought former Maoist rebels into the government after a decade-long civil war in which more than 13,000 people died.

The dissolution of the Constituent Assembly without a new constitution is a huge setback for those who were looking to a new constitution, written by the popularly elected assembly; to chart a new course for the war-torn and economically lagging country....The assembly's mandate was to write a new constitution to establish a federal democratic republic. In 2008, soon after it was constituted, the assembly voted out the monarchy but failed to deliver a new constitution even after extending the initial deadline of May 28, 2010, four times. Parties were divided on how many federal states the country should have and whether they should be based on the ethnicity of people in that state or the geographical features of that area.

Women in Nepal, separated and divorced women in Nepal

Employment for women in Nepal

59. The Nepalese economy remains predominately subsistence agriculture, with 86 per cent of the population living in rural areas, and 81 per cent deriving their livelihoods from agriculture. According to the Laligurans Women Skill Development Centre, Nepalese women “bear great burden in household chores and agricultural activities”, and contribute 74 per cent of the labour input to subsistence economic activities and 86 per cent of input into social and domestic work. While women account for approximately 40 per cent of the total work force in Nepal, they reportedly tend to occupy lower status jobs, and are paid less than men.²⁷ In an August 2011 report, the UN Committee on the Elimination of Discrimination Against Women noted “the high proportion of women [employed] in the informal sector; and the widespread prevalence of sexual harassment in the workplace”.²⁸

²⁶ ‘Nepal army ‘completes’ peace process with Maoists’ 2012, *BBC News*, 11 April
<<http://www.bbc.co.uk/news/world-asia-17676538>>

²⁷ ‘Women in Nepal’ 2006, Laligurans Women Skill Development Centre website
http://www.laliguranswomenskill.org.np/nepali_women.htm

²⁸ UN Committee on the Elimination of Discrimination against Women 2011, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Nepal*, 11 August

Internal displacement in Nepal

60. The Internal Displacement Monitoring Centre (IDMC) reported that in 2010 up to 50,000 people remain in the Kathmandu Valley, having been displaced by conflict. The IDMC states that “some people who had fled the conflict had managed to integrate and find jobs, but others, including in particular internally displaced children and women, were struggling to find proper accommodation or access basic services. They were also exposed to trafficking, sexual exploitation, discrimination and child labour”²⁹ In a separate report, the IDMC states that displaced persons from rural Nepal who flee to cities and towns usually leave their only assets, such as a home and land, and therefore have few means by which to pay for accommodation and food. Furthermore, as farmers, they “often lack skills required by urban employers and are forced to do menial low-paid and labour-intensive jobs.”³⁰

Women and Divorce in Nepal

61. An article published in May 2012 indicates that “with more awareness of legal rights and less attention paid to social stigma, a rising number of women are filing for divorce in Nepal.” The article also indicates, however, that although it is easier for women in Nepal to file legally for divorce, “socially it’s not easier for them. Despite what the law says, many acknowledge that society looks down upon divorce and in most cases blames the women for failed marriages, citing reasons such as her inability to handle her husband or a problem she must have.” Women were many times blocked by institutional biases and socially discriminatory practices from exercising their right to property after divorce, according to a 2011 shadow report on the Nepali government’s fourth and fifth periodic reports on the Convention on the Elimination of All Forms of Discrimination Against Women, which was coordinated by the Forum for Women, Law and Development.³¹
62. In relation to remarriage after divorce for Hindu women in Nepal, the case study on divorce in Pokhara, Nepal indicates that “divorce and remarriage is not culturally and socially accepted in the almost all Hindu dominant Nepalese society”.³² An undated article on patriarchy and marriage in Nepal indicates that divorced women are stigmatised in the Hindu tradition, and a divorced woman from a high caste/class Hindu family would have little chance of remarriage within her own socio-economic group.³³ Another article refers to divorced women in Nepal facing difficulties in remarrying in conservative rural communities.³⁴

²⁹ Internal Displacement Monitoring Centre 2011, ‘Internal Displacement: Global Overview of Trends and Developments in 2010 – Nepal’, UNHCR Refworld, 23 March
<http://www.unhcr.org/refworld/docid/4d932e1ac.html>

³⁰ Internal Displacement Monitoring Centre 2010, *Nepal: Failed implementation of IDP Policy leaves many unassisted*, UNHCR Refworld, 28 January, p.14 <http://www.unhcr.org/refworld/docid/4b61a32f2.html>

³¹ Bhusal, K. 2012, *Rising awareness of legal rights doubles divorce rates in Nepal’s capital*, Trust Law, source: Global Press Institute, 4 May <<http://www.trust.org/trustlaw/news/rising-awareness-of-legal-rights-doubles-divorce-rates-in-nepals-capital>>

³² Acharya, B.R. 2005, ‘Sociological Analysis of Divorce: A Case Study from Pokhara, Nepal’, *Dhauлагiri Journal of Sociology and Anthropology*, Vol. 1, Nepal Journals Online
<<http://www.nepjol.info/index.php/DSAJ/article/viewFile/284/274>>

³³ RAO Online n.d., *Patriarchy and Marriage* <<http://www.raonline.ch/pages/np/npwom01b.html>>

³⁴ Laligurans Women Skill Development Centre 2006, *Women in Nepal*
<http://www.laliguranswomenskill.org.np/nepali_women.htm>

63. The May 2012 article indicates that Chandra Tiwari, a section officer at Nepal's Supreme Court, had said that in Nepal, cultural norms still many times outweighed the law and "even in this 21st century, women still have to be a victim of domestic abuse and are forced to stay as single women after divorce," he says, referring to cultural norms."³⁵
64. Women in Nepal were reported to "rarely receive the same educational and employment opportunities as men".³⁶ Women face "systemic discrimination, particularly in rural areas, where religious and cultural traditions, lack of education, and ignorance of the law remained severe impediments to the exercise of basic rights, such as the right to vote or to hold property in one's own name." Despite the 2006 Gender Equality Act, there remained discriminatory provisions in the law, such as the law on property rights which favoured men in its provisions for land tenancy and division of family property. The law provided protections for women, including equal pay for equal work, but "the government did not implement those provisions, even in many state industries." Unmarried, widowed, and divorced women, however, were able to inherit parental property.³⁷
65. The 2010 Asian Development Bank report indicates that although "the proportion of economically active women in Nepal is quite high compared to other South Asian countries," women's wages lagged well behind those of men. The wages of women in agricultural work were lower than for men, and women in non-agricultural wage employment were "concentrated in low-paying and less-productive jobs of low capital intensity."³⁸
66. In relation to social security, single women who are widows, unmarried or divorced and are aged 60 years and over are provided with social security in Nepal. The benefit levels of social assistance programs in Nepal are reported to be generally low.³⁹
67. In relation to support networks for domestic violence or single women in Nepal, it was reported in December 2011 that the government had "established safe houses in 15 districts, and OHCHR supported capacity-building of the staff of the safe houses and of law enforcement officials. OHCHR-Nepal further supported local networks in responding to sexual and gender-based violence and other forms of discrimination, including an initiative to declare one entire development area as 'witchcraft violence free'"⁴⁰ Another report refers to Nepal's police claiming to have women's cells in every

³⁵ Bhusal, K. 2012, *Rising awareness of legal rights doubles divorce rates in Nepal's capital*, Trust Law, source: Global Press Institute, 4 May <<http://www.trust.org/trustlaw/news/rising-awareness-of-legal-rights-doubles-divorce-rates-in-nepals-capital>>

³⁶ Freedom House 2011, *Freedom in the World 2011 – Nepal*, UNHCR Refworld, 18 July <<http://www.unhcr.org/refworld/docid/4e2450e3c.html>>

³⁷ US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April, Section 6

³⁸ Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, pp. 11-12 <<http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>> Accessed 11 February 2011

³⁹ Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, pp. 16-17 <<http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>> Accessed 11 February 2011

⁴⁰ UN High Commissioner for Human Rights 2011, *Report of the United Nations High Commissioner for Human Rights – Addendum: Report on the human rights situation and the activities of the Office of the High Commissioner, including technical cooperation, in Nepal*, UNHCR Refworld, A/HRC/19/21/Add.4, 16 December, p. 7 <<http://www.unhcr.org/refworld/country,,,,NPL,,4f2a40ef2,0.html>> Accessed 2 May 2012

district, although this could not be confirmed. Female officers in the cells had special training in dealing with victims of domestic violence and trafficking. There were shelters in all districts, usually not inside police stations, and toll-free hotlines for various services.⁴¹ In 2010, it was reported that the United Nations Children’s Fund (UNICEF) supported an extensive network of paralegal committees in 23 districts in Nepal, dealing with a broad range of cases, including domestic violence and property disputes.⁴²

68. Despite recent legal improvements, divorce remains relatively uncommon in Nepal, and divorced women continue to be significantly stigmatised and disadvantaged.⁴³ The information that follows addresses state protection for women, employment for women, and the effects of internal displacement in Nepal.
69. According to the Laligurans Women Skill Development Centre, Nepalese women are afforded little legal protection upon divorce. If a husband initiates a divorce against his wife, and if she has no other means of supporting herself, then he must provide financial support to her in accordance with his status and income; financial support is provided for five years. There is reportedly a “strong stigma” attached to divorced women, and women can find it difficult to re-marry in conservative rural communities.⁴⁴ An article posted at the Nepal Nepal website refers to the financial support provided by husbands to their former wives as a meagre allowance that was just enough to “fill her stomach” In the past, according to the article, women accepted the “humiliating allowance probably because there was no other option for them”. Divorced women were reportedly considered to be ‘discarded’, and unwanted by society. The article also claims that families considered them to be an embarrassment, and parents often took their daughters back out of pity.⁴⁵ According to an article posted at RAO Online, women who are divorcees are stigmatised in the Hindu tradition; a divorced woman from a high caste reportedly has little chance of remarriage within her socioeconomic group.⁴⁶
70. In 2010, the Asian Development Bank reported that a number of discriminatory legislative provisions regarding divorce had been repealed, entitling women to significant rights. Women were granted the right to their husband’s property after divorce, and the provision of receiving monthly or yearly support in lieu of property. Women are also now allowed to divorce their husbands on the grounds of rape, while a man can no longer divorce his wife due to her inability to bear a child. However, some discriminatory provisions remain, enabling the husband to divorce his wife if he can prove that she has a sexually transmitted disease, or that she is having an affair. In the

⁴¹ US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April, Section 6

⁴² Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, p. 16
<<http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>> Accessed 11 February 2011

⁴³ Jennings, E. 2012, ‘Marital Dissolution in Nepal: The Influence of Spouses’ Perceptions of Marital Dynamics’, Paper presented at the 2012 Population Association of America Annual Meeting, Princeton University website <http://paa2012.princeton.edu/download.aspx?submissionId=121916> – Accessed 26 March 2012

⁴⁴ ‘Women in Nepal’ 2006, Laligurans Women Skill Development Centre website
http://www.laliguranswomenskill.org.np/nepali_women.htm - Accessed 16 October 2007

⁴⁵ ‘Life After Divorce in Nepal’ (Undated), Nepal Nepal website <http://nepalnepal.com/community/blogs/entry/-2010-10-21-685> – Accessed 23 June 2011

⁴⁶ ‘Patriarchy and Marriage’ (Undated), RAO Online website <http://www.raonline.ch/pages/np/npwom01b.html> – Accessed 23 June 2011

patriarchal Nepalese society, it is considered unlikely that the husband's accusations would be questioned by others, and the wife would not be given the opportunity to disprove such accusations.⁴⁷

71. According to a 2012 paper on divorce in Nepal, women “still face bleak prospects for life after marital dissolution”. Piecemeal legal changes may remove some disincentives to divorce, in that women now have theoretical access to improved property rights and custody arrangements, and that men can no longer divorce their wives on the grounds of infertility. Nonetheless, “many Nepalese women are illiterate and unaware of legal codes”, and “even those who are literate are not aware”. In addition, the time and money required to initiate and carry through a divorce is likely beyond the means of many women in Nepal.⁴⁸

State protection for women in Nepal

72. Although there is no information that police and security forces are actively withholding protection from women, a number of factors, such as police attitudes, corruption, bribery, impunity, political intimidation and legal weaknesses, contribute to the ineffectuality of protection for women. The extent of police corruption and political intimidation indicates that police could be bribed not to prosecute cases of violence against women. Women reportedly rarely have access to money to pay bribes and are also politically marginalised.⁴⁹ The Nepali police forces were reported by the US Department of State Bureau of Consular Affairs in January 2011 to “have limited resources and lack sufficient manpower to effectively enforce law and order. Their services are not up to Western standards. Many cases reported to the police remain unresolved.”⁵⁰
73. According to a 2010 Asian Development Bank (ADB) report, the Nepal government has formulated a national plan of action to implement 12 critical areas of concern, one being violence against women.⁵¹ The Ministry of Women, Children and Social Welfare (MWCSW) is the key ministry for gender equality and women's empowerment. The Department of Women Development, under the MWCSW, looks after women's programmes. Effectiveness at all levels (ministry, department and district), however, is constrained by weak capacity and inadequate resources.⁵² There are both government agencies and non-governmental organisations (NGOs) which support women. For example, the government's Department of Women Development looks after women's programmes; NGOs, such as Women's Legal Services Project (SUSS), Legal Aid and

⁴⁷ Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, pp.10, 16-17 <http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf> – Accessed 11 February 2011

⁴⁸ Jennings, E. 2012, ‘Marital Dissolution in Nepal: The Influence of Spouses’ Perceptions of Marital Dynamics’, Paper presented at the 2012 Population Association of America Annual Meeting, Princeton University website <http://paa2012.princeton.edu/download.aspx?submissionId=121916> – Accessed 26 March 2012

⁴⁹ ‘Nepal: Pushing back against domestic violence’ 2010, *Integrated Regional Information Network (IRIN)*, 28 September <http://www.unhcr.org/refworld/docid/4ca989ac1e.html>

⁵⁰ US Department of State Bureau of Consular Affairs 2011, ‘Nepal – Country Specific Information’, Travel.state.gov website, 10 January http://travel.state.gov/travel/cis_pa_tw/cis/cis_980.html#

⁵¹ Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, p.5 <http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>

⁵² Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, p.6 <http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>

Consultancy Centre (LACC) and Agro Forestry Basic Health and Cooperatives (ABC) Nepal, run advocacy centres and shelters. The ADB has also reported that UNICEF supports a district-level network of paralegal committees, comprising women, from a variety of cultural, socio-economic and religious backgrounds, dealing with a range of cases, including domestic violence.⁵³

74. The 2012 Human Rights Watch annual report on Nepal states that women and girls continue to face widespread discrimination, that domestic violence, rape, and sexual assault remain serious problems, and that police rarely carry out effective investigations into crimes against women.⁵⁴ In March 2012, the Asian Human Rights Commission (AHRC) concluded that “the failure to protect women from gender-based violence is only the tip of the iceberg of the government’s ineptness to promote women’s rights, whether civil and political rights or economic, social and cultural ones”.⁵⁵ The report also claimed that “the state is notably failing ... to guarantee women’s access to justice ... and to adopt comprehensive policies to transform discriminatory and harmful views and practices which constitute violations of the women’s rights”.⁵⁶

FINDINGS AND REASONS

75. The applicant travelled to Australia from Nepal on a passport issued by the government of Nepal. The Tribunal accepts that the applicant is a citizen of Nepal and has assessed her claims against Nepal as her country of nationality.
76. The Tribunal finds that the applicant is outside her country of nationality as required by Article 1A(2).
77. The applicant claims to fear returning to Nepal for the following reasons. Her father was betrayed by people in relation to a business deal involving land and he served 2.5 years in prison as a result. These people still threaten the applicant’s family and she fears she will be harmed by them if she returns to Nepal. The applicant’s father is a member of the RPP and was kidnapped by Maoists in 2005. Maoists still threaten the family, including in Kathmandu. The applicant’s sister was beaten by members of the YCL and required hospital treatment. The applicant fears she will be harmed by Maoists and/or YCL members if she returns to Nepal. The applicant fears harm as a single female, separated from her husband. She will be blamed for the marriage breakdown, people will look down on her and she will face serious discrimination. The applicant fears that she will not find good employment in Nepal and she and her family will suffer from poverty and financial hardship. It will be very hard for her to survive in Nepal without her husband. She would be jobless in Nepal and her family will suffer from hunger and poverty. She will have nowhere to live and her family will starve. She will not be able to give her parents money they have come to rely on and there will be a lot of financial difficulty. She has no useful skills for employment and it will be very hard to find work in Nepal. It would be hard to live and work in [Village 1] as it is a small village and there is no employment there. She will have to go back to Nepal

⁵³ Asian Development Bank 2010, *Overview of Gender Equality and Social Inclusion in Nepal*, p.16
<http://www.adb.org/documents/reports/country-gender-assessments/cga-nep-2010.pdf>

⁵⁴ Human Rights Watch 2012, *World Report 2012 – Country Summary: Nepal*, 22 January

⁵⁵ ‘Nepal: Women’s Day – Political Brinkmanship has sacrificed women’s rights’ 2012, Asian Human Rights Commission website, 8 March <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-050-2012>

⁵⁶ ‘Nepal: Women’s Day – Political Brinkmanship has sacrificed women’s rights’ 2012, Asian Human Rights Commission website, 8 March <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-050-2012>

with nothing and start from zero. Life will be a hard struggle for herself and her family in Nepal.

78. The Tribunal has to assess whether or not there is a “real chance” that the applicant will suffer “persecution” in the reasonably foreseeable future in Nepal. In so doing the Tribunal has considered whether the harm the applicant claims to fear involves serious harm; and whether the harm would involve systematic and discriminatory conduct, essentially and significantly for a Convention reason.
79. In assessing the applicant’s claims of fearing harm in the reasonably foreseeable future in Nepal the Tribunal first considered the applicant’s claims of harm she experienced in the past. She claims, that as a member of her father’s family, she was threatened with harm by people involved in a business deal over land, and by Maoists. She claims that her father has experienced harm in the past. She states that he was kidnapped by Maoists for one month in 2005 and he was pressured to change his political allegiance from the RPP party to supporting the Maoists. Her father was imprisoned for 2.5 years as a result of a land deal and betrayal by friends. She claims that members of the YCL beat and injured her sister. She states that her family home in [Village 1] has been locked up by Maoists. She claims that a Maoist threatened to prevent her from departing Nepal in June 2009 when she first travelled to Australia.
80. The Tribunal accepts that these claims would combine to give rise to a level of fear in the applicant. However the Tribunal has to assess whether there is an objective basis for her fears with regard to the reasonably foreseeable future in Nepal. That is, is there a real chance that the harm she fears will occur? The Tribunal first considered the veracity of the applicant’s claims. The Tribunal found that generally the applicant is a credible witness whose account of the experiences of herself and her family has been reasonably consistent throughout the processing of her application, although slightly embellished with regard to one matter. At the hearing the applicant stated that a person who was a Maoist had said he would make it difficult for her to obtain a passport and leave Nepal. This claim had not been raised at any time prior to the hearing and in her written application the applicant indicated that she had no difficulty in obtaining a passport or leaving Nepal. When the Tribunal put this to the applicant at the hearing, the applicant stated that this claim possibly just involved “threats” and agreed that she had obtained a passport with no difficulty and had departed and re-entered Nepal several times without any problem. The Tribunal therefore gives this claim little weight in assessing whether the applicant’s claims of future harm at the hands of Maoists are well-founded.
81. The Tribunal notes the following country information relevant to the applicant’s claims of fearing harm from Maoists and YCL members. The Tribunal put a summary of this information to the applicant at the hearing and invited her response. Reports from the South Asian Terrorism Portal, the International Crisis Group 2009, the United Nations Security Council 2009 and the US Department of State 2009 confirm that Maoist cadres, including those belonging to the YCL, engaged in sporadic acts of physical violence and brutality against political opponents in the lead up to and period following their election to government in 2008. However those agencies report that the level of violent activity in general, including violent activity perpetrated by Maoists and the YCL, has significantly decreased since the 2008 elections. The 2008 elections saw the Maoists win a majority of seats in the Constituent Assembly, but they did not win an outright majority. They were therefore required to cooperate with the RPP and other

political parties who also won seats. After the election, the vast majority of the former Maoist insurgents handed over their weapons and were integrated into the Nepalese army.

82. The applicant stated that Maoists still cause disruption and threaten to harm her family.
83. The Tribunal noted recent political events which led to a political deadlock over the drafting of a new Constitution in Nepal and protests over the issue of whether states in a new federal system would be divided along ethnic lines. Several political parties have resigned from the coalition government and the prime minister has called for elections to be held in November 2012. This situation has led to protests and strikes, including in Kathmandu where the applicant's family live. However there is no evidence before the Tribunal to indicate that the applicant's family have been targeted in any way as a result of these events.
84. The applicant stated at the hearing that nothing adverse has happened to her father or any other member of her family since her father was released from prison in November 2011, which can be attributed to his membership of the RPP or his political opinion.
85. The Tribunal notes the applicant's claim that the house in [Village 1] was locked by Maoists and remains locked. However in the Tribunal's view the fact that the house remains locked does not in itself constitute serious harm in accordance with the definition found in s.91R(2) of the Act. Furthermore the applicant did not dispute that the lock could be broken and the applicant's family could restore their access to the family home in [Village 1]. The applicant did not claim that the [Village 1] house was no longer owned by her family and that the Maoists would continue to prevent the family from accessing the home, if the family did break the lock and restore their access to the home.
86. After considering all the evidence before it, the Tribunal is satisfied that the chance of the applicant facing serious harm in the reasonably foreseeable future in Nepal as a result of her political opinion, or imputed political opinion arising from her father's association with the RPP, is very remote. The Tribunal finds therefore, that the applicant does not have a well-founded fear of persecution for reasons of her political opinion in Nepal.
87. The Tribunal went on to consider the applicant's claims that her family fears returning to [Village 1] because of threats from neighbours relating to the business deal involving land, which saw her father imprisoned for 2.5 years. The Tribunal accepts that the applicant's fears in this regard arise from her being a member of her father's family and assessed whether or not her membership of a particular social group, namely her family, could, in relation to this claim, give rise to a well-founded fear of persecution for Convention purposes. However the harm experienced by the applicant's father and her family relates to a business deal and threats made by people involved in the business deal. The harm experienced by the family and the ensuing fear for the applicant as a member of the family does not arise from a reason specified in Article 1A(2) of the Convention. Therefore the Tribunal must disregard it in accordance with the legislation at s.91S of the Act.

88. The applicant does not claim that the business deal involving land and her father's subsequent imprisonment are related in any way to Maoists or her father's political opinion.
89. The Tribunal finds that the applicant's father's imprisonment and the family's subsequent fears of harm arising from threats made by those involved in the business deal, do not relate to any of the other grounds specified in the Refugees Convention. Accordingly these claims cannot be considered as grounds for protection for the applicant under s.36(2)(a).
90. The Tribunal went on to consider the applicant's claims relating to the breakdown of her marriage. She claims that as a single female, separated from her husband, she will be blamed for the marriage breakdown, people will look down on her and she will face serious discrimination. The applicant fears that she will not find good employment and she and her family will suffer from poverty and financial hardship. It will be very hard for her to survive in Nepal without her husband. She would have to live with her family and try to make her own living. Society will look down on her and people will say bad things to her and they will speak badly about her behind her back. She will be blamed for the breakdown of the marriage and people will say it is her fault.
91. The Tribunal first considered whether or not these claims have a nexus to the Convention. That is, are "women in Nepal" or "women in Nepal separated from their husbands" a particular social group for Convention purposes. In *Applicant A*, the Court determined as follows:

The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.⁵⁷

92. The Tribunal accepts that "women in Nepal" and "women in Nepal separated from their husbands" constitute a particular social group for the purpose of the Refugees Convention.
93. The country information referred to in the preceding pages indicates that "women in Nepal" in general suffer disadvantage in comparison to men with regard to education, employment, responsibility for household chores, lower rates of pay, low status jobs and sexual harassment in the workplace. The Tribunal accepts that as a member of the particular social group of "women in Nepal" the applicant will suffer from disadvantage and she may have difficulty in finding employment. The Tribunal finds that if she does find employment there is a real chance that she will be paid at a lower rate than a man would be paid, that she may only find a lower status job and that she

⁵⁷ *Applicant A v MIEA* (1997) 190 CLR 225 at 241 per Dawson J.

may face sexual harassment in the workplace. However, the evidence does not suggest that the applicant will be denied access to employment or access to an income or basic services such that her capacity to subsist would be threatened. Therefore, as difficult as the applicant's circumstances might be, the Tribunal finds that the disadvantage she will face as a member of the social group "women in Nepal" does not constitute persecution as defined in s.91R(1) and (2) of the Act.

94. The information also supports the applicant's claims that as a member of the particular social group of "women in Nepal separated from their husbands" she will face social criticism, stigma and additional hardship in Nepal. However, the information also indicates that there is an increase in the number of women filing for divorce in Nepal, in spite of the resulting social difficulties. It indicates that women separated from their husbands exist in significant numbers, are not denied access to employment, albeit low-paid employment, and are not denied access to services. The government has introduced 2006 Gender Equity Act which provides protections for women, including equal pay for equal work and the repeal of a number of discriminatory legislative provisions regarding divorce, entitling women to greater rights than previously existed. Furthermore, if a husband initiates a divorce against his wife, and if she has no other means of supporting herself, then he must provide financial support to her in accordance with his status and income, for a period of five years. However in spite of these legal reforms, the reports indicate that conservative cultural attitudes prevail and separated and divorced women continue to face blame, criticism and social stigma.
95. In responding to this information at the hearing the applicant reiterated her claim that because she is separated from her husband she will face a lot of criticism, be blamed, and face a lot of hardship if she has to return to Nepal.
96. After assessing all the evidence before it, the Tribunal accepts that the applicant will face hardship and social criticism and stigma in Nepal, for reasons of her membership of a particular social group, namely, "women in Nepal separated from their husbands" The Tribunal then considered whether this treatment constitutes persecution.
97. Section 91R(1) of the Act prescribes that persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Section 91R(2) provides the following examples of 'serious harm': 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. Furthermore the treatment must be officially tolerated or uncontrollable by the authorities of the country. In this case the Tribunal finds that whilst the applicant will face hardship and social stigma, the evidence does not suggest that she will face "serious harm" as defined in the Act. The Tribunal is therefore not satisfied that the applicant has a well-founded fear of treatment that can be regarded as "persecution" in the reasonably foreseeable future in Nepal.
98. The applicant also claims that her family will suffer from hunger and poverty if she returns to Nepal because she will no longer be sending money to them. She claims that she has no qualifications; that she may be jobless in Nepal, and she and her family will suffer from poverty and may starve. She claims that in [Village 1] it is hard to find work as it is a small village and there is no employment there. The applicant also claims that she and her family will be looked at very badly because of her father's past

imprisonment and this will magnify the disadvantage and harm she and her family will face.

99. The Tribunal accepts that the applicant's circumstances are such that she may face disadvantage in obtaining employment in Nepal and that she may be affected by poverty. However it is noted that the applicant has a [sibling] studying at university and [another sibling] who has travelled to the United Kingdom. The applicant herself has returned twice to Nepal since first arriving in Australia and she wants to return there again when her father undergoes surgery. These factors do not equate with a family facing poverty. The applicant has stated that she will be able to live with her parents and [siblings] in Kathmandu. Therefore, although the family live in small premises, the applicant will not be homeless in Nepal. After assessing all the evidence the Tribunal finds that the applicant's circumstances are not such that she will be denied the capacity to subsist. As such the circumstances that she faces in Nepal cannot be regarded as persecution in accordance with the legislation at s.91R(2) of the Act.
100. After considering the applicant's claims, including on a cumulative basis, and the country information, the Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention reason in the reasonably foreseeable future in Nepal. Therefore, the Tribunal finds that the applicant does not meet the refugee criterion specified in s.36(2)(a) of the Act. The Tribunal then went on to consider whether the applicant meets the complementary protection criterion contained in s.36(2)(aa) of the Act.
101. To be granted protection under the complementary protection criterion, the Tribunal must be satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country (Nepal) there is a real risk that she will suffer significant harm.
102. Section 36(2A) of the Act specifies that a person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act. The legislation requires that cruel or inhuman treatment or punishment must involve severe pain or suffering intentionally inflicted on a person. Degrading treatment or punishment must be intended to cause extreme humiliation.
103. The Tribunal assessed all the applicant's claims, individually and cumulatively, and determined that the disadvantage and treatment that she will face in Nepal do not constitute "significant harm" as required by s.36(2A) and s.5(1) of the Act. The Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal there is a real risk that she will suffer significant harm. Accordingly, the applicant does not meet the complementary protection criterion contained in s.36(2)(aa) of the Act.

CONCLUSIONS

104. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
105. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
106. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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