

071179670 [2007] RRTA 66 (3 April 2007)

DECISION RECORD

RRT CASE NUMBER: 071179670

DIAC REFERENCE(S): CLF2005/32072

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Patricia Leehy

DATE DECISION SIGNED: 3 April 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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. 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.

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 (Class XA) 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 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:

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.

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

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'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.

The applicant appeared before the Tribunal to give evidence and present arguments.

Department file

According to his Protection Visa application, the applicant at the time of his original application was an unmarried man who is Hindu. He says his parents are currently resident in Nepal. The applicant came to Australia as a student, and has remained in Australia since that time. He says that he was educated until receiving a Bachelor's degree in Australia.

The applicant claims that he left Nepal to study and to avoid further harassment. He says that he fears that the government authorities or the Maoists will harm him because of his and his family's political opinion.

The applicant submitted a statement of claims. His claims include:

- He was born in Nepal, and came to Australia to continue his academic career; he has not returned;
- He always thought the situation in Nepal would improve and he could return, but his student visa has now expired;
- On one occasion when returning from school, he noticed a demonstration against the king, and within a short time the leader of the protest was arrested by police and there was turmoil; this was the start of the Nepalese people's fight for their rights against the king;
- After the monarchy finished, there was an interim multi-party government and the applicant's parents were very political;
- People used to come to the applicant's house to discuss politics with his parents; his parents supported the United Marxist and Leninist group (UML) and he participated in programs and campaigns run by the party, becoming a member of the Democratic National Youth Association (DNYA);
- The applicant was a very active participant in campaigns on behalf of the UML; his relative was a party officer in their district in the election campaign;
- The UML and the Nepal Congress supporters had major clashes, in one of which the applicant was badly injured; Nepal Congress won the election and at celebration rallies crowds threw stones at his house and broke windows;
- The applicant had to have medical treatment for a long period, but was forced to go to another country for treatment, where he stayed for a few months; he was referred to another hospital during this time and prescribed medication which he discontinued;

- On his return to Nepal, the applicant was sent by his father to another town for further study, and then came to Australia;
- During the applicant's time in Australia, Nepal was undergoing upheavals and the situation there worsened, especially because of the activities of Maoist rebels;
- The applicant's home town is in one of the areas affected by the political crisis; his family has a lot of land and are a well-off family; Maoist rebels threatened his family with death if their demands for money were not met;
- The Maoists took from the applicant's family a lot of money and their land titles (which means they cannot sell their property), and all their businesses were shut down;
- Maoist rebels keep asking when the applicant will return;
- The applicant's parents insist that he not come home where his life will be in danger;
- Most of the applicant's former political enemies are Maoists and a few of his friends have been kidnapped by Maoists;
- The applicant could not attend the funeral of his grandfather who "passed away because of pain and anxiety";
- The applicant was depressed and could not study for a period;
- If he returns to Nepal he will be killed by the Army or by Maoists; his house was searched by the army on several occasions and his father is under house arrest.

The applicant sent with his application a quantity of information, consisting of Internet downloads, particularly from BBC News, relating to the Nepalese political situation.

Tribunal file

The applicant had a hearing with the Tribunal. At the hearing he submitted a number of documents, including further country information on Nepal, and a number of documents apparently translated into English. There is a letter from a Command of the Communist Party of Nepal (Maoist) addressed to the applicant's father, seeking a donation of a sum of money. There are receipts for further sums of money. There is a letter by a Maoist Command to the applicant's father stating that they have already sent a letter seeking financial assistance, and saying that unless the money is given to the collectors, physical action will be taken against him. There is a letter by the UML Ward Committee, addressed to the applicant, telling him he has been nominated as a party officer for the ward for the local elections and listing his responsibilities, and a letter addressed to the applicant thanking him and others for the assistance given the party at the recent local elections. There is also a request for membership of the UML submitted by the applicant, and acceptance of the request by the Secretary of the UML.

Following the hearing, the applicant sent the original documents and the English translations of documents already submitted. Additional documents submitted include:

- Receipt sent to applicant's father by the Maoists for a sum of money;
- Letter from the Maoists to the applicant's father requesting that the applicant join the people's army of the Maoists.

At the Tribunal hearing, the applicant's comments included the following;

- He had gone to another country because of ongoing medical problems; he has not consulted anyone in Australia for this condition;
- His father is still in Nepal;
- When asked why the Maoists had sent letters to his father mentioning the applicant some years after he had left, and not mentioning the applicant's relative, the applicant said that he was better known and has political enemies;
- When he was in Nepal, the Congress Party had been his political enemies, and now some of these have joined the Maoists;
- He had not returned home for a number of years despite his grandfather dying, his mother being sick and his father having an illness, because there would be no safe place for him in Nepal, which is in a state of civil war;
- His father had been paying the UML party membership fees for him, the Maoists were everywhere and people would know he had returned because he had so many enemies there;
- When asked about living in the other country, the applicant said that if you came to the attention of the police, they would put you in gaol and torture you; the lawlessness there made it an unsafe place to live;
- In Nepal, if anyone said you were a Maoist, the army would "shoot you on the spot";
- If someone like his father complained to the police about Maoist harassment, the Maoists would take vengeance on him.

The applicant sent a number of documents to the Tribunal including:

- Marriage certificate showing that he married a woman born in Nepal in Australia;
- Character certificates for the applicant and his wife issued in Nepal;
- Experience Certificate issued in Nepal;
- Medical report stating that various tests have been done to establish the cause of the applicant's symptoms and that further investigations may need to be done;
- Country information on the political situation in Nepal, and on "intercaste marriage";
- Applicant's statement.

In the statement the applicant puts forward a new claim, that he has married his “long time intercaste girlfriend, challenging the Nepalese conservative society”. He says that parents and relatives on both sides are against them. He says that he met his wife when they attended university, and were in the same class. They kept their relationship secret in Nepal because of cultural and social factors. Now that he is married, his parents have told him that he is not allowed to enter the house and they will not recognise his wife. He says: “They harass me, discriminate me and abuse me badly.”

The applicant also says that the conditions in Nepal are as before, and in practice things have hardly changed. He says that the Maoists are continuing to act with impunity, and that they have built a camp in his area. He says he was well-known in his home town because of his membership of local clubs and his organisation of social functions and sports events, as well as being a member of a political party.

The applicant attended a Tribunal hearing. He brought his passport with him to the Tribunal hearing. He said that this was his second passport. He travelled to Australia on the first passport.

The applicant said that his parents were currently living in Nepal, but that he was not in touch with them. He last spoke to his parents the day after his marriage and has not spoken to them since because they disapprove of his marriage and were very angry about it. He did not tell his parents anything about his relationship or his intention to marry because he could not do so because of social disapproval.

The applicant said that his parents were well, but his grandfather died because of stress related to taking his lands and business. He said that his parents were unharmed because they gave donations to the Maoists when asked. He was asked when was the last time that his parents were approached by the Maoists. He said that he thought it was a few years ago.

The applicant was asked whether he spoke regularly to his parents prior to his marriage. He said that he spoke to them occasionally, maybe every two or three months, up to the time of the marriage. He was asked whether a few years ago was the last time that his parents said that they were approached by the Maoists. He said he could not remember.

The applicant was asked when his family’s problems with land seizures and other matters began. He said that his grandfather was the first of the family to settle in the area. He acquired a lot of land. He said that when he came to Australia, everything was fine in Nepal with his family. It was put to him that political problems had already started in Nepal by then. He said that his family had no problems. He was asked when his family’s lands were taken. He said that he thought it was a few years back. His grandfather died about then. He died after the lands were taken, and the Maoists started to take his land a number of years ago. He seemed very uncertain about the dates of these happenings. The applicant was asked whether his father inherited his grandfather’s property after his grandfather died. He said that he did, but the other businesses, were taken over by the Maoists before his grandfather’s death, so that his parents were in bad shape financially. However, they continue to live in the original large house they lived in previously. He was asked their source of income. He said that they rent out areas of the house to other people.

The applicant was asked about his siblings. He said they do not have any involvement in politics. The applicant last called a relative about five years ago. Another e-mails him sometimes. He agreed that his siblings would let him know if anything serious happened to

their parents. The applicant was asked whether the last time he heard about his parents being approached by the Maoists was a few years ago as he said earlier. The applicant seemed uncertain. He was asked whether he had gathered from his conversations with his father that the Maoists had let them alone after he handed over the money. The applicant said that he had told his father that he ought to report these things to the police, but there was no law and order in the country. The applicant then agreed that the last time the Maoists had approached his parents was a few years ago.

The applicant was asked about his relationship with the person who became his wife. He said that they were in the same class at university, and they decided they liked each other. They wanted to get married from very early in the relationship. They realised that they could do nothing about it, however, because of the caste situation. It was put to the applicant that information before the Tribunal from the Department of Foreign Affairs and Trade indicated that intercaste marriages were not illegal, and that such marriages were increasing and were increasingly accepted. He agreed this was so, but said that society objected to intercaste marriages, no matter what position in society people had. He said that the royal family massacre was because of these issues. The applicant said that parents do not accept intercaste relationships. It was put to the applicant that both he and his wife had effectively left their parents and studied and lived independently. He was asked what would happen if he and his wife went back to Nepal. He said that his wife could not go into various areas of his parents' house because, according to their beliefs, she would pollute those areas. The society would ignore them and discriminate against them. He was asked whether they could live in Kathmandu. He said that they would be facing a lot of discrimination. The applicant was asked how he would feel if he decided to leave his family, if they were not prepared to accept his wife. He said that it would be very bad to leave his family. It was put to him that he has already left them, by coming to Australia. He said that there would be discrimination against them. They would ignore them socially.

The applicant was asked what his parents had said when he told them about the marriage. His father said that he had lost the prestige they had from their ancestors, and that he had betrayed their trust. His mother also said that it was not supposed to be like this. She said that it is impossible to marry intercaste. They said that they did not want him to come back. The applicant said that he had spoken to one relative, but not the others. His relative said that the thing you have done is not good. He was critical of the marriage.

The applicant said that his wife was in Australia on a visa which is still current. She came to Australia to be with the applicant. She has no family in Australia. She told her parents about the marriage after they were married. Her parents said the same thing as his parents. He said that city people wanted their children to marry city people, not country people. The applicant said that she does not speak to her parents. The applicant was asked whether he and his wife had discussed what would happen if they went back. She said that they should leave their future to the gods.

The applicant was asked about his ill health. He stated his condition. He was asked whether he had been to a medical practitioner. He said that he had not, because he could not afford it.

The applicant was asked about his family's involvement with politics. He said that the whole family was very involved in political discussion. The location of their house meant that a lot of people would come to the house, where there were a range of newspapers put out by different parties, and they would discuss politics. The applicant's father was and is a member

of the UML. He was asked what sort of work he did on behalf of the party. He said that he was just a member; he was not an office-bearer in the party. He is a supporter.

The applicant said he became a member of the UML a number of years ago. He was asked what he did for the party. He said that he put up posters and campaigned for them for the elections. The applicant was asked whether the documents he had submitted in relation to his membership of the party were genuine. He said that they were. It was put to him that the documents he had submitted indicated that his father was still giving money to the Maoists as recently as a few years ago, which indicated that his parents still had money to give them. He was asked how they managed to do this if they had no money. He said that his father might have borrowed from relatives.

The applicant was asked about his work for the elections. He said that he campaigned for a particular candidate. He was asked what his electorate was. He stated the name. He was asked who the candidate was. He said that he could not remember the name of the candidate. He was asked whether the candidate won. He said that the Congress party won, because his area is dominated by the Congress party. He was asked again about his candidate. He said that he was in his forties, and he gave the candidate's caste. The applicant was asked whether he was campaigning as he was going to university. He said that he studied but went home often. His area is only a few hours from his university. He said he was also involved in sports at the university, as well as politics. He said that there were a lot of student political groups at university, and they were often in conflict and had fights.

The applicant said that the main reason he came to Australia was to study. He had completed his studies in Nepal and wanted to do a further degree in Australia. He thought that the political situation in Nepal was not going to get worse, as it has done. Before he came to Australia, the applicant had no particular problems in Nepal. His family had not had difficulties with the Maoists.

It was put to the applicant that information before the Tribunal indicated that Nepal appeared to still be on track for elections in June this year. While there have been outbreaks of political unrest, the peace process has been continued with. The applicant said that the Maoists now have the upper hand. They have not been punished for their past actions. It was put to the applicant that if a majority of the people want the Maoists to have power, and voted for them in the elections, then this would still be a democratic process. It was put to the applicant that BBC News has reported many positive signs. The applicant said that the Maoists are still kidnapping people. It was put to the applicant that some outbreaks could be expected given that there had been some ten years of civil war, but that the democratic process appeared to still be on track. The applicant said he would love to return to Nepal if everything was settled down. He said that his family was middle class, and they had businesses there, so he did not need to stay in Australia. He said that he did not believe that everything would proceed peacefully.

The applicant was asked what he feared if he went back to Nepal. He said that he feared that the Maoists will think, because he has been abroad, that he has a lot of money, and they will demand money from him. He is also afraid because of his marriage. He is afraid of being attacked by the Maoists and by his family. He was asked why he was afraid of the Maoists now, given that he has been out of the country for a long time. He said that Nepal is a small country, and the Maoists since he has been abroad will ask him for money. He was asked whether they would do anything besides ask him for money. He said: "You never know". He said that if he refuses the Maoists money he will be killed, kidnapped, tortured, anything

can happen. It was put to the applicant that his father had not suffered any of these things. He said that this was because he had given them everything he had. It was put to the applicant that in recent times his parents had not been harmed because they no longer had money to give; therefore there was no reason to believe that they would automatically harm the applicant if he could not give them money. He said that they knew there was no point harming his parents. It was put to the applicant that if the Maoists knew there was no point in asking for money from him, it was unlikely that they would harm him.

The applicant was asked about his concerns in relation to his marriage. He said that they would be ostracised.

The applicant was asked whether there was any reason why he could not go to India, if he was afraid of the Maoists. He said he did not want to go to India. He said that the Maoists also exist in India. They have a problem with Maoists there. It was put to the applicant that only in some parts in India were there problems with Maoists. He said that this was how things started in Nepal. He said you never know whether the Maoists would not take over in India. He said that he also had a language problem in India. There is discrimination against Nepalese in India. He said that human rights advocates in India say that Nepalese are mistreated in India.

The applicant said that he had suffered a lot of mental stress. He said that his family stopped their financial support for him when the Maoists took their property. The applicant said that he decided to apply for a Protection Visa when he saw that everything was changing there. It was put to him that he did not apply until recently, when much that was harmful had already happened there.

The Tribunal also had before it independent information relevant to the applicant's claims.

The US State Department, in its Country Report on Human Rights Practices 2006 (released March 2007) for Nepal states:

Nepal is a constitutional monarchy with a parliamentary form of government and a population of approximately 28 million. Until April 27, King Gyanendra Bir Bikram Shah Dev had direct control of the government, citing the need to fight a Maoist insurgency under the emergency powers article of the constitution. After the successful popular uprising in April, the king restored parliament and ceded power to a government headed by Prime Minister Girija Prasad Koirala and run by an alliance of the seven main political parties (Nepali Congress, Nepali Congress-Democratic, Communist Party of Nepal-United Marxist Leninist, Nepal Sadbhavana Party-Anandi Devi, People's Front Nepal, Nepal Peasants and Workers Party, and the United Left Front). On November 21, the government and the Maoists signed a comprehensive peace agreement that called for an interim government, with the participation of the Maoists, to be formed by December 1. At year's end, the government and the Maoists had not yet formed an interim government...

At year's end, in most cases, the Maoists had not returned previously seized property; however, on November 15, Maoists unlocked a house in Hetauda that they had seized in 2002 and allowed the owner to return. Maoists continued to seize property after the cease-fire declaration in April...

Discrimination against lower castes was especially common in rural areas in the western part of the country, even though the government outlawed the public shunning of dalits and made an effort to protect the rights of the disadvantaged castes.

Economic, social, and educational advancement tended to be a function of historical patterns, geographic location, and caste. Better education and higher levels of prosperity, especially in the Kathmandu valley, were slowly reducing caste distinctions and increasing opportunities for lower socioeconomic groups. Better educated, urban-oriented castes continued to dominate politics and senior administrative and military positions, and to control a disproportionate share of natural resources.

Caste-based discrimination, including barring access to temples, is illegal; however, dalits were occasionally barred from entering temples. Progress in reducing discrimination was more successful in urban areas

BBC News in a report dated 2 March 2007 states:

The Nepalese prime minister has urged former Maoist rebels not to bear arms in public. He said they should create the right climate to join a government. GP Koirala made his remarks after meeting Maoist leader Prachanda and other senior former rebel leaders in the capital, Kathmandu. Ministers say they have now received Maoist guarantees that action will be taken against those found guilty. Concern over public displays of weapons by the Maoists has risen recently. The issue was raised during another meeting between Prachanda and the leader of the Communist Party of Nepal (United Marxist and Leninist) Madhav Kumar Nepal, earlier on Friday.

The Maoists say they want ministries in an interim government before elections are held. But the government has categorically said all their arms need to be locked up in UN-monitored cantonments before that can happen. State-run Nepalese radio said that in his meeting with the prime minister, Prachanda proposed that the country should be declared a republic before constituent assembly elections are held. It quoted sources as saying that the prime minister objected to that suggestion, and condemned the Maoists for their "arrogance".

The station said that Mr Koirala was unhappy that the Maoists continue to show their strength by bearing arms in public on the eve of the formation of an interim government. Last week, the UN said all the rebels and their arms had been registered, but some Nepalese government officials have voiced concern that not all their weapons had been accounted for (http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/6412579.stm)

BBC News in a report dated 1 April 2007 details further progress:

Maoist ex-rebels have been sworn in as ministers in Nepal's interim government after a deal on the make-up of the new cabinet tasked with building peace. Parties in the ruling alliance reached a deal after a day of haggling over senior posts. Five Maoist ministers are joining the government under a peace deal that ended 10 years of bloody civil war. The election of a constituent assembly, which will determine Nepal's future course, was set for 20 June.

Up until last year's truce, the Maoists were engaged in a violent civil conflict with the state. Based in the mountains and jungles, they were banned as terrorists. Now the Maoists are getting control of five out of 21 ministries: the departments of information, local development, planning and works, forestry, and women and children. They are joining the government as the Communist Party of Nepal (Maoist).

"A new chapter has begun in the history of Nepal," Prime Minister Girija Prasad Koirala told the interim parliament. An initial deal on cabinet posts was reached on Friday but differences over seniority rankings in the cabinet delayed its final formation until Sunday. The constituent assembly to be elected in June will chart out Nepal's future. It has to decide, among other issues, whether Nepal will remain as a kingdom or become a republic, as the Maoists want. King Gyanendra relinquished key powers amid street protests last year, prompting the Maoist truce. That ended 10 years of civil strife during which at least 13,000 people died (http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/6515159.stm)

In relation to intercaste marriage, while Nepal is officially recognised as a 'Hindu Kingdom' its constitution ensures the rights of all Nepalese citizens against discrimination on the basis of religion, gender, ethnicity or caste.

No official obstacles exist to either inter-caste or inter-religious marriages in Nepal (see below). However, as with many traditional societies it is not uncommon for people of such unions to suffer negative societal attitudes. According to a DFAT advice of 1994:

While many inter-caste marriages have been occurring in Nepal in recent years it has not gained full social acceptability within some sectors of the community. This is especially true in conservative and higher caste groups including the Brahmin caste. The social acceptability of this system depends upon several factors, including caste, locality, educational level in a particular locality, family values, local community customs and traditions, etc.

...There is no law which prohibits inter-caste marriage nor is there any legal provision which provides for prosecutions for entering into marriage in Nepal (DFAT 1994, *DFAT Cable KM6687 - Information request: Inter-caste marriage in Nepal*, 4 May)

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a Nepalese national, on the basis of evidence before it, including the evidence of his passport.

Most elements of the applicant's claims are consistent in relation to his fear of serious harm from the Maoists, although at both Tribunal hearings his evidence about previous instances of family land and business seizures, and evidence, including documentary evidence, about forced donations have been vague and contradictory. In the course of the second Tribunal hearing, the applicant, having said that his family have been reduced to extremely poor financial circumstances by the Maoists, later said that his unwillingness to return to Nepal was not motivated by economic circumstances, since his family had businesses in Nepal.

The applicant also made a new claim, as a consequence of his marriage to his long-term Nepalese girlfriend in Australia.

The Tribunal accepts that the applicant and his family were supporters of the UML (United Marxist-Leninist) party, and that the applicant was involved in campaigns on behalf of the party in the lead up to elections. However, on the applicant's evidence, his father, though a UML supporter, was not an activist, and the applicant himself was vague about his work for the party prior to the elections, being unable to remember the name of the candidate on whose behalf he campaigned. The applicant claimed, and the Tribunal accepts, that there were student clashes between the supporters of the UML and of the Congress Party, that he was involved in student politics, and (in his original statement attached to his Protection Visa application) had been injured in a major clash. However, these events were prior to the rise of the Maoists, and are not relevant to the current situation in Nepal or to the applicant's claim of fearing persecution from Maoists.

The applicant has claimed that the Maoists took from the applicant's family land, businesses and a substantial amount of money by way of forced donations. This action by the Maoists is consistent with the country information about property seizure and extortion by the Maoists. However, the applicant was vague about when such events occurred when he was questioned at the second Tribunal hearing. In particular, he was uncertain about when the Maoists last approached his parents for money. His statement at the hearing that they last approached his parents a few years ago is accepted by the Tribunal, but on the applicant's evidence, seizures of lands and businesses took place at some point prior to his grandfather's death a number of years ago. Furthermore, when it was put to the applicant, that documentary evidence he had submitted to the Tribunal indicated that his father was still giving money to the Maoists recently, he seemed confused, and was unable to provide a satisfactory explanation of his father's ability to pay the Maoists a substantial amount of money, when they had already taken everything from him. His explanation that other family members contributed money for his father's "donation" seemed a response made up on the spot at the hearing. On balance, the Tribunal accepts that Maoists seized assets and extorted money from the applicant's family, who were clearly, on his evidence, wealthy landowners and businessmen. The Tribunal also finds, however, that the extent of the Maoists' depredations against his family have been exaggerated by the applicant. It also finds, on the applicant's evidence, that the applicant's family was not approached by the Maoists after a few years ago.

The applicant has not claimed to have suffered serious harm from the Maoists, since he left Nepal before they began any actions against his family. On the applicant's evidence, his family, though it sustained serious financial losses inflicted by the Maoists, were not physically harmed, and while they live in reduced circumstances, they have been able to maintain themselves by renting out part of their home. The Tribunal therefore finds that neither the applicant nor his family have in the past suffered harm serious enough to amount to persecution in a Convention sense.

The applicant has claimed, and the Tribunal accepts, that he is married to a woman from a different, and lower caste than his own, and that his family have been seriously angered by this action and have said that they reject the applicant and his wife because of the dishonour the applicant has brought on the family. While the applicant has been hurt by this reaction on the part of his family, it would appear that this was not unexpected, since the applicant and the woman who is now his wife had conducted a relationship which they kept secret from their families, for several years.

The Tribunal has considered whether there is a real chance that the applicant will be persecuted if he returns to Nepal in the foreseeable future. He has claimed that Maoists will attempt to extort money from him if he returns, particularly because they consider all people

returning from abroad are likely to be wealthy. The Tribunal accepts that the applicant may indeed be approached for money for this reason. However, the Tribunal does not accept the applicant's claim that his inability to donate money to the Maoists will result in his death. While the applicant's family have been the victims of Maoist extortion, they have not suffered physical harm, and indeed have not been approached by the Maoists for some years, on the applicant's evidence. Furthermore, the political situation is changing in Nepal, a peace agreement having been signed, and arrangements being under way for elections later this year (see pages 11-12). The current government is run by a coalition which includes the applicant's UML party (see page 11) and there is no reason to believe that the applicant would be targeted by the Maoists for this reason, even if he had been a prominent political activist. There is nothing in the applicant's evidence to indicate a reason that he would be seriously harmed by the Maoists, and the evidence on current events in Nepal is to the effect that the situation is becoming more stable there, and that therefore mechanisms of civil protection are becoming stronger. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicant will be persecuted by Maoists in Nepal if he returns there in the foreseeable future.

The Tribunal has considered the applicant's claim, unrelated to harm by Maoists, that the family and social ostracism consequent on his intercaste marriage amount to persecution in a Convention sense. The Tribunal has noted the independent evidence to the effect that caste-based discrimination is illegal in Nepal, and that intercaste marriages are not prohibited by law (page 12). However, it also notes that social discrimination is likely, depending on a range of factors. The Tribunal accepts the applicant's evidence that his family has told him that he has brought dishonour on them, and that he cannot return to the family home. It accepts that there has been a similar reaction from the applicant's wife's family. However, the Tribunal has also taken into account the fact that the applicant has lived away from his family in Australia for a period of some years, and that his wife has also lived away from her family for some time. Furthermore, the applicant is very well-educated, and he has an excellent command of English. While it is no doubt painful for the applicant to be rejected by his family, the Tribunal is of the view that he and his wife could find employment and take up their lives in urban areas of Nepal, and the possibility that they will suffer discrimination sufficiently serious as to amount to persecution in a Convention sense is remote. In particular, the Tribunal is satisfied that any discrimination faced by the applicant will not cause him 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. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicant will suffer serious harm because of his intercaste marriage if he returns to Nepal in the foreseeable future.

The Tribunal has considered whether the applicant's claims of ill-health are likely to have any impact on the consequences of his return to Nepal. While the Tribunal accepts that the applicant has suffered and continues to suffer symptoms of stress, it does not consider this to be a condition which would seriously disadvantage the applicant if he returned to his country. Even if his symptoms worsened substantially, any such reaction would not be inflicted on him for a Convention reason.

The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution in Nepal.

CONCLUSIONS

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) for a protection visa.

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1968.

Sealing Officer's I.D. PRCFSA.