

**071244193 [2007] RRTA 94 (14 May 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071244193

**DIAC REFERENCE(S):** CLF2006/135952

**COUNTRY OF REFERENCE:** Nepal

**TRIBUNAL MEMBER:** Patricia Leehy

**DATE DECISION SIGNED:** 14 May 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 her review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

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

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

### **RELEVANT LAW**

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

#### **Definition of 'refugee'**

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages.

According to her Protection Visa application, the applicant is a single female who was born in City A, Nepal. She gives a single residential address in City A since the late 1970s. She says that she has a sibling who is an Australian citizen. She also has a child, who is currently resident in Nepal, as are her parents. The applicant says that she was educated for 10 years, and says that she has been unemployed.

The applicant submitted a statement with her Protection Visa application. In the statement, she says that she is an unmarried mother with one child. She says that she was forced to enter into an abusive marriage against her will by her relatives. She says that after 6 months of abusive marriage she escaped and went to Village B where her ex-boyfriend lived. The ex-boyfriend expressed his full support for the applicant by accepting her as a fiancée. He is a different caste from hers. She is of a lower caste. The applicant was very happy with the ex-boyfriend despite the intercaste relationship, but his parents did not accept her. She lived with the ex-boyfriend for a few months, and accidentally got pregnant. Her ex-boyfriend distanced himself from her after she became pregnant. He subjected her to domestic violence and forced her to work as a prostitute. She gave birth to her baby who is living with one of her school friends.

The applicant says: "My life was disrupted by the uncivilised society. I did not have the opportunity to enjoy the benefits of living in a society where basic services are available when I was growing up ... Facing, accepting and dealing with my past circumstances, I feel I was born disadvantaged." She says she has been discriminated against on the basis of her intercaste relationship. She says she is subjected to selective harassment and socially ostracised. She says that despite the Nepali Constitution specifying that the State not discriminate against citizens on the grounds of sex and caste, among other things, discrimination against women and lower castes is widespread. She says that her child, born outside marriage, is severely discriminated against. The Nepalese government is reluctant to provide adequate protection to women who are subjected to violence. She says that she is a victim of social stigma attached to her as a single mother. She is the victim of gender-related violence where the state provides her with no effective protection. The applicant says that she as a single mother is vulnerable to violence and exploitation, and that women in Nepal who fail to honour an arranged marriage are a particular social group. She says she would face persecution as a member of this group. She says she fears persecution from her former boyfriend who abused her during their relationship. She says that after the relationship ended

he harassed her and her family. She says that Nepalese authorities engage in discriminatory and harassing behaviour towards ethnic minorities and single mothers are at particular risk of rape and sexual violence from soldiers and police. She will face harm not only from the Nepalese authorities but also from males in general. She says she came to Australia with the assistance of her sibling who is an Australian citizen.

The applicant made a submission to the Tribunal. Additional claims or details in relation to previous claims are summarised as follows:

- Her child's father was of different ethnicity from the applicant, and she and her child will face discrimination because of the social stigma attached to single mothers and mixed race children;
- She fears persecution from her former boyfriend who was a Maoist and who abused her during their relationship, and harassed her and her family after the relationship ended;
- The Maoists demanded money from her as she had a relative living in Australia; she was brought a letter from the Maoists requesting her attendance at their camp where she was held for a day;
- The Maoists demanded a sum of money from her and she paid a third of that sum after she received a letter from her sibling;
- She fears persecution for her race, imputed political opinion and membership of a particular social group.

The applicant attached a substantial amount of country information with her submission. The information related to a range of issues in Nepal including the political situation, discrimination against Dalit women, women in Nepal, caste-based discrimination and human rights violations.

The applicant attended a hearing. The applicant brought her passport to the hearing. She also submitted two country information documents, one headed "Nepal: 'The People are Muzzled with the Government's Undemocratic Rules and Regulations': Interview with Kanchan Chaudhuri", and the other headed "Nepal: Five minors and two adults severely tortured by the police after their illegal arrest and detention". The interview with Mr Chaudhuri, which appears to have been published in a quarterly, *Human Rights Solidarity*, in November 2005-January 2006, is a commentary on the poor human rights situation in Nepal following the royal coup in February 2001. The other article, dated 13 April 2007, makes a point about the arbitrary arrest, detention and torture of people, including minors, in Nepal, in this case for alleged minor theft.

At the Tribunal hearing the applicant said that her parents were currently living in Katmandhu. When asked when she last spoke to them, she said she spoke on the phone about a month before her departure for Australia. She said that she was not on good terms with her parents. She was asked why she rang them. She said that she wanted to talk to them because she is still their child. She said that she was not on good terms with them because she did things against their wishes. She was asked to give more detail. She said that she was a student and her parents decided to arrange a same caste marriage for her but although the

applicant said she did not want to marry, they got her married. However, the applicant did not stay with her husband and her parents were upset.

The applicant said that her child was staying with a friend in Village C, the applicant's village, which is in the district of City A. Village B is about two hours from Village C. The applicant said that she was living in Village C prior to her departure for Australia. She was asked whether her parents were living in the village while she was there. She said that they usually live in the village, but they also stay in Kathmandu for business. She said that when she was living in the village she did not see her parents because relations with them were not good. She said that the village is small. She did not know how many people lived there, perhaps a relatively small number.

The applicant was asked how she supported herself and her child when she was living in the village. She said that she relied on people to help her. She said that she and her child lived alone together. Sometimes they would be given a room when she helped in the household for a family.

The applicant was asked when her relationship with her child's father ended. She said that he started to ill-treat her when he found out that she was pregnant. She returned to Village C to have her baby. She said that her boyfriend would come and threaten and verbally abuse her saying that she had no relationship with him. The applicant was asked how long her boyfriend continued to do this. She said it was up to about a year before she left for Australia. It was put to her that it did not seem credible that he would continue to abuse her so many years after the birth of her child. She said that his parents did not accept her because she was of a lower caste. It was put to the applicant that the relationship was over when she left her husband and her baby was born. The applicant continued to speak about intercaste problems. She said that she was looked down on by society.

The applicant was asked whether she had problems when she returned to her village to have her baby. She said that she did. She did not have support. She could not talk to anyone. She had to endure a lot of verbal abuse and she had no respect.

The applicant was asked when she was married. She said that it was in a specific year. She stayed with her husband about one or two months and then she left, because she had been married against her will. She was asked whether her husband harmed her. She said that he did not, but her parents and her neighbours abused her for it.

The applicant was asked about the boyfriend. She said that he and she had been boyfriend and girlfriend at school, but they did not have a relationship. She fled to him after she ran away from her marriage. She stayed with him for a few months, and he started to become violent to her when she became pregnant. She said that when she went to her boyfriend in Village B he was living with his parents. His parents accepted her as a friend at the beginning. But when she became pregnant her boyfriend became physically violent and would abuse her for being of a lower caste. His parents also abused her because they did not want their son to marry a lower caste woman.

The applicant was asked whether she spoke to her parents when she came back to her village. She said that she did but they said: "You are dead to us", and told her that she had departed from their caste. She was asked what they said when she spoke to them before coming to Australia. She said that they said the same things. She said that the society there said nasty things to her and called her a prostitute.

The applicant was asked about her problems with Maoists. She said that they demanded money from her. It was put to her that she had not mentioned this in her Protection Visa application to the Department. She said that her English was not very good. She said that her sibling's family had written it for her. She was asked about her problems with Maoists. She was very general in her response. She said that they knew her sibling was in Australia and therefore asked for money. She was asked where the Maoists were from. She said that there were some Maoists in the village and they came and took her. She was asked when this happened. She said it was a year before she came to Australia. She was asked where they took her. She was vague, saying they had a house in the village, or a bit away from the village, and they took her there. It was a long walk away but she was not sure of this. She said that there were a number of people in the house and they said that her sibling was in a foreign country and she should give them money. She said she had no money and they told her to ask her sibling. She told her sibling about this, and her sibling sent her money. She gave them a sum of money but she could not get more. They continued to ask her for money and she told her sibling about it and her sibling said that she should come to Australia. The applicant was asked whether the Maoists took her away again. She said that they did not, but they would send messages asking for money. She said that she used to hide from them.

The applicant was asked what she feared if she returned to Nepal. She said that she was afraid of her boyfriend and she was afraid of society. They could attack her. She said that she is without support. She said that she also fears the Maoists, because she has no money to give them. She said that if she goes back to Nepal, people will look down on her and her child and will make them feel bad.

It was put to the applicant that she had submitted information on the treatment of Dalits in Nepal, and she was asked whether she considered herself a Dalit. She said that she was not a Dalit, but she was of a lower caste than the caste which her boyfriend belonged to. The applicant said that it was very difficult to be a single parent in Nepal. Everyone would look down on her.

The Tribunal wrote to the applicant in accordance with s424A of the Act, saying that she had been given information at the hearing that would, subject to any comments she made, be the reason, or part of the reason, for deciding that she was not entitled to a protection visa. The information was as follows:

The applicant claimed in a submission to the Tribunal [date] that Maoists had demanded money from her and requested she attend a camp where she was held for a day, but she had not mentioned this claim in her Protection Visa application.

As explained at the hearing, this information was relevant because the fact that she did not mention this claim in her Protection Visa application might lead the Tribunal to believe that she had fabricated it to support her application for a Protection Visa. She was invited to comment on this information by a specific date.

The Tribunal received a further letter from the applicant. In the letter she says that there were a number of factors relevant to her failure to mention the claim that Maoists had demanded money from her and detained her for a day. They include:

- Lack of legal advice, since she relied on her sibling's spouse for assistance; her sibling's spouse appeared to have failed to include the claim in the Protection Visa application, even though the applicant had told the spouse about it;

- Her sibling's spouse focused more attention on the social stigma attached to the applicant as a single mother of a mixed race child than on the Maoist claim;
- Her sibling's spouse recalled the Maoist claim when submitting the review documentation to the Tribunal.

The applicant concludes: "I would like the Tribunal to consider the painful circumstances of myself resulted from the Maoists, social stigma attached to me as a single mother and mixed race child."

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) states:

Although prohibited by law, citizens practiced caste discrimination at Hindu temples in rural areas, and such discrimination strongly influenced society. On March 21, upper caste locals barred dalit (lower caste) youths from entering the Saileshwori Temple in Dipayal by padlocking the temple door.

On August 30, a dalit woman filed a case against a priest alleging that she was not allowed to enter a temple during a religious celebration because the priest would only allow high caste people into the temple.

On September 7, demonstrators in Silgadhi protested the entry of dalits into the local temple. Locals demonstrated after dalits tried to enter the temple...

Domestic violence against women was a serious problem that received limited public attention. There was a general unwillingness among police, politicians, citizens, and government authorities to recognize violence against women as a problem. Sensitizing programs by NGOs for police, politicians, and the general public have led to a greater awareness of the problem. The women's cell of the police received 939 reports of domestic violence during the country's fiscal year, which ended June 15. However, in the absence of a domestic violence law, police were unable, or unwilling, to file cases against the accused.

Police had 18 women's cells in 16 of the country's 75 districts. The female officers in the cells received special training in handling victims of domestic violence and trafficking. Police also issued directives instructing all officers to treat domestic violence as a criminal offense that should be prosecuted. Nevertheless, according to police officials, this type of directive was difficult to enforce because of entrenched discriminatory attitudes among police. Even if police made arrests, often neither the victim nor the government pursued prosecution.

More than 20 NGOs in Kathmandu worked on the problem of violence against women and on women's issues in general, and provided shelter, medical attention, counseling, and legal advocacy for the victims of violence...

Although the law provides protections for women, including equal pay for equal work, the government did not take significant action to implement those provisions, even in many state industries. Women faced systematic 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 their own names. Unmarried, widowed, and divorced women were able to inherit parental property...The November 21 peace agreement called for the rights of women to be protected in a special way. It was unclear at year's end what that would mean in practice...

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.

## **FINDINGS AND REASONS**

On the evidence before it, including the evidence of her passport, the Tribunal finds that the applicant is a Nepalese citizen.

The Tribunal formed the impression at the Tribunal hearing that her evidence was not reliable. She was unable to explain why the father of her child would continue to abuse her several years after their child had been born, and after she had left his household and gone to another town. The Tribunal was not persuaded by the applicant's claims that she was unemployed and without support of any kind in her village from the year the child was born until she left for Australia, even though the village was small, on her evidence, and her parents lived there most of the time. The applicant did not mention in her Protection Visa application that she had been detained by Maoists, and her explanation in response to the Tribunal's 359A letter inviting comment was that she did not have legal advice, that she relied entirely on her sibling's spouse, and that she told her sibling's spouse of the claim, but that the spouse failed to include this claim in the application. Given the seriousness of this claim, the Tribunal does not accept this explanation. Furthermore, it did not find her account of her experience with Maoists at the Tribunal hearing credible. It was very vague and lacked detail.

The Tribunal accepts that the applicant ran away from an arranged marriage and that as a result, her parents were very angry and distressed. It accepts that the applicant stayed with another man and his family after her marriage, and that she became pregnant. It accepts that the child's father abused her verbally and physically, and that she left him prior to the baby's birth. It also accepts that the ex-boyfriend's family were verbally abusive to her while she was living in their house. The applicant did not mention at the Tribunal hearing that the ex-boyfriend had forced her to work as a prostitute, and the Tribunal is very doubtful that this occurred. However, it is prepared to give the applicant the benefit of the doubt, and accepts that this occurred prior to the birth of the applicant's baby and her departure for her village. The Tribunal accepts that at least some people in her village spoke rudely to her when she returned, and that she feels she and her child are not well accepted by her community. The Tribunal does not accept that the applicant's ex-boyfriend continued to come to her village and threaten or harm her in any way after the year her child was born. The applicant was vague about this at the hearing, and, rather than provide any details, complained of her caste status generally. Furthermore, the ex-boyfriend and the applicant were not married, she had left his family home, and he had nothing further to fear from her, since his association with a lower caste woman had been severed by the applicant herself.

The Tribunal rejects the applicant's claims that Maoists demanded money from her, and that they took her away for questioning. Not only was this claim not mentioned in her Protection Visa application, but when she was asked about it at the Tribunal hearing, she was unable to give a convincing account of what happened to her.

The applicant has said that she is afraid that her ex-boyfriend, his family, the authorities and society generally will harm her both physically and emotionally or psychologically because of her caste and her membership of a particular social group, variously described. Specifically, she has claimed that her ex-boyfriend will attack her and make her and her child feel bad, and that society will look down on her and her child. She claims that Nepalese authorities engage in discriminatory and harassing behaviour towards ethnic minorities, and that single mothers are at particular risk of rape and sexual violence from soldiers and police, and that she will face harm not only from the Nepalese authorities but also from males in general. She has also claimed to fear harm from the Maoists, since she has no money to give them. The Tribunal has considered whether there is a real chance that the applicant will face harm amounting to persecution in a Convention sense if she returns to Nepal in the foreseeable future.

The Tribunal has not accepted the applicant's claim that her ex-boyfriend continued to abuse her after the birth of their child and her move to another town a number of years ago. The applicant was unable to provide any convincing reasons for her boyfriend's continuing adverse interest in her, and the Tribunal is not satisfied that there is a real chance that she will suffer harm from him or his family in the future.

The Tribunal has not accepted the applicant's claim that she has been harmed in the past by Maoists, and is therefore not satisfied that there is a real chance that she will suffer harm from them in the future.

The Tribunal accepts that the applicant may face discrimination and some social rejection because of her situation as single mother in Nepal. It does not accept that she will face serious harm for reasons either of her ethnicity, her caste status, or her status as a single mother, considered either separately or cumulatively. The applicant has not suffered serious harm in the past from the authorities either because of her ethnicity or caste status, or because of her status as a single mother, although she has certainly faced financial and emotional hardship. While there are reports of continuing discrimination against Dalits, the country information before the Tribunal about Nepal does not support the applicant's claim that because she is of an allegedly lower caste than other members of Nepalese society she will face harm amounting to persecution in a Convention sense, and the Tribunal rejects this claim. The Tribunal accepts that Nepal's record in relation to the treatment of women in Nepal is not good. Domestic violence is widespread, and does not receive appropriate attention by the authorities. Women face systematic discrimination, although there are legal protections for them. However, the US State Department notes that there are more than 20 NGOs in Kathmandu addressing women's issues, and steps have been taken to train police in relation to domestic violence (see US State Department report, pages 8-9). In the applicant's case, she has been able to live with her child in a village in Nepal for a number of years without suffering serious harm from authorities such as the police or the army, or the community, and indeed she has received significant support from some members of that community. The Tribunal is not satisfied that there is a real chance that the applicant will suffer persecution in a Convention sense from the authorities or the community if she returns to Nepal in the foreseeable future for reasons of her caste or her membership of a particular social group, however defined, or for any other Convention reason. It is therefore not satisfied that the applicant has a well-founded fear of Convention-based 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)(a) for a protection visa.

## **DECISION**

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

<p>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 <i>Migration Act 1958</i>.                      PRRRNM</p>
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