

**1201040 [2012] RRTA 638 (23 July 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1201040

**DIAC REFERENCE(S):** 2008/014932; CLF2011/120747

**COUNTRY OF REFERENCE:** Nepal

**TRIBUNAL MEMBER:** Di Hubble

**DATE:** 23 July 2012

**PLACE OF DECISION:** Melbourne

**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 applicants] July 2011. The delegate refused to grant the visa [in] December 2011 and the applicant applied to the Tribunal for review of that decision. The applicant was represented in relation to the review by his registered migration agent.

### RELEVANT LAW

3. 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 to 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 to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

4. 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 to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
5. 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.
6. 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.

7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.
10. 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.
11. 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.
12. 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.
13. 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.

14. 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.

### **Complementary protection criterion**

15. 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 to 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').
16. '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.
17. 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.

### *Protection Obligations*

18. Subsection 36(2) of the Act, which refers to persons to whom Australia has protection obligations, is qualified by subsections 36(3), (4), (5) and (5A) of the Act. They provide as follows:

#### *Protection obligations*

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right

mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

19. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4), (5) or (5A) are satisfied, in which case the s.36(3) preclusion will not apply.
20. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].
21. In determining whether these provisions apply, relevant considerations include: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; and whether s.36(3) does not apply because of the operation of s.36(4), (5) or (5A).

## **CLAIMS AND EVIDENCE**

22. The Tribunal has before it the Department's file relating to the applicant and the Tribunal's own file.

### **Application for a protection visa**

23. According to the applicant's Form 866C 'Application for an applicant who wishes to submit their own claims to be a refugee':
  - a. the applicant was born [date deleted: s.431(2)] at [Town 1], Nepal;
  - b. he speaks, reads and writes Nepalese and English and speaks Hindi;
  - c. he identifies his ethnicity as Nepalese and his religion as Hinduism;
  - d. he has never been married or in a de facto relationship;

- e. he is a citizen of Nepal, he holds no other citizenship and has no right to enter and reside in any other country;
- f. he entered Australia as the holder of a Student visa [in] April 2009;
- g. he holds a passport issued by Nepal [in] 2008 which expires [in] 2018 and was issued in [district deleted: s.431(2)];
- h. the most recent Australian immigration visa granted to him is a Student visa issued [in] March 2009 which was valid until [a date in] June 2011;
- i. he has previously travelled to India on several short stay visits throughout the period 2000 to 2009;
- j. he gives the address he lived at for the 10 years prior to his arrival in Australia as [address deleted: s.431(2)] [Town 1], Nepal.
- k. he has had 14 years of schooling at [two schools] in Nepal and completed 1 year at [an academy];
- l. gives his usual occupation or profession as 'student'; and
- m. gives no employment history.

24. At question 41 of Form 866C the applicant states that he is seeking protection in Australia so that he does not have to go back to Nepal. At questions 42 to 46, where he is asked about his claims for protection he states:

**Question 42 Why did you leave that country?**

I left for political reasons. I am a member of the Rastrya Prajatantra Party. This party wants the sovereign to stay, be under the king. All other parties have combined together and are killing or beating us up.

**Question 43 What do you fear may happen to you if you go back to that country?**

I will be killed. I am constantly threatened. They say they will harm my family members.

**Question 44 Who do you think may harm/mistreat you if you go back?**

Nepal Congress (UMA).

**Question 45 Why do you think this will happen to you if you go back?**

It's happening now they are trying to eliminate people like us.

**Question 46 Do you think the authorities of that country can and will protect you if you go back? If not, why not?**

Government is trying to eliminate us people who want the king to rule.

25. In Form 866B 'Persons included in this application and family composition' the applicant states that:

- a. he is the only applicant;
- b. he has not previously applied for refugee status or a protection visa; he has previously applied for a student visa; he has never held a Bridging Visa E nor been in immigration detention;
- c. he has no members of his family unit in Australia not included in the application;
- d. his mother, father and [sibling] were outside Australia and not included in the application at the time of application;
- e. he has no close relatives in Australia at the time of application; and
- f. his migration agent assisted him to complete his application.

26. The applicant participated in a telephone interview with the delegate [in] December 2011, which had to be resumed part way through [in] December 2011 after the applicant's mobile phone dropped out and the delegate was unable to re-contact him. The Tribunal has listened to the recording of that interview which was conducted in English.

### **Tribunal hearing**

27. The applicant appeared before the Tribunal [in] July 2012 to give evidence and present arguments. The Tribunal hearing was conducted in English via video conference facilities between [a location in Queensland] and the Melbourne office of the Tribunal.
28. After explaining the function of the review, the role of the Tribunal, the operation of the Convention in Australia, and the complementary protection criteria, the Tribunal asked the applicant whether he had been able to understand the Tribunal without any difficulty. The applicant confirmed that he did understand.
29. Asked who filled out his protection visa application forms, the applicant responded that he did, although he had his immigration agent with him at the time and if he didn't understand a question he asked her. Asked whether he was quite comfortable filling out the forms himself, the applicant responded, "yes". Asked whether the claims he had made in his application for a protection visa are true and correct, the applicant responded "yes, that is true". Asked whether he wished to make any changes or additions to the claims contained in his protection visa application, the applicant responded, "no, I don't".
30. The Tribunal noted that in his protection visa application the applicant had stated that he is a Nepalese citizen by birth and he currently holds a Nepalese passport. Asked whether this was correct, the applicant responded "yes". Asked whether he also holds the citizenship of any country other than Nepal, the applicant responded, "no, I don't". Asked whether he has travelled to any other country except Australia, the applicant responded "yes, actually, India". The Tribunal noted that in his protection visa application the applicant had claimed that he visited India for several short stays during the period 2000 to 2009. Asked whether the first time he travelled to India was in 2000, the applicant responded that it was not; before he also travelled when he was a kid. Asked how old he was, approximately, the first time he travelled to India, the applicant responded that he was maybe 10 years old; he was sick and travelled to India for about 1 week for medical treatment.
31. The Tribunal confirmed with the applicant that he comes from the town of [Town 1], which according to a map of Nepal that the Tribunal had consulted, was very close to the Indian border. The applicant confirmed that this was correct. Asked approximately how many times in his life he had travelled to India, the applicant responded "5 or 6". Asked how old he was the second time he went to India, the applicant responded that he was maybe around 15 or 16. Asked whether these were all fairly short trips, the applicant responded that both trips were about 1 week. Asked how old he was the next time he went to India, the applicant responded that he was around 17, 18 or 19 and he went for about a week. Asked how old he was the next time he went to India, the applicant responded that between the ages of 15 to 19 he went to India about 3 times and mostly he stayed for 1 week. Asked whether he travelled to India after he was 19, the applicant responded that after he was 19 he was in Australia; he had finished high school. The Tribunal confirmed with the applicant that he had been to India about 5 times; the first time when he was 10 and then again when he was 15 and between the ages of 15 to 19 he went another 3 times. The applicant confirmed that this was correct. Asked whether he needed a visa to enter India, the applicant responded, "no, I don't".

The Tribunal stated that it understood there is an open border between Nepal and India. The applicant confirmed that this was right. Asked whether you just go through the border, the applicant stated, “yes, whatever we carry, that’s it” Asked whether he had been to any other countries, the applicant stated, “no”.

32. The Tribunal noted that according to his protection visa application, the applicant had travelled to Australia on a Student visa in April 2009. Asked whether he had undertaken any studies in Australia, the applicant responded that he studied an [Advanced Diploma] in Sydney from around late April 2009. Asked when he had stopped studying, the applicant responded that he studied for one and a half years. The Tribunal suggested that this would mean he stopped studying in late 2010. The applicant initially said, “yes”, but when asked whether he remembered when in 2010 he had stopped studying, he said that it was actually in the middle of 2010. Asked why he had stopped studying, the applicant responded that there were plenty of reasons. At that time it was really hard to find a job in Sydney, he kept looking but he couldn’t find one. Sometimes he didn’t even have money to buy a train ticket. Asked whether there were any reasons other than financial reasons why he stopped studying, the applicant stated that because he couldn’t find a job he started getting a bit depressed. Asked whether it was fair to say that the main reason he stopped studying was because he had financial problems, he couldn’t find a job and then he started getting a bit depressed, the applicant responded, “yes” Asked what he did after he stopped studying in the middle of 2010, the applicant stated that he moved to Melbourne and one of his friends helped him to find a job; he did that job for a couple of months and then he moved to country Victoria to find more jobs before relocating to the country in Queensland.
33. Asked what he thinks will happen to him if he has to return to Nepal, the applicant responded that he thinks they will probably kill him. Asked who he was referring to, the applicant responded, “the communists, the Maoists” Asked why he feared the communists or the Maoists would kill him, the applicant responded that when he was with his family he and some of his friends founded a group to support the King. His family name is “[name deleted: s.431(2)]” and his caste was from the royal family so he was more of a focus for them. So many members of his family were involved in politics before; his father’s brother was involved in an election for mayor of the city and that is why he was known to the communists.
34. Asked whether, other than the communists and the Maoists, he fears anyone else in Nepal, the applicant responded, “no” Asked whether it was fair to say that the only people or group he fears in Nepal are the communists or the Maoists, the applicant responded, “yes” The applicant stated that that was when he was in his country; he still fears the Maoists but he heard now they are making other groups and they are becoming friends with so many other parties. He is not sure if he goes back to his country now what will happen but he still fears the Maoists. The Tribunal asked the applicant whether it was fair to say that apart from the communists or the Maoists, there could be other people who potentially might harm him but at this moment he does not know who they are; he just suspects that there could be other people. The applicant responded, “yes, I don’t know what’s happening in my country but those Maoists and communists they are making so many new groups; they hide and they do one thing in one place”. Asked what he meant by “they hide and they do one thing in one place”, the applicant stated that they may hold a strike and shut down all the shops and then come into the street with big numbers of people.
35. The Tribunal advised the applicant that it had read his Protection visa application, and in response to the question, “Who do you think may harm/mistreat you if you go back” to



Nepal, the applicant had written “Nepal Congress (UMA)”. Asked why he had written this, the applicant responded that he was not sure about the name of the party, that’s why; because in his application he wrote that he was a member of the Rashtrya Prajatantra Party. He was not sure about the Maoist party name, that’s why he wrote Nepal Congress; nobody likes the Rashtrya Prajatantra Party

36. The Tribunal advised the applicant that it found it difficult to accept that he was politically active in his country but he did not know the name of the Maoist party and he wrote by mistake that he was frightened of the Nepal Congress (UMA) instead of the Maoists. The Tribunal noted that there was an election in 2008 and the Maoists had won the majority of the seats. The Tribunal advised the applicant that it found it difficult to accept that being a young educated man from a good family and a royal background, he would accidentally write that he feared the Nepal Congress (UMA) instead of the Maoists. The applicant responded that whenever he had a problem with those people, the Youth Communist League or the YCL, especially when he was in his city, [Town 1]... *(the applicant did not finish this sentence)* Asked why he didn’t state in his Protection visa application that he feared the YCL, the applicant responded, “to be honest, maybe it sounds stupid, but I thought I had to write some big party’s name because YCL was just a party that was forming in some cities of Nepal”. Asked whether he was saying that he wrote the Nepal Congress because he thought he had to write a big party’s name, the applicant stated, “yes, I thought because once... I know I had a problem with YCL...if somebody talks with me then I can explain but when I was filling in the form I wrote Nepalese Congress” The Tribunal advised the applicant that he was meant to write the truth in his Protection visa application and the truth, according to what he had told the Tribunal, would have been that he feared the YCL. The Tribunal advised the applicant that it was at a loss to understand why the applicant had thought it correct to write down that he feared the Nepal Congress (UMA) and it did not make any sense to the Tribunal as to why he would do that. The applicant responded that he did not know what to say; when he was filling out the form he was being honest but he knows what the Tribunal means. He was being honest with what he wrote but he understands it is hard for the Tribunal to believe that he wrote Nepalese Congress; if anybody talks with him then he can explain that it is YCL. Asked whether he actually fears the Nepal Congress, the applicant stated, “no”.
37. The Tribunal noted that the applicant had earlier referred to the claim in his Protection visa application that he is a member of the Rashtriya Prajatantra Party (which the Tribunal observed it would thereafter refer to as the RPP). Asked whether he is a member of the RPP, the applicant responded, “no”. Asked why he said in his Protection visa application that he was a member of the RPP, the applicant responded that he had been asked the question, “Are you a member of any party?”, and the group they had back in his country supports the King and the RPP also supports the King, so that’s why he gave that party’s name. Actually he was not a member; he would like to be but he never got a chance. The group he was involved with did the same thing for the same person, the King; that’s why he wrote the RPP. Asked why he had not written in his Protection visa application, “I am a member of a group that formed in my town which supports the King. I would like to join the RPP but I don’t actually belong to it” Asked why he had said he was a member of the RPP when he knew he wasn’t, the applicant responded that he thought that maybe it’s the same thing; they do the same thing, the RPP and the group that was formed in his town. The Tribunal advised the applicant that it had difficulty accepting this. The Tribunal noted that the applicant is an educated young man who claims to have been politically active and it had difficulty accepting that he would not know the difference between a group of people in his town who were informally supportive of the King and being a formal member of the RPP. The applicant

responded that he knows the difference between the RPP and the group that was formed in his town but he thought he should write the RPP. The Tribunal advised the applicant that it still did not know why he wrote this. The applicant responded that he was asked the question, "Are you a member of any political party", so he thought he should write the RPP. The Tribunal advised the applicant that the difficulty with this is that it is not the truth. The applicant responded that the person who took his interview at the Department argued the same thing and he gave the same answer; he is not lying even though it is hard to understand. The Tribunal advised the applicant that to the Tribunal it actually did look like a lie. The applicant responded that he is going to say the same thing.

38. Asked whether anything bad had happened to any of his family members since he left Nepal, the applicant responded that it had not to his family members but it had to his friends. Long ago his father's [brother] was in an election and he was threatened by Maoists in a phone call; they wanted him to withdraw from the election and not be involved in politics anymore. Asked when this had occurred, the applicant responded that it was around 2005 to 2007. The Tribunal noted that it was asking about the period since the applicant had left Nepal in 2009. The applicant responded that it had not happened to his family but one of his friends was killed a couple of months ago; they killed him and threw his body in the river. Asked to confirm that this had occurred a couple of months ago, the applicant responded that it was actually around 4 to 5 months ago. The Tribunal noted that the applicant had told the delegate during his interview in December 2011 that the Maoists had killed one of his friends from his home town in 2008 and thrown him in the river. Asked to comment on the disparity as to when this event had occurred, the applicant claimed that this type of thing had happened so many times.
39. The Tribunal then confirmed with the applicant that nothing had happened to any of his family members since he left Nepal. The applicant confirmed that this was correct. The Tribunal noted that in his Protection visa application the applicant had claimed that he was constantly threatened and "they say they will harm my family members", but nothing had actually happened to his family members. The applicant confirmed that nothing had actually happened to his family members and he was glad about that, but he was talking about his life; if he goes back he is scared that they will do something to him.
40. The Tribunal advised the applicant that available country information indicates that following elections in 2008 the Maoists obtained a majority of seats in the Nepalese parliament and since the election Nepal has been making progress towards a peaceful democratic society. The Tribunal advised the applicant that this raised doubts in the Tribunal's mind about the genuineness of his claim that a few months ago a friend of his was killed by the Maoists and thrown in the river because this was different to the country information the Tribunal had access to. The Tribunal noted that a second issue was the fact that the applicant had been able to survive in Nepal during a period when there was more political violence; however, things were settling down in Nepal now. Asked why he thought the Tribunal should find that he is more at risk now in Nepal than previously, the applicant responded that many people think things are settling down in Nepal but it is not actually. Last month, for 3 weeks or 1 month his home town was totally closed for a month, shops, everything. It is still happening there. Asked why his town had been totally closed for a month, the applicant responded that he is not sure of the real reason. He asked his family what was happening and they said "something's going on between parties and everything" The Tribunal advised the applicant that his response did not make much sense. The applicant responded that the only people who are going to do that are the Maoists, the communists. Asked what he meant when he

said that the town was totally closed for a month, the applicant responded that all the shops were closed, transportation was stopped, and banks shut down. Asked whether his parents had left the town, the applicant responded that his dad was already in the capital and his mum was in the town; she could not leave because all the transportation had stopped running.

41. The Tribunal noted that the applicant arrived in Australia in April 2009 but he did not apply for a Protection visa until July 2011 and, according to his Protection visa application, this was 1 month after his Student visa expired in June 2011. Asked why he had waited more than 2 years and until after his Student visa expired before applying for a Protection visa, the applicant responded that before he thought he would finish his studies but because of so many reasons he couldn't do that. After his Student visa finished he found out about the Protection visa; he had been looking for something like this for a long time and thinking about it for a long time. He knows all the things that happened in Nepal and he knew what would happen to him if he went back to his country. He thought about it and decided to apply for a Protection visa.
42. The Tribunal noted that the applicant had just said that he thought he would finish his studies; however earlier in the hearing he had said that he finished studying in the middle of 2010. The Tribunal noted that the applicant didn't apply for a Protection visa until a year after that, which was a long time to wait, and he also waited until one month after his Student visa expired and then he applied. The applicant stated that when he stopped studying he was looking for a proper job because if he found one he would really like to go back to college and finish his studies; that is what he was thinking. The Tribunal advised the applicant that the fact that he waited more than 2 years after he arrived in Australia and until after his Student visa expired, and for more than a year after he stopped studying, before applying for a Protection visa may cause the Tribunal to doubt the genuineness of his claim to fear persecution in Nepal. Asked whether he wished to respond, the applicant stated that he was still hoping to go back to study. The Tribunal advised the applicant that it was inclined to think that he would have applied for a Protection visa much earlier than he did if he was genuinely frightened of returning to Nepal. The Tribunal also advised the applicant that although he had given the Tribunal an explanation as to why he had put certain things in his Protection visa application that were not true, the fact that he had told the Tribunal that he feared the Maoists and, in particular, the YCL, but in his Protection visa application he said that he feared Nepal Congress (UMA), and the fact that the applicant had told the Tribunal that he is not a member of the RPP, which he had claimed in his Protection visa application, but he was just a member of a group that supports the King; the fact that the applicant had made these inconsistent claims could lead the Tribunal to doubt his credibility and the truth of his claims. Asked whether he wished to respond, the applicant stated that he totally understands what the Tribunal means but he did not know what to say; he has to be more consistent with whatever he wrote, whatever he claimed. The applicant stated that those things he said are true, he swears to god; he wants this because he is really scared to go back to his country, that is all he is asking.
43. The Tribunal advised the applicant that the next issue it needed to consider was whether he has the right to live in India. The Tribunal explained that according to s. 36(3) of the Migration Act, if the applicant has the right to enter and reside in another country Australia does not owe him any protection obligations. The Tribunal explained that in 1950 India and Nepal entered into a treaty, the *Treaty of Peace and Friendship*, which gives citizens of Nepal and India the right to enter and live in each other's countries. The Tribunal suggested to the applicant that he was probably already aware that many millions of Nepalese have

gone to live in India. The Tribunal noted that available country information indicates that the applicant could live safely in India, and the applicant had told the Tribunal that there is an open border and he has been to India about 5 times. The Tribunal advised that country information indicates that only Nepalese who are on a look-out list for security agencies or who are suspected of involvement in terrorist activity would be denied entry to India. The Tribunal advised the applicant that it was considering whether he had the right to enter and reside in India which would mean that Australia did not owe him protection obligations and available information suggested that he does have the right to enter and live in India. Asked to comment, the applicant stated that maybe it is true that he can go to India and live his whole life, he is not sure about his whole life but live for a period of time, but he is scared to go back to his country, that is true. He is here in Australia as a Student visa holder and this is about what he thinks will protect his life; he wants to make his future bright but he doesn't think he is going to do that in India. Maybe his life would be protected from all those things he is scared of, but his future... *(the applicant did not finish this sentence)*.

44. Asked whether he was frightened that Nepalese Maoists would find him in India, the applicant responded that he is not sure about that. Asked whether he had any reason to believe that Maoists could find him in India, the applicant responded that in all the towns of India near his town, there are some Maoists still there and if he goes to India it would be really close to his home town and it would be easy for them to come over there and look for him.
45. The Tribunal advised the applicant that available country information indicates that Nepalese Maoists are not welcome in India and there are reports of Nepalese Maoists being stopped at the border and being captured and imprisoned in India. Asked to comment, the applicant responded that the Tribunal is right. Maoists aren't welcome in India but if you pass through the border nobody knows if you're a Maoist; the Indian police aren't going to check everything. The Tribunal acknowledged that this was true but noted that India is a country of more than one billion people and the applicant's movements were not restricted to towns near the border; he could go anywhere. Asked why he thought the Maoists would be able to find him in a country of more than 1 billion people, the applicant responded that he was not saying they will find him but there is a chance they will find him. The Tribunal suggested that it was only a remote chance, not a real or a likely chance. The Tribunal suggested that on the available country information it was very, very unlikely that the Maoists would be able to find him in a country of 1 billion people. The applicant stated that he was just talking about a chance; he was not saying that they will find him but he does not want to live his whole life being scared, physically or mentally. The Tribunal advised the applicant that it had difficulty accepting that he would be scared in India.
46. The Tribunal noted that the applicant had told the delegate that his friend had been killed and thrown in the river and the applicant had earlier told the Tribunal that there was a second incident 4 or 5 months ago where his friend was killed and thrown in the river. The Tribunal advised the applicant that it was prepared to accept that there might have been 2 separate incidents involving 2 of his friends having been drowned in the river. The Tribunal observed, however, that notwithstanding this it was inclining to the view that the applicant had the right to safely relocate to India. Asked to respond, the applicant stated that maybe he can live in India but he wants to think about his future too.
47. Asked whether there was anything else he wished to say before the hearing concluded, the applicant stated that he was totally honest at the first interview and at the Tribunal's hearing. He likes this country and whatever he said he is saying from his heart and is totally true. The

applicant stated that sometimes it is difficult for other people to understand about other people; whatever he said before is all true and he humbly requests that he can stay here.

## COUNTRY INFORMATION

48. RRT Research Response NPL31374, which is dated 23 February 2007, includes the following information about the rights of Nepalese citizens to enter and reside in India pursuant to the 1950 Indo-Nepal Treaty of Peace and Friendship, and also refers to the activities and treatment of Nepalese Maoists in India:

**1. Is there any information available about the application of the Treaty in India for example in relation to property rights. This is peripheral to the issue of right to enter and reside but is of interest.**

India and Nepal are signatory to the 1950 Treaty of Peace and Friendship. Under the Economics and Commerce section of the Treaty:

The two governments agree 'to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation of trade and commerce, movement and other privileges of a similar nature' (Subedi, S.P. 2005, Dynamics of Foreign Policy and Law: A Study of Indo-Nepal Relations, Oxford University Press, New Delhi, pp. 4 – 5 1).

A Department of Foreign Affairs and Trade (DFAT) advice was sought on the clarification of the 1950 Treaty of Peace and Friendship between India and Nepal and if the treaty has been incorporated into India's domestic law. The following was the response provided by DFAT on the 23 October 2006:

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

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

Start text

The Governments of India and Nepal agree to grant, on reciprocal basis, to the nationals of one country in the territories o [sic] the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.

End text

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

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

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

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

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

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

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

Start text

Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, in its territory, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts relating to such development.

End text

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

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

8. Dr VD Sharma said that treaties on a specific subject usually had their provisions brought into Indian domestic law through the passage of a bill with the same provisions as the treaty. Sharma said, however, that in the case of more general treaties, such as the 1950 Treaty of Peace and Friendship, the practice was for the conditions of the treaty to be met by India without the passage of the domestic legislation. Sharma characterised the operation of the 1950 Treaty as having been enacted for a long time (Department of Foreign Affairs and Trade 2006, *DFAT Report 554 – RRT Information Request IND30728*, 23 October; RRT Country Research 2007, *Research Response NPL31235*, 18 January).

RRT *Research Response NPL17734* of 6 January 2006 stated that the DFAT Reports were perhaps at variance with reports from other sources of information including reports from 2004 and 2005 where New Delhi police “had started asking Nepalis for character certificates and identity papers” in order to stay in hotels or apply for jobs. Indian and Nepalese authorities are also enforcing a system of registration at the international border at the Nepalgunj-Rupaidiha transit point and have subjected Nepalis to a variety of labour and human rights abuses ( RRT Country Research 2006, *Research Response NPL177434*, 6 January; ‘Indian police asks Nepalese to produce identity cards in New Delhi’ 2004, *BBC Monitoring South Asia*, sourced from *Kantipur*, 8 February; Timsina, Nitya Nanda & Bhattarai, Devendra 2004, ‘Migrant Nepali workers are marked in Delhi’, *Kathmandu Post*, 28 January <http://www.kantipuronline.com/php/kolnews.php?&nid=6786> – Accessed 8 March 2004 –; ‘India, Nepal begin enforcing border registration 1 November’ 2005, *BBC Monitoring*, sourced from *Nepal News.Com*, 1 November; Shukla, K. and Brown, M. 2005, ‘Refugee Voices: Nepalese in India’, *Refugees International website*, 8 July <http://www.refugeesinternational.org/content/article/detail/6306> – Accessed 28 September 2005; For more information on the ability of Nepalis to exercise their rights in India under the terms of the *Treaty of Peace and Friendship*, see: RRT Country Research 2004, *Research Response IND16523*, 9 March; RRT Country Research 2005, *Research Response NPL17223*, 24 March).

There are also reports that Nepalis in India require documentation to open bank accounts even though no documentation is required to come into India. According to the Refugees International website:

Once in India, the Nepalis become vulnerable to labor and human rights abuses, much like poor Indians. According to the chowkidars, they have no legal rights. If they are abused at work and complain to law enforcement officials, their complaints are not taken seriously. In

case of robbery, for example, even if they have worked in a neighborhood for many years, the police assume that they are accomplices and the Nepalis are increasingly finding themselves being blamed for crimes. While the Nepalis in the formal sector in India enjoy the same legal rights as Indians by joining labor unions, the formal sector only includes 8% of the workforce, and the majority of Nepalis fall outside this sector. The lack of membership in any organized labor group hits women the hardest, and those working as domestic servants remain particularly vulnerable.

The 1950 Peace and Friendship treaty allows Nepalis free access to Indian government schools, provided they have the correct documentation. However, for many migrants, it is difficult to obtain papers, especially since no documents are needed to cross into India. Without documentation, the Nepalis have no choice but to pay for their children's education in private schools or keep their children out of school. Lack of documentation also hinders Nepalis from opening bank accounts in India, which would make the process of remitting money to Nepal much simpler. In the absence of access to bank accounts, the Nepalis have no choice but to send money via people travelling to and from Nepal. Many of these couriers become the victims of extortion at the hands of petty border officials and guards. Almost all the Nepalis interviewed by RI stressed the need for a registration system for them in India, which would bring with it legal identification ('India: Nepali migrants in need of protection' 2005, Refugees International website, 25 July <http://www.refugeesinternational.org/content/article/detail/6429/?PHPSESSID=5cfliegen3C> – Accessed 15 February 2007).

On 10 January 2007, the Maoist Foreign Department Chief CP Gajurel stated that the 1950 Treaty of Friendship between India and Nepal had become irrelevant and there was a need to review this unequal and obsolete pact ('Review past pacts with India: Nepal Maoists' 2007, India Express website, 15 February source: *Press Trust of India* (10 January 2007) <http://www.expressindia.com/fullstory.php?newsid=79446> – Accessed 15 February 2007). The Government of India has announced plans to revise the bilateral relationship with Nepal, following moves by political parties in Nepal to renounce violence and agree to a road map to an elected government ('India plans to reach out to Nepal, Bhutan' 2007, *Dawn* website, 18 January <http://www.dawn.com/2007/01/18/int13.htm> – Accessed 16 February 2007; Jha, P. 2007, 'Nepal's perplexing moment of opportunity' Himal Southasian website, February <http://www.himalmag.com/2007/february/specialreport.htm> – Accessed 14 February 2007 –).

Despite indications from both Nepal and India on revising the Treaty of Friendship, none of the parties to the Treaty have introduced any bills or legislations in their parliaments, indicating that changes to the Treaty may take time to materialise.

## **2. Any information available about the process whereby “suspected Maoists” in India are identified for return to Nepal? Is it likely to be on the mere say so of Nepalese authorities rather than a process of meaningful inquiry? There are reports of the return to Nepal by Indian authorities of a human rights worker (possibly alleged to have been involved in acts of violence).**

There are cases where suspected Maoists are identified in India and returned to Nepal and also cases where a number of suspected Nepali Maoists were detained by the Indian authorities.

### **Nepali Maoists returned to Nepal**

An article in the *Kathmandu Post* notes that amidst “allegations that the Indian side has not cooperated with Nepal on the issue of nabbing rebels who flee to India”, Indian sources said that “some 57 Maoists out of 97 who were rounded up in India” have been extradited to Nepal (Bhandari, Damaru Lal 2004, 'Nepal, India serious in fight against terrorism', *Kathmandu Post*, 3 February <http://www.kantipuronline.com/php/paperarc.php> – Accessed 8 March 2004; see: RRT Country Research 2004, *Research Response IND16523*, 9 March).

Sushil Sharma reporting for the *BBC* discovered that India deported two senior Nepali Maoists to Nepal.

Matrika Prasad Yadav and Suresh Ale were arrested in the northern Indian state of Uttar Pradesh, a Nepalese newspaper reported on Tuesday.

The news follows promises from Delhi that it would help Nepal tackle its long-running Maoist insurgency.

Nepal has long said rebel leaders were hiding in India. There has been no official statement on the release.

But officials of the Indian embassy in the Nepalese capital, Kathmandu, have privately confirmed the reports that appeared in the Nepalese-language Kantipur newspaper.

They would, however, give no details.

The newspaper reported that the two rebel leaders were arrested in Lucknow, the Uttar Pradesh state capital, before they were handed over to the Nepalese authorities.

One of the deported rebel leaders, Matrika Prasad Yadav, was a member of a Maoist team who took part in failed peace talks with the government last year (Sharma, Sushil 2004, 'India 'hands over' Nepal rebels', *BBC News*, 10 February [http://news.bbc.co.uk/2/hi/south\\_asia/3475301.stm](http://news.bbc.co.uk/2/hi/south_asia/3475301.stm) – Accessed 4 March 2004).

In July 2002, Indian authorities deported three Nepalese nationals on suspicion of supporting Maoist insurgency in Nepal. Indian human rights activist, Gautam Navlakha, argued that the individuals arrested were journalists with a Nepalese newspaper ('India deports Nepalese Maoists' 2002, *BBC News* website, 12 July [http://news.bbc.co.uk/2/hi/south\\_asia/2124802.stm](http://news.bbc.co.uk/2/hi/south_asia/2124802.stm) – Accessed 16 February 2007 'Rights groups fear fate of Nepalese journalists' 2002, People's Union of Civil Liberties website, 16 July <http://www.pucl.org/Topics/Media/2002/rights-groups.htm> – Accessed 16 February 2007).

### **Nepali Maoists detained in India**

On 16 June 2006, Indian Police arrested suspected Nepali citizen for alleged connection with the Maoists in Nepal, even though the accused had lived in India for many years. According to the *Times of India* website:

The accused, Yuvaraj Jayprakash Sharma, 42, belongs to Bagasi village of Zapa district in Nepal. According to Junagadh DSP BD Vaghela, the accused had entered India through Siliguri to Kolkata and then to Gujarat.

He added that Sharma was settled in Gujarat since 1999 and stayed in Pranami Temples of Junagadh and Jamnagar. According to Vaghela, the accused admitted to his connection with Maoist activities, but he also said that since he had shifted to India, he didn't have any connection with the Maoist activists in Nepal.

"If the accused was living a spiritual life in the temple, then what prompted him to keep the Gujarat police belt with him? Police are investigating this," said Vaghela. Meanwhile police have registered a case against the accused under IPC 484 and 171 ('Nepali citizen nabbed, Maoist link suspected' 2006, *The Times of India* website, 16 June <http://timesofindia.indiatimes.com/articleshow/1655361.cms> – Accessed 16 February 2007).

In March 2004, police in West Bengal arrested a senior Nepalese Maoist leader and his assistant. The men were remanded in custody for fifteen days. "Police say Mr Baidya, who is a Nepalese national, and Mr Pradhan, who is an Indian of Nepalese origin, belong to the Maoist group named the Bharatiya Nepali Jatiya Ganatantrik Morcha, or the BNJGM" ('Two Nepalese Maoists arrested in India' 2004, *BBC News* website, 30 March [http://news.bbc.co.uk/2/hi/south\\_asia/3583989.stm](http://news.bbc.co.uk/2/hi/south_asia/3583989.stm) – Accessed 16 February 2007).

On 27 February 2003, Bihar Special Task Force arrested eight suspected Nepalese Maoists. According to the Rediff website:

The Bihar Special Task Force on Wednesday arrested eight Maoist extremists, including 5 Nepalis, in Patna after raiding some hotels and a PCO booth.



“We found a large number of documents and literature connected with their activities, Indian currency worth Rs 50,000 and Nepali currency worth Rs 8,000 in their possession,” a top STF official told rediff.com.

Some of them, including Maoist Communist Centre (MCC) members from Bihar and Jharkhand, might have escaped before the raids, he added.

All of them were engaged in getting three seriously injured Nepali Maoists treated in a private nursing home in Patna, STF sources said.

In recent months, the Bihar police have arrested nearly a dozen Nepali Maoists undergoing treatment in private clinics in districts adjoining Nepal (‘8 Maoists, including 5 Nepalis arrested in Patna’ 2003, Rediff website, 27 February <http://specials.rediff.com/news/2003/feb/27bihar.htm> – Accessed 16 February 2007).

In September 2002, nine suspected Nepalese Maoists were arrested by the Bihar police. According to *The Hindu* website:

There has been a spurt in the entry of Maoist rebels from Nepal into the bordering districts of Bihar, particularly for medical help of those injured in the ongoing battle with the Royal Army there. There have been at least two incidents of crackdown by the Bihar police in East Champaran and Sitamarhi districts along the Indo-Nepal border over the weekend, leading to the arrest of at least nine hardcore members of the Communist Party of Nepal (Maoists), involved in insurgency activities in the Himalayan Kingdom (Balchand, K. 2002, ‘Bihar police nab Nepal Maoists in clinics’, *The Hindu* website, 22 September <http://www.hinduonnet.com/2002/09/23/stories/2002092304331200.htm> – Accessed 16 February 2007).

49. The USSD also publishes annual human rights reports on India. The reports include sections on national/racial/ethnic minorities, societal violence or discrimination, and the protection of refugees. The 2008 report, which was published on 25 February 2009, is available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm>. The 2010 report was published on 8 April 2011 and is available at <http://www.state.gov/g/drl/rls/hrrpt/2010/sca/154480.htm>. Neither report makes any reference to problems experienced by Nepalese in India except in the context of the trafficking into India of Nepalese citizens, generally women and children, for exploitation work as bonded labourers, including in the sex industry.
50. The 2009 USSD report, which was published on 11 March 2010 and can be accessed from <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136087.htm>, relevantly includes the following:

#### Protection of Refugees

The country is not a party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol. Due to the absence of clear guidelines, refugees are governed under the Foreigners Act 1946, which defines a foreigner as a person who is not a citizen of India and is thus eligible to be deported. The government has established a system for providing protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. This applied especially to Tibetans and Sri Lankans.

According to the Office of the UN High Commissioner for Refugees (UNHCR), during the year there were 11,321 refugees under UNHCR mandate in the country. Since 1960 the government has hosted approximately 110,000 de facto refugees from Tibet. Tibetan leaders in the country stated that the government treated them extremely well. The MHA has spent 180.7 million rupees (approximately \$4.2 million) on Tibetan refugee resettlement.

According to the World Refugee Survey, 456,000 refugees were in the country, including the Dalai Lama, spiritual leader of Tibetan Buddhists. The survey noted that there were 100,000 refugees from Myanmar, 30,000 from Afghanistan, 25,000 from Bhutan, and 25,000 from Nepal

residing in the country. According to the MHA's 2008-09 annual report, citing information of the Bureau of His Holiness the Dalai Lama, the population of Tibetan refugees in the country as of February 2008 was 110,095.

USCRI also reported a number of cases of abuse of refugees and arbitrary detentions. USCRI noted that "even recognized refugees cannot work legally, although Nepalese and Bhutanese nationals could do so under friendship treaties... [but] the Government rarely punishes employers formally for hiring refugees illegally. Many refugees work in the informal sector or in highly visible occupations such as street vendors, where they are subject to police extortion, nonpayment, and exploitation."

51. RRT country advice NPL37205, dated 24 August 2010, also includes the following information about relocation from Nepal to India:

**Can Nepalese citizens safely relocate to India? What sort of problems might be faced by Nepalese who relocate to India? Do the Indian authorities respect the Friendship Treaty between India and Nepal?**

Safe relocation to India is likely to be feasible for some Nepalese nationals. The large numbers of Nepalese living in India, estimated to be three to 10 million, together with the absence of reporting of widespread violence against this group in current human rights reports, suggest they are not targeted for ill-harm in India. However, targeting of relatively small sections of the Nepalese population is reported for the north eastern states of Assam, Manipur and Meghalaya.

Sources differ on whether the Nepalese population in general face problems in India, the levels of discrimination, and whether Indian authorities respect the Friendship Treaty between India and Nepal. DFAT advice of April 2006 concluded that "conversations with interlocutors did not support the view that there was discrimination against Nepali residents in New Delhi such that they were not practically able to exercise their rights under the 1950 Treaty [*1950 Treaty of Peace and Friendship*]"'. A study by Raju Bhattraï published in 2007 from the South Asia Study Centre in India titled *Open Borders, Closed Citizenships: Nepali Labour Migrants in Delhi*, concludes that recently arrived Nepalese are treated poorly in comparison to second generation Nepalese in India. Bhattraï highlights harassment and humiliation by police, higher authorities, local residents, social segregation, and poor economic and living conditions of newly arrived Nepalese in India. He concludes that they are denied basic legal rights and are vulnerable to labour violations and exploitation.

52. Advice has also been sought on this issue from the Nepalese Government. On 12 July 2011, a request for information was made to the Embassy of Nepal, Canberra.<sup>1</sup> On 22 July 2011, RRT Country Advice received the following response:

**1. Do Nepalese citizens have the legal right to enter and reside in India?**

Yes, with the provisions enshrined in the Treaty of Peace and Friendship signed on 31 July 1950, the Nepalese citizen has the right to enter and reside in India. Recently, we have a provision to show any valid ID card to prove the identity so that they can enter into each other's country without any hindrance.

**2. Are there any circumstances in which a Nepalese citizen may be denied entry to India?**

Generally no. As per the provisions of the treaty between Nepal and India, citizens of both countries can enter into each other's country without visa.

**3. Can Nepalese citizens residing in India be forcibly returned to Nepal? If so, under what circumstances?**

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<sup>1</sup> RRT Country Advice 2011, Email to Second Secretary Paras Pandit, 'Refugee Review Tribunal – Request for Information', 12 July

Legally No. For those involved in crimes and other unwanted activities, Governments of either country can extradite each other's nationals as per the provisions of a separate Extradition Treaty.<sup>2</sup>

## **FINDINGS AND REASONS**

### **Country of nationality**

53. The applicant claims to be a national of Nepal. Based on a copy of the applicant's passport held on the Department's Student visa file (2008/014932) and his oral evidence, the Tribunal finds that he is a national of Nepal. Being satisfied that the applicant is outside that country, the Tribunal will assess his claims to refugee status as against that country of nationality.

### **Protection claims**

54. The applicant claims to be at risk of persecution in Nepal by either the Nepalese Maoists or the Nepalese Youth Communist League.
55. The Tribunal had significant concerns about the applicant's credibility and the truthfulness of his claims in light of major inconsistencies between the information contained in his Protection visa application and the claims he made at the Tribunal's hearing. In particular, the Tribunal was concerned that in his Protection visa application the applicant claimed to be a member of the RPP who feared that he would be killed by members of Nepal Congress (UMA) whereas at his Tribunal hearing he resiled from those claims, instead maintaining that he was a member of an informal group of pro-monarchist people from his local area who feared persecution at the hands of Maoists or the Youth Communist League. The Tribunal also considers that the applicant was unable to provide any credible explanation to account for these inconsistencies.
56. However in light of the findings that follow regarding Safe Third Country, the Tribunal considers that it is not necessary for it to make findings regarding the applicant's protection claims.

### **Safe Third Country**

57. There is evidence before the Tribunal to indicate that the applicant may have the right to enter and reside in a safe third country for the purposes of s.36(3) of the Act or of Article IE of the Convention, namely India.
58. The country information available to the Tribunal indicates that there is an international bilateral agreement between India and Nepal known as the *Indo-Nepal Treaty of Peace and Friendship of 1950*. As explained in RRT Research Response NPL31374, Article 7 of the Treaty provides, in essence, that pursuant to this treaty the holder of a Nepalese passport such as the applicant can enter and reside in India. The Tribunal notes that:

[t]he two governments agree 'to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation of trade and commerce, movement and other privileges of a similar nature

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<sup>2</sup> Pandit, P. 2011, Email to RRT Country Advice, 'Re: Refugee Review Tribunal – Request for Information', 22 July

59. The same Research Response goes on to note that in the case of Nepalese citizens travelling by air, it is necessary to produce as an identity document one of a range of documents, which includes a valid passport. The applicant claimed in his Protection visa application that he holds a Nepalese passport which is valid until [a date in] 2018. The Tribunal accepts that evidence and finds, for the purposes of s.36(3) of the Act, that the applicant has a presently existing, legally enforceable right to enter and reside in India, should he be fearful of persecution in Nepal. The Tribunal notes that in evidence the applicant accepted that he could go to India. However, there is no evidence to suggest that he has taken any steps to avail himself of his presently existing and legally enforceable right to enter and reside in India, and the Tribunal finds that he has not.
60. The applicant claimed in evidence before the Tribunal that there is a chance that Nepalese Maoists could find him in India. However, the Tribunal is strongly of the view that available country information does not support this conclusion. There is no reference, for example, to any threats by Nepalese Maoists to their fellow countrymen in India in any of the USSD reports extracted above. However, the RRT Research Response NPL31374 cited above does give examples of Nepalese Maoists in India being arrested and deported.
61. Some of the country information cited above does indicate that from time to time some foreigners and refugees may experience problems in India. However, the Tribunal considers that the evidence in relation to this issue is, at best, equivocal and RRT Country Advice notes that *[s]ources differ on whether the Nepalese population in general face problems in India, the levels of discrimination, and whether Indian authorities respect the Friendship Treaty between India and Nepal.*
62. As noted above, neither the 2008 nor 2010 USSD reports relevantly refer to any such problem. The 2009 USSD report notes that there are some 25,000 Nepalese refugees in India. It states that there was *a number of cases of abuse of refugees and arbitrary detentions*, and the USCRI noted that *even recognized refugees cannot work legally*, but then went on to record the relevant exception, namely that *Nepalese and Bhutanese nationals could do so under friendship treaties.*
63. The reference to the Indian authorities having arrested or deported suspected Nepalese Maoists indicates that their activities are not tolerated in India. Furthermore, given the size and population of India, the Tribunal considers that there is only, at best, a remote possibility of the applicant even encountering any Nepalese Maoists in that country, let alone ones who might recognise and seek to harm him.
64. In the Tribunal's view, the weight of available country information does not support a finding that the applicant faces a real chance of experiencing serious harm capable of amounting to persecution in India or any other significant harm in India. The Tribunal accordingly finds that he does not have a well-founded fear of being persecuted for a Convention reason in India. The Tribunal is also not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India, that there is a real risk that he will suffer significant harm in India. As a consequence, the Tribunal finds that section 36(4) of the Migration Act does not apply in this instance.
65. The available country information does not indicate that the applicant is at risk of *refoulement* from India to Nepal, or any other country. Rather, this information suggests that Maoists or suspected Maoists may be deported from India. The Tribunal notes that there is a separate extradition treaty between India and Nepal and finds that Nepalese generally who enter India

under the treaty of Peace and Friendship will not be deported from India unless they are seen to be undesirable by the Indian authorities, such as Maoists. The Tribunal considers that ss. 36(5) and 36(5A) of the Act have no application in this instance.

66. In summary, the Tribunal finds that the applicant has a right to enter and reside in India and he has not taken all possible steps to avail himself of that right. Furthermore, the Tribunal finds that the applicant does not have a well-founded fear of being persecuted for a Convention reason in India and there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing himself of the right in s.36(3), there would be a real risk of the applicant suffering significant harm in India. The Tribunal further finds that the applicant does not have a well-founded fear of being returned from that country to a country where he has a well-founded fear of being persecuted. Nor does the applicant have a well-founded fear of being returned by India to a country where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing himself of the right in s.36(3), there would be a real risk of the applicant suffering significant harm. Accordingly, the Tribunal concludes that s.36(3) applies to the applicant and Australia does not owe protection obligations to him.

#### **Well-founded fear of persecution for a Convention reason**

67. The Federal Magistrates Court recently held in *SZREH v MIAC [2012] FMCA 525* that there was no error by the Tribunal in the case under consideration, which also involved a Nepalese applicant for a Protection visa, where the Tribunal found that it was not required to determine the applicant's protection claims in Nepal once section 36(3) of the Act was enlivened. His Honour, Driver FM, found that there was:

*“...No jurisdictional error in the Tribunal's application of that section. By the application of that section, the Tribunal was relieved of any obligation to consider the applicant's claims for protection in Australia.”*

68. Therefore given the finding above, it is unnecessary to undertake an assessment of the substantive merits of the applicant's claims for protection in Nepal under s.36(2).

#### **CONCLUSIONS**

69. 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), or the alternative criterion set out in s.36(2)(aa), for a protection visa.

#### **DECISION**

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