

1104568 [2012] RRTA 39 (6 January 2012)

DECISION RECORD

RRT CASE NUMBER: 1104568

DIAC REFERENCE(S): CLF2011/6518

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Adam Moore

DATE: 6 January 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 and Citizenship 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, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2010 and applied to the Department of Immigration and Citizenship for the visa [in] January 2011. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
3. 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.
4. The applicant applied to the Tribunal [in] May 2011 for review of the delegate's decision.
5. 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

6. 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.
7. 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 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. 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.

10. 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 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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

19. 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.

Application for a protection visa

- a. was born on [date deleted: s.431(2)] at [District 1], Nepal;
- b. speaks, reads and writes Nepalese and English 'not well';
- c. identifies his ethnicity as Chhetri and his religion as Hinduism;
- d. was married [in] January 2006;
- e. is a citizen of Nepal, holds no other citizenship and has no right to enter and reside in any other country;
- f. entered Australia using a 'bogus passport';
- g. holds a passport issued by Nepal [in] April 2008 which expires [in] April 2018;
- h. answers 'N/A' to the question about the most recent Australian immigration visa granted to him;
- i. has never otherwise lived or travelled outside Nepal;
- j. gives the addresses he lived at for the 10 years prior to his arrival in Australia as [addresses deleted: s.431(2)];
- k. had 12 years of schooling in Nepal between [years deleted: s.431(2)] and obtained a 'Proficiency Certificate Level in Management' in 2000;
- l. gives his usual occupation or profession as 'accountant'; and
- m. gives his employment history as Accountant, [Organisation A], [Area 2], Myagdi from September 2005 to December 2010.

20. At question 41 of Form 866C he 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 engaged criticising the Maoists because I believe they are bad to our county. They control everyone forcefully, unfairly. I believe they are criminals. They threatened me to harm as I am a member of Nepal Students' Union affiliated with Nepali Congress. I was mentally disturbed by the Maoists YCL. I left my country due to safety reasons as the authorities cannot protect me because Maoists are very strong in my country. Please refer to my statement which will be forwarded shortly.

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

I am afraid that I will be harmed or killed. I will be forced to give up politics so I will lose my political freedom. Please refer to my statement which will be submitted soon.

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

Maoists and other political opponents. Please refer to my statement which will be submitted soon.

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

My political opinion is the reason that I will be persecuted by the Maoists. Please see the statement, which I will send you shortly.

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

No, we have no stable government and the authorities are ineffective. I am aware that they are corrupt and incapable in its response to protect me when I have problems with the Maoists or other political opponents. Please see the statement of translation which I will send you shortly.

21. 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 made application for a protection visa or refugee status, has not previously applied to the department, ever held a Bridging Visa E or been in immigration detention;
- c. he has no members of his family unit in Australia not included in the application;
- d. his wife and his daughter are members of his family unit outside Australia at the time of application;
- e. he has no close relatives in Australia at the time of application;

- f. his father, father-in-law and mother-in-law, [siblings] were living in Nepal at the time of application, and
 - g. he had the assistance of the registered migration agent, [Mr B], in completing his application.
22. Accompanying the application forms is a photocopy of the bio-data pages of the applicant's passport and the passport in the name [Mr C] which contains a Subclass 572 visa endorsement label.
23. Further documents appear on the department's file as follows (documents in Nepalese having been translated into English):
- a. a document entitled Nepal Communist Party (Maoist), District Organisation Committee, [District 1];
 - b. a document entitled Nepal Students' Union (Central Office, Kathmandu);
 - c. a marriage registration certificate recording the marriage of the applicant to [Ms D] [in] 2006;
 - d. a Nepali Citizenship Certificate in the name of [Ms D];
 - e. a Nepali Citizenship Certificate in the name of the applicant;
 - f. a reference from the applicant's employer, [Organisation A];
 - g. an academic transcript from [Faculty E] and a certificate from the same institution certifying that the applicant passed the Proficiency Certificate examination in Management in 2000;
 - h. a Nepalese Driving Licence in the name of the applicant;
 - i. a certificate from [City 4] Boarding Secondary School;
 - j. a handwritten statement in English.
24. The document entitled Nepal Communist Party (Maoist), District Organisation Committee, [District 1] states:

[The Applicant]

[Address], [District 1]

In the above mentioned subject, our party has drawn its attention to the fact that you have helped the hostile revolutionist by acting as an informer or a spy against our glorious party NCP Maoist. As you have also spread various negative deliberations among the people against the party, our party has listed you on a file of action. Physical action against you will be taken and you will be smeared with black powder and expelled from the village if such activities do not stop immediately. You are also informed that you help our party Rs 5 lakhs (five lakhs) in cash as a donation for the conclusive movement held in Kathmandu from May [date] to [date].

(Signed)

[Name]

In-charge

25. The document entitled Nepal Students' Union (Central Office, Kathmandu) states:

In the above mentioned subject, it is to certify that [the applicant], a resident of [address], [District 1] has participated in various programs and social service having been involved with Nepal Students' Union, which is known to everyone. Everyone is aware of the fact that he was frequently threatened over the phone and he was also beaten by the activists of NCP (Maoist) as the Maoists did not want to see his success. It is also known that they demanded him he pay five lakhs rupees cash as a donation. In this matter, our Students' Union strongly condemns them. It is informed that he has been out of our contact since [date].05.2010. We urge the government to look for him. Everyone is informed of the fact that he is very active activist and social worker of our union.

Victory Nepal – N.S.U.

(Signed)

[Position], [name]

26. The applicant's handwritten statement reads:

My statement of claims for a protection visa

My name is [the applicant]. I was born on [date] in [District 1], Nepal. I am a Nepalese citizen. I am married with one daughter. All members of my family reside in Nepal. I am Hindu by birth. I was an accountant prior to coming to Australia.

I was educated in a private school. I completed my secondary education in [year] from the [school] [Area 2], Myagdi, Nepal. For my tertiary education, I studied at [Faculty E], [City 3], Koski from [year] to [year]. I complete 12 years of education in my country. I operated a business named [Organisation A], [Area 2]. I worked as an accountant from December 2005 to September 2010.

I had to pay the Maoists to run and protect my business during the operation of my business. If I don't pay the money they request to me, they will be obliged to take physical action against me. They tell me that it is the decision of the committee as the Maoists insist on doing so. The Maoists will approach me and demand a large sum of money. It is impossible for me to act according to their wish. I will face a financial crisis or death. My physical and mental stress will be climbed up to an unbearable level. My area is predominantly occupied by Maoists. I have been the subject of threats, and intimidation, including death threats if I do not join or support them.

My personal history of my political involvement which is intended to show how I will be regarded as an opponent of the Maoists and a target for their persecution. I am an active member of Nepal Student's Union. Nepal Student's Union is student wing of Nepali Congress Party. I have participated in all activities of the union for its betterment. I was involved in the democratic reform. I had a strong belief in the Nepali Congress Party, thus affiliating myself in Nepalese multi-party democracy. I am suffering from the Maoists.

I joined Nepal Student's Union affiliated with Nepali Congress Party, Nepal in November 2002 because of my belief in a democracy. Nepali Congress Party is the only party which is committed to the democracy so I was motivated to join this union. I am an ordinary member of the union. I am a hard-core supporter of Nepali Congress Party. I engaged criticising Maoists because I believe they are not democratic and they are bad to our country. They control everyone forcefully and unfairly. I believe they are criminals. They threatened me to harm due to my political opinion. I was mentally disturbed by the threat of Maoist YCL.

Maoists attacked me on my way home from student's union meeting held in [City 4], Myagdi in May 2010. The Maoists used bricks and rods during the attack. I escaped sustaining a minor injury in the attack. The meeting was held to develop a plan to protest against the Maoists illegal activities in our area.

I had serious problems with the Maoists because of my political opinion. I hate the Maoists as I consider them as terrorists. My motherland has been worse off because of Maoists. I continue to oppose the Maoists. My nature is democratic and that I cannot change. I am a believer in the democracy I am devoted to the Nepali Congress Party. I witnessed a lot of Maoist (YCL) attacks have occurred in various parts of my country against members of students union affiliated with Nepali Congress Party. I was fearful for my safety and rarely went out during my stay in Nepal after I was attacked. I had to live discreetly without being able to openly express my political opinions.

I am applying for the protection visa now because I am a genuine refugee of persecution. I came to Australia on a bogus passport through the assistance of an agent who lives in Kathmandu. I paid the agent the amount of NLRs 7,00,000.00.

I'm convinced that the members of Nepal Student's Union affiliated with Nepali Congress Party have been plagued by nearly daily incidents in all parts of the country ranging from harassment, kidnapping, torture and assault which have often resulted in the death and injury of many persons. My daily life and activity will be severely affected by the situation. I know that the attacks by YCL Maoist insurgents continue unabated and its casualties continue to grow in remote areas such as my village. I sensed threat of being seriously harmed and having been realised my inability to either protect myself, or obtain protection from the authorities, I made the decision to flee Nepal. I am identified as an active member of Nepal Student's Union affiliated with Nepali Congress Party and consequently, I will be harassed and will be physically assaulted by Maoists and Maoists YCL. I fear I will lose my freedom.

I cannot be protected by our union and the authorities because they are incapable to locate and punished Maoists. Therefore, I came to Australia with the hope that the Australia government can protect me. I do not trust the people in the authorities because they are corrupt. The security situation and its implication of my life will continue to be the major challenge in Nepal if returned. I am here in Australia to save my life and stay without a fear. I hold a continued fear of persecution from the Maoists and Maoists YCL. As a matter of practical reality and fact, I fear persecution arising from my political opinion as an anti-Maoists and my membership of Nepal Student's Union.

I respectfully request the Australian government to consider my protection visa application with compassionate heart. Thank you.

Departmental interview & delegate's decision

27. The applicant attended an interview with the delegate [in] February 2011. The Tribunal has listened to the recording of that interview which was conducted with the assistance of an interpreter in the English and Nepalese languages. The delegate discusses the applicant's evidence at interview fairly in his decision.

Tribunal hearing

28. The applicant appeared before the Tribunal [in] November 2011 and [January] 2012 to give evidence and present arguments. The Tribunal hearings were conducted with the assistance of an interpreter in the Nepali and English languages.

Background

29. After explaining the role of the Tribunal, how the hearing would be conducted and the operation of the Convention in Australia, the Tribunal questioned the applicant. What follows is a summary of his evidence.
30. The applicant said he had some help over the telephone from [Mr B] and also from a friend in completing his application forms and his written statement. He said he has a little bit of English. He said he provided the information in his application by himself and he read it after it was completed. He said the information in his application and the accompanying statement is true and correct and that he did not wish to make any changes.
31. The applicant confirmed his identity, and his date and place of birth. He was born in a small village [in District 1]. [Family details deleted: s.431(2)].
32. At this stage the video conference link between the Tribunal in Melbourne and the applicant at the Tribunal's premises in Sydney dropped out and was unable to be reinstated. The hearing resumed [in] January 2012.
33. The Tribunal questioned the applicant about his life in Nepal until he left for Australia. His evidence is summarised in the table below:

Year	Location	Occupation
DOB to [year]	[District 1]	Childhood, school
[year] to [year]	[City 4]	Boarding school
[year] to [year]	[City 3]	Study at [Faculty E]
[year] to 2005	[District 1]	Relaxing and private study from [Faculty F]
2005 to 2010	[City 4]	Accountant, [Organisation A]

34. In the periods when he was at boarding school and [City 3] he would travel home during the holidays. In the periods when he was working at [Organisation A], he would travel with his wife between [City 4] and [his village].
35. The applicant said that he had never lived elsewhere in Nepal, although he said he travelled to Kathmandu from time to time as he was enrolled at [Faculty F] for his private study and had to go to Kathmandu to sit exams. He said he has completed three years of an accounting course but has not passed it yet.
36. The applicant said he worked at [Organisation A] until he left for Australia. He said he was an employee as well as a business partner in this. The Tribunal asked him to clarify what he meant by being a business partner, particularly as the letter the applicant had provided with his application stated that he was an employee of the school. He said he invested 350,000 rupees in the business. The Tribunal asked him what share of the ownership he had from this investment. The applicant said he was not sure, because things don't work like that in Nepal. He said he thinks it is at least 25%. The Tribunal said to the applicant that it had some concerns about the credibility of his claim to be an owner of this business. It asked him where he obtained the 350,000 rupees from. He said from his family and his wife's family. He said he was expecting to get a return on the investment but when he had to leave for Australia he asked for the money to be returned. He said he thinks the money was returned to his wife after he came to Australia.
37. The Tribunal asked the applicant when he arrived in Australia. He said it was [in] November 2010. When asked, he said he had never travelled to any other country or has the right to enter and reside in any other country. He agreed that his passport was issued in May 2006. When asked why he obtained a passport then, he said that it is because it is essential and it can be used as identification.
38. The Tribunal asked the applicant about the passport in the name of [Mr C] which is copied on the department's file. The applicant said he obtained this from a broker and this was the passport he used to travel to Australia. When asked why he used this passport rather than his own passport, he said he was feeling unsafe and he wanted to leave quickly, which is why he obtained the passport from the broker.

Claims for protection

39. The Tribunal asked the applicant what had happened in Nepal that made him feel this way. He said he was getting threats for attacks from the Maoists and he had to leave as soon as possible. He said they started to ask for money and also they attacked him once. He said the Maoists were getting more powerful which made him feel unsafe.
40. The Tribunal asked the applicant to describe the time he was attacked. He said he was a member of the Students' Union and he was participating in local activities which is the reason he was targeted. He said also because he had a business he was asked for money and received regular threats from them. The Tribunal asked the applicant when he was attacked. He said it was May 2010. He said he was returning home from a program in [City 4] by himself when a bunch of YCL activists set on him. The Tribunal asked the applicant how he knew that it was YCL activist who attacked him. He said it was because they had targeted him for a long time and he was sure it was them. He said he reported the incident to the police but they took no action.

41. The Tribunal asked the applicant if he was injured. He said he had to stay in hospital for a day or two and he obtained a medical report which he needed to report the matter to the police. The Tribunal asked the applicant if he had that document. He said he did not.
42. The Tribunal asked the applicant to describe the threats he had received. He said he received threats via telephone and also via letter several times. He said he had been forced to change his mobile phone number several times. He said he tried to report the threats but no action was taken. The Tribunal asked the applicant when the threats started. He said after he started work at [Organisation A]. He said he received threats several times a month. The Tribunal discussed the letter that appears on the department file which purports to be a threatening letter issued from the [District 1] office of the Nepal Communist Party (Maoist). The Tribunal raised with the applicant the issue that forgery of all types of documents was common in Nepal and asked the applicant why it should think this was a genuine document. The applicant said this was the letter he received. He said this is the way the Maoists go about their business – it is their style to make threats over the phone and send such letters.
43. The Tribunal raised with the applicant the issue of whether the threats he received were just demands for money and were in reality criminal in nature, rather than being directed at him for a Convention reason. The Tribunal observed to the applicant that fact that he had only started receiving the threats when he commenced at [Organisation A] would tend to indicate they were just targeting him because he may be perceived as a source of money. The applicant said the purpose of the threats is because he is a part of the Student Union and he was actively involved.
44. The Tribunal asked the applicant what he thought might happen to him if he returned to Nepal. He said when he returns to Nepal his activities will be the same and he will still be active for the party and his life will be in danger.
45. The Tribunal questioned the applicant about his political activity. He said he joined the Students' Union in 2002 when he enrolled at [Faculty F] in Kathmandu. He said he was studying as a private student so he got his membership through there. He said the union was committed to democracy and freedom and to look after the welfare of students. The Tribunal asked the applicant why he remained a member of the Students' Union after he started working in 2005. He said it was because it is a youth movement and he is young and he thought he could be engaged and politically active in the movement.
46. The applicant said the Students' Union was affiliated with Nepali Congress which he supported and which is the reason he joined one of its branches. The Tribunal asked the applicant why he supported Nepali Congress. He said it is because a party that has fought for democracy since the Rana rule. It supports democracy and nationalism and that is why he supports it.
47. The Tribunal asked the applicant what sort of political activities he engaged in. He said he did student programs and lots of activities directed by the party. The Tribunal asked him to provide examples rather than a general statement. He said he went to the village to educate people about the Nepali Congress principles. He said he did this in the lead up to the Constituent Assembly elections. The Tribunal asked the applicant if he had done anything after the 2008 elections. He said he always raised his voice against the Maoists because they were still harming and threatening people.

48. The Tribunal asked the applicant to confirm that he only started receiving threat after he commenced at [Organisation A]. The applicant agreed. The Tribunal said to the applicant that from what it had read about the activities of the Maoists in Nepal, they often targeted individuals and businesses for extortion, and that was often simply criminal activity rather than being targeting for any Convention reason. The Tribunal asked that applicant to explain why it should think that he was being targeted for reason of his political opinion rather than simply being seen as a source of funds because he was involved in a business. The applicant said they were definitely after him because for a political reason. He said they knew that he had been actively participating in activities. He said he comes from a rural area, there is little communication it is hard to send news about the corruption there. He said he knows the things he has experienced. He said their objective is to make active members like him inactive.
49. The Tribunal discussed country information with the applicant which indicated that there was decreasing violence in Nepal, that the Maoists were no longer engaged in widespread political violence. The Tribunal asked the applicant why it should think that he would be subjected to politically motivated harm. The applicant said it is still not peaceful and the Maoists are still holding arms. They have their own network and said when he goes back and becomes active he will be targeted. He said international organisations have not removed them as a threat. He said there is no guarantee that the Maoists will not return to their methods of the past to retain power.

Safe third country (s36(3) – s36(5))

50. The Tribunal asked the applicant if he had ever been to India. He said he had not. The Tribunal asked the applicant if he thought he could go and live in India. He said he knows it is an open border and that he can go there. The Tribunal explained to the applicant the effect of s36(3) of the Act, the existence of the Indo-Nepal Treaty of Peace and Friendship and that the country information showed that if he had identification, such as his Nepalese passport, he could exercise the right to enter and reside in India. The Tribunal asked him to comment. He said:
- I know there is an open border. If I can go in there freely then my opponents can go in there freely so I don't feel safe. Also there are Maoists in India as well and they are well-connected. Also the population is huge and the people there cannot get justice so how can I get justice there? I won't be secure and I won't be safe to go and live there.
51. The Tribunal said to the applicant that his response raised the next issue for consideration and explained to him the operation of s36(4) of the Act. The Tribunal discussed with the applicant the country information which indicated that Nepalese Maoists were not welcome in India, and that there were reports of them being deported and detained in India. The Tribunal suggested to the applicant that this information indicated he would not be harmed by Nepalese Maoists in India. The Tribunal also said to the applicant that given the enormous size and population of India, that it would have difficulty accepting that Nepalese Maoists would even be able to find him in India, let alone cause him harm. The applicant said that in the past the Maoists were based from India and obtained their weapon in India. He said their network is strong that they will be able to find him in India. He also said that the officials in India are corrupt and he will not be safe there.

52. The Tribunal said that it had not read any material that supported the proposition that Nepalese Maoists could find him in India and asked him if he wished to provide supporting material. He repeated that they have an active network and that they can find him.
53. The Tribunal explained to the applicant that to the extent his responses related to generalised harm or lack of security in India, that this would not constitute a well-founded fear of persecution for s36(4) unless he could establish that he would face a well-founded fear of persecution for a Convention reason. The Tribunal explained that whilst it accepted that living conditions in India might be difficult, and that there may be a level of corruption in India, the country information that with the exception of Nepalese women and children who may become swept up in trafficking, that Nepalese men did not face a real chance of persecution for a Convention reason. The applicant said that he knew there were hundreds of thousands of Nepalese people living in India, but his objective is to get his own safety and human rights and to be secure. He said he does not accept that he will be secure in India.
54. The Tribunal then explained the operation of s36(5) of the Act and that the country information indicated that only suspected Nepalese Maoists, terrorists or people of interest to Indian security agencies may be deported from India. The Tribunal asked the applicant if he thought he may be of any interest to the Indian authorities. He said:
- I am sure the Indian government will not return me, but I will still be unsafe because of the Maoist network which is what I worry about.
55. The Tribunal asked the applicant if there is anything else he wished to discuss. He said he thinks that is about it.

FINDINGS AND REASONS

Country Information

Relocation to India

56. 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 and 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 of [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. 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) 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) 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 INDI6523*, 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 – 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 – 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 – 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).

57. 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.
58. 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."

59. RRT country advice NPL37205 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.

FINDINGS AND REASONS

Country of Nationality

60. Notwithstanding that the applicant travelled to Australia on a false passport, the Tribunal has inspected the copy of the Nepalese passport in his own name on the Department file and based on this and his oral evidence about his upbringing the Tribunal is satisfied that the applicant is a national of Nepal. Being also satisfied that he is outside that country, the Tribunal will assess his claims as against that country.

Assessment of Protection Claims

61. The applicant says that he faces persecution in Nepal for reason of his political opinion. He says that the Maoists have harmed him in the past, including attacking him on one occasion, making threats and demands for money because he is a member of the Nepal Students’ Union affiliated with the Nepali Congress Party. He claims that they will harm him again if he returns to Nepal and they will also prevent him from voicing or expressing his political opinion. He does not claim to be at risk of harm from other actors.
62. For the reasons that follow, it is not necessary to consider the applicant’s claims for protection in any greater detail, other than to identify who he states will harm him.

Safe Third Country

63. The country information 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 above in RRT Research Response NPL31374, Article 7 of the Treaty provides in essence that under this treaty, the holder of a Nepalese passport holder such as the applicant can enter and reside in India, noting 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

64. The same report 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 including a valid passport. As evidenced by the extract copy of the applicant’s passport submitted with the protection visa application, the applicant holds a Nepalese passport which is valid until [a date in] May 2016. The applicant accepted at hearing that he can go to India. The country information, in particular, the 2006 DFAT advice (which the Tribunal assesses as still current) and RRT country advice NPL37205 reproduced above, shows that the provisions of Treaty are respected as a matter of fact, and that citizens of India and Nepal can each enter the others’ countries.

65. The Tribunal therefore finds that the applicant has a presently existing, legally enforceable right to enter and reside in India, should he be fearful of persecution in Nepal.
66. The applicant states in his application form that he has not travelled to any other country outside Nepal before coming to Australia. Apart from India, there is no evidence to suggest the applicant has the right to enter and reside in any other country. He stated at hearing that he had never been to India. The Tribunal finds that he has not taken any steps to avail himself of what the Tribunal has found to be his presently existing and legally enforceable right to enter and reside in India.
67. The applicant asserts that he will be persecuted in India, including by Maoists. However, the country information does not appear to the Tribunal to support this proposition. 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, but the RRT Research Response NPL31374 does give examples of Nepalese Maoists in India being arrested and deported.
68. The Tribunal offered to the applicant the opportunity to provide material to support his contention that there is a network between Nepalese and Maoists and that Nepalese Maoists would be able to locate and harm him in India. The applicant did not take up the offer.
69. Some of the country information reproduced above does suggest that from time to time some foreigners and refugees may experience problems in India. However, the evidence in support of this proposition is equivocal at best, with RRT Country Advice noting 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*. In the Tribunal's assessment, a close reading of the report by Raju Bhattarai mentioned in NPL37205 reveals it to be less than objective and gives it little weight.
70. As noted above, neither the 2008 nor 2010 USSD reports support the proposition that Nepalese men in India face systematic and discriminatory harm for one or more than one Convention reason. 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 that 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*. In the view of the Tribunal the weight of the country information reproduced above does not support the proposition that the applicant faces a real chance of experiencing serious harm capable of amounting to persecution in India, and the Tribunal finds accordingly that he does not.
71. The reference to the Indian authorities having arrested or deported suspected Nepalese Maoists suggests that their activities are not tolerated in India. Furthermore, given the size and population of India, the Tribunal considers that there is only a remote possibility of the applicant even encountering any Nepalese Maoists in that country, alone ones who might recognise and seek to harm the applicant for a Convention reason. For this reason too, the country information does not suggest that the applicant is at risk of *refoulement* from India to Nepal, on the basis that it is the Maoists or suspected Maoists or Nepalese otherwise suspected terrorism or of being a security risk who are the ones facing such a risk. The Tribunal finds that there is only a remote possibility that the Indian authorities would suspect the applicant of being a Maoist or terrorist or a security risk, were he to invoke his right to enter and reside in that country. The Tribunal therefore also finds that subsection 36(5) of the Act is not enlivened in this case.

72. The Tribunal has found that that the applicant has a presently existing, legally enforceable right to enter and reside in India and has not taken all possible steps to avail himself of that right. Furthermore, the Tribunal finds for the purposes of s.36(4) that the applicant does not have a well-founded fear of being persecuted for a Convention reason in India, or of being returned from that country to a country where he does have a well-founded fear of being persecuted for the purposes of s.36(5). Accordingly, s.36(3) of the Act applies to the applicant, and Australia does not owe protection obligations to him on that basis.

CONCLUSIONS

73. 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

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