

1203480 [2012] RRTA 730 (23 August 2012)

DECISION RECORD

RRT CASE NUMBER:	1203480
DIAC REFERENCE(S):	CLF2011/155422
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Simon Jeans
DATE:	23 August 2012
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the <i>Migration Act 1958</i> .

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 applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Nepal, applied to the Department of Immigration and Citizenship for the visas on [date deleted under s.431(2) of the Migration Act 1958 as this information may identify the applicant] September 2011.
3. The delegate refused to grant the visas [in] February 2012, and the applicants applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees and 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

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations 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.
7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZF DV v MIAC* (2007) 233 CLR 51.

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

15. Whether an applicant is a person 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

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

Member of the same family unit

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants. 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.
21. The applicants were represented in relation to the review by their registered [migration agent].

Immigration history

22. The applicant arrived in Australia as the holder of a Class TU subclass 572 student visa [in] October 2008 valid until [a date in] March 2011. He became an unlawful non-citizen after [this date in] March 2011.
23. The second visa applicant arrived in Australia [in] August 2009 as the holder of a false Nepalese passport. A copy of the information page of the false passport was provided to the Department.
24. [In] August 2011 the applicant was located working and detained as an unlawful non-citizen. During the Compliance Client Interview he stated he was working illegally for around two years, earning around \$600 and \$700 a week. When questioned if there were any reasons why he could not return to Nepal, he stated there were, citing political reasons. He also stated that his main intention in coming to Australia was to find work. He provided a departure ticket indicating he was due to depart [in] September 2011. A person identifying himself as a cousin undertook to provide accommodation and financial support.
25. [On a later date in] August 2011 the applicant had sent a facsimile from the detention facility to the Department's office in Sydney indicating he intended to apply for a protection visa. This form was sighted by a Departmental officer at the detention facility and signed by the applicant and the officer [in] May 2011, although this is more likely to be a reference to [the date in] August 2011.
26. A decision to release the applicant as the holder of a Class WE bridging visa was made [in] August 2011 based on his departure arrangements.

Primary application

27. The first named applicant (hereafter the "applicant") stated in his protection visa application that he was a citizen of Nepal. He submitted a copy of the information page of his Nepalese passport. He indicated he was born in Nepal on [date deleted: s.431(2)]; he was fluent in the Nepalese language; he belonged to the Chhetri ethnic group; his religion was Hindu; he was married on [date deleted: s.431(2)]; he travelled to Australia [in] October 2008 as the holder of a student visa; he was residing [in] Nepal between 2001 and October 2002; then at various addresses in Kathmandu between October 2002 and October 2008; he completed 10 years of education in Nepal; his occupation or profession before travel to Australia was politics/social work/business; his employment since leaving high school was in Australia between October 2008 and August 2011 in the same company; and he had [details of family deleted: s.431(2)] residing in Nepal.
28. The second visa applicant stated in her protection visa application that she was a citizen of Nepal and provided a certified copy of the information page of her Nepalese passport issued [in] November 2003. She indicated she was born in Chitwan, Nepal on [date deleted: s.431(2)]; was fluent in the Nepalese language; belonged to the Chhetri ethnic group; her religion was Hindu; and her occupation before travel to Australia was in [business].
29. The applicant stated in his application forms that he was seeking protection so that he did not have to go back to Nepal. He left Nepal because he was the chairperson of his ward in the Village Development Committee No. 1 and he was elected from the Nepali Congress Party in May 1997. He was continuously threatened by Maoists to resign and leave politics. He did

not listen to them and did not obey the order. They attacked him at home at midnight when he was sleeping, sustaining several injuries. He was left unconscious on the road near his house. Members of his family and neighbours took him to hospital where you were treated for his injuries. After five days, because of fear, he left the hospital and went to Kathmandu where he remained in hiding. He stayed in several places. It was not possible to stay in hiding for years. In the meantime his family members received several warnings and threatening letters for him. They burnt down his house [in] June 2006 because he did not surrender to them. Finally, he decided to leave the country in 2008.

30. In answer to what he fears may happen if he returns to Nepal, he stated he may be kidnapped and killed because he was still received threatening phone calls to his family members in Nepal. He does not think he will be safe in Nepal when he returns. In answer to who may harm or mistreat him if he returns, he stated members of the United Communist Party of Nepal (Maoist) and their youth wing, the Young Communist League (YCL).
31. In answer to why he thinks this will happen if he returns, he stated he was targeted because of the following reasons: he was elected chairperson of his ward from the Nepali Congress Party; he was vocally against the Communists who are extremists; he was threatened to resign and leave politics or support them; he was reported as the main enemy of the area by their spies; therefore they were after him.
32. In answer to whether he thinks the authorities in Nepal can and will protect him if he returns, he stated the police and authorities are not powerful in Nepal, are not able to go everywhere whereas the Maoists are everywhere. At the moment the Maoists are in government and the authorities are bound to follow the orders of the government. He stated he was targeted several times and therefore stayed in hiding for a long time. He does not believe he can be safe in Nepal.
33. The applicant provided a translated statement in which he provided the following. He has [details of family deleted: s.431(2)]. He completed high school. He was interested in social work and worked for the Nepal Students Union in different positions.
34. He applied for nomination for the Nepali Congress in the local election and was elected as president of the village ward in April 1997. He continuously worked in social service.
35. He was married in 1997. Their first child was born in [date deleted: s.431(2)]. Their second son was born in [date deleted: s.431(2)].
36. He registered a [business] company in 1999 and operated it with the second visa applicant. He was also undertaking social work.
37. In 1995 the Nepal Communist Party (Maoist) were carrying out an armed revolution. This created instability in the country and there was an increase in murders, killings, forced donations and terror. All the people's representatives were pressurised to resign and the government asked the people's representatives not to resign. The Maoists asked him to resign and threatened that if he did not resign, they would take action against him. He neglected the demand and obeyed the Party's instructions.
38. On [a date in] October 2002, around 11pm, five or six Maoists came and asked him to come out as they told him they had some business to do with him. He came out because he thought there was an emergency. They started beating him saying this was a punishment in the name

of the people. He tried to run away but could not and they started beating his legs, saying "these are the legs trying to run away from us". He fell to the ground. They beat his face and he was hit on his forehead and teeth where he still has the wounds. Before they left him, they told him this is just a warning. Local people helped him and took him home.

39. After this incident he was not able to return to his village. He went to Kathmandu and lived at different places. As the Maoists could not find him in the village, they came to his house on [a date in] June 2005, took his family out of the house and then burnt the house with all the goods inside. The villagers helped his family extinguish the house.
40. His family has been in a dangerous situation since this incident. He organised his father and mother to stay with his elder sister. He took his wife and two sons to his father-in-law's house. He remained in Kathmandu. They closed the [business] and they put a notice outside the [business] with a warning note saying any person who buys or sells the [business] will also be punished.
41. When he was in Kathmandu he heard there was an agent who organised a paper marriage and he came to Australia to save his life. After he came to Australia, his wife was asked to donate money and had been threatened by Maoists in different matters. She was also forced to come to Australia.
42. After he came to Australia he realised he had much more protection. As their English was not good and they did not know where they could get help or what they could do about a protection visa. He was detained by the Department. He cannot return to Nepal. The Maoists are in government which increases his fear and terror. He does not want to return to Nepal so he made this application. They are bound to live here in safety although it is not in their interest and leave their elderly parents and infant children in Nepal.
43. The applicant provided three untranslated documents in the Nepalese language. According to the application form, he would be providing translations of all these documents at a later time.

Delegate's interview

44. The applicant was interviewed by a delegate of the Minister [in] February 2012. The Tribunal has listened to the recording of the interview and the following is a summary.
45. The applicant did not recall his current residential address. When studying in school he was in the Nepali Students Association. He was [age deleted: s.431(2)] years old when elected as the president. He was married the same year and in the following year had his first son. He established a [business] and his wife was looking after that. He was involved in politics. There was fighting by the Maoists. They threaten him to resign. They held a meeting to discuss this. The discussions at the meeting were leaked and the Maoists took issue with this and took revenge. He lived in a poor area and since he owned a motorbike, was called on in cases of emergencies. Someone came at night to wake him up. He thought someone needed help so he went to check. Five or six people started beating him. He has marks on both his legs and his teeth as well as an injury to his hand. He was told this was a warning and if he did anything against them, they would take action against him. He was taken to hospital where he stayed for five days. He wanted to go home but his friends warned him that if he went home, anything could happen, so he went to another place. He stayed in Kathmandu where his sister's daughter's husband lived. He lived from place to place.

46. He attempted to travel to Japan but the agent was approached, threatened and he refused to assist him. He found another agent to assist him travel to Australia.
47. He is responsible for the care of his parents because he is the only son. He would not have left his parents, who are almost 80 years of age, as well as his two small children, without a good reason.
48. [In] June 2005 they set fire to his house and ran away. All the villagers gathered and tried to extinguish the fire. Everything was destroyed.
49. He was unable to stay in Nepal. He felt so helpless. His elder sister said she would take care of his parents. His wife and children went to live with his wife's parents.
50. They put up a poster that said if anyone comes there, they will take action.
51. He took a tractor to the city and sold it.
52. After he came to Australia his wife started to receive threatening telephone calls. He engaged an agent who obtained a visa for his wife. His two sons were put in a boarding school and do not leave.
53. He was working in a laundry but after two or three weeks of his wife also working there, they dismissed her because her language was not good enough.
54. He joined the Nepali Students Union in 2044 [1987] and was a member until 2054 [1997].
55. He continues to serve as the president of his village ward because there have not been any elections. The policies of the Nepali Congress Party were democracy and socialism. By this he meant everyone had the right to free speech.
56. Everyone was receiving threats from the Maoists from 2001, not just against him but everyone. They were told they had to resign. All the representatives had a meeting and spoke about what they should do. He spoke against the Maoists. Representative of other political parties attended this meeting
57. In 2059 [2002] he was beaten up. He had not received any personal threats by letter or phone prior to this. When he was attacked they told him they knew at the meeting he said everyone should have basic rights. He thought it was an emergency so went out. He was unaware until they started hitting him. He went outside the door and they started to attack him and beat him up. He tried to save himself but could not do anything. He was hit and bleeding all over his body. They said this was a warning to him and left. He was in hospital for five days after that went straight to Kathmandu. He flew there by plane. He was staying with his son-in-law. He moved from place to place. His family also supported him. He did not have any involvement in politics in Kathmandu.
58. The Maoists burned down his family's house in 2062 [2005]. He was informed about the fire through his son-in-law. He thinks they wanted to harm him because they could not find him. He knew someone who was president of the youth association who went to gaol and he was killed in gaol because they took revenge. The Maoists were also jealous with him because of the money he was making through the [business]. The [business] was closed down the day after they beat him up. There was a note put up which said that if anybody wanted to buy the

[business] or give work there, or tries to work there, action will be taken against them. He believes this was because of his involvement with the political party.

59. The Maoists are in power and have confiscated the properties of the party leaders. The flag of the Nepali Congress Party is red-and-white with four stars in the middle and the election symbol is a tree.
60. The agent who secured his visa for Australia was organised through his son-in-law. He never met the agent and signed papers given to him by his son-in-law. He paid 10 lakhs for the visa. He was taken to Australia as a dependent of another student and travelled as husband and wife. The agent arranged all the documents. His real wife is in Australia and is the second visa applicant. She came to Australia on a false passport because she could not travel with him to Australia.
61. He did not attempt to go and live in India because the Maoists were also living there and could harm him. The Maoists from Nepal and India communicate with each other.
62. It is not safe for him to return to Nepal where even people who have sought protection have been killed.
63. He has been working in Australia since October 2008.
64. He did not renew his membership in the Nepali Congress Party. He had a Party membership card but did not bring it with him to Australia.
65. He has not engaged in any political activities in Australia.
66. The second visa applicant came to Australia because she was receiving threats from the Maoists. She was threatened with rape and they were torturing her. These threats were made by telephone. They were torturing her by saying they will do this or that to her. They told her that her husband had left and it will not matter if they rape her. No one else in his family has been threatened. The [business] is still closed down.
67. He was thinking of returning to Nepal until someone he knew was killed. He heard he was in hospital and did not survive. This was one month ago. He was waiting for the situation to calm down and if that happened, he would return. He did not apply for a protection visa because he had a problem with language and did not go out or socialise. He was supposed to get a hepatitis injection but could not go and could not tell anyone because he had a language problem. He did not think he could obtain an interpreter to assist him. Only when detained by the Department did he realise he could apply for a protection visa. He worked with other Nepalese people but did not trust them. On one occasion one of them told him not to come to work anymore claiming he was sacked, but the employer found out and told him to return to work.
68. The delegate put to him that when detained by the Department, he said the main reason for his travel to Australia was to work and the applicant stated he did not recall this.
69. He claimed he was departing Australia [in] September 2011 because he was advised to obtain a ticket and then decide what to do once released from detention. The person who assisted him to live in the community is not his cousin but is from his wife's village. He never discussed with him about applying for a protection visa.

70. It is not possible for him to return to Nepal. The Maoists say one thing but do another and incidents are happening all the time. He left his son when very young and does not have a close relationship with the youngest one. He would not have left his parents with his sister's family as this is not culturally appropriate and they will be saying things behind their backs.
71. He offered to show his scars to the delegate and was told this was not necessary.
72. The applicant provided the delegate with a certificate and translation which indicated the [business] was registered [in] March 2000.

Delegate's decision

73. [In] February 2012 a delegate of the Minister decision to refuse to grant a protection visa to the applicant. The delegate accepted that the applicant was elected as president of the local ward in 1997, was active as a member of the Nepali Congress Party and was politically opposed to the Maoists from the time of his school and college years until his travel to Australia. The delegate accepted the applicant was beaten by Maoists in October 2002. The delegate considered the applicant would be able to relocate safely to another part of Nepal to avoid persecution and would be able to relocate to India. The delegate did not accept the applicant would face a real chance of serious harm because of his political activities if he returned to Nepal and that effective state protection was available to him. The delegate found the applicant had sought to prolong his stay in Australia to pursue employment and financial gain rather than any fear of persecution in Nepal. The delegate considered the delay in lodging his application for almost 3 years from the time of arrival indicated he did not have a fear of persecution in Nepal. The delegate did not accept he did not apply because of a language barrier. The delegate found the applicant was not a person to whom Australia protection obligations. As the delegate refused to grant a protection visa to the applicant, he also refused to grant a protection visa to the second visa applicant who is a member of the family unit included in the application.

Tribunal proceedings

74. The applicants made an application to review the delegate's decisions [in] March 2012. Accompanying the application was a copy of the decision record and letter of notification from the delegate.
75. The Tribunal wrote to the applicants [in] June 2012 inviting them to appear before the Tribunal to give evidence and present arguments relating to the issues arising in their case [in] July 2012.
76. The applicants appeared before the Tribunal [in] July 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages. The following is a summary of the oral evidence.
77. The agent who assisted the applicant obtain the visa is not the agent whose details appear on a sticker on the back of his passport. The visa was organised through a relative.
78. The Tribunal stated that there were some documents provided to the Department in the Nepalese language which were not translated and that if they wanted the Tribunal to consider this information, it should be translated. The applicant showed the Tribunal a folder of

documents. The Tribunal stated if he wanted to submit them he can provide them and if any are not in the English language, they should be translated.

79. They resided at [address deleted: s.431(2)]. They were not living at the address in [suburb deleted: s.431(2)] because they did not want to stay there after he was detained. They were unemployed because they did not have permission to work.
80. The Tribunal asked the second visa applicant when she arrived in Australia. She knew the Nepalese date and it was calculated by the interpreter as August 2009.
81. The second visa applicant stated that after the applicant left and went to Kathmandu in October 2002, she took the children and went to live with her mother. The applicant moved to Kathmandu because the Maoists came and beat him. She was in the house at the time. The applicant was beaten by the Maoists outside the house and when she went outside she saw that he was beaten. He stayed outside the door of the house. She was inside and saw him being beaten and there were injuries to his teeth. His parents were also inside and they came to help. When she went outside the Maoists had already run away. She saw he was beaten and called for help from his parents and neighbours. They were taken to hospital on two motorbikes. The applicant and a friend were on the first motorbike and she and another friend were on the second motorbike. There was blood on the applicant's forehead and he was wounded in the legs.
82. The second visa applicant stated she received the first threatening telephone call after the applicant had left for Kathmandu. She stated they came again, could not find him so set fire to the house and she took the children to her mother's house. She received the threatening telephone calls almost every day on her mobile phone. She did not get a new SIM card because it was hard to change all the time, she used to switch off the phone when she received the calls, and she had a lot of relatives who had her number and if she changed the number they could not contact her. The callers said where is your husband, you do not have a husband so we can rape you. This continued up until she left Nepal in August 2009.
83. The second visa applicant gave evidence about the incident when the house was burned down. She stated when the applicant left home they came for revenge. They burned the roof. She was living with her parents-in-law and children. It was [in] the second month of 2062. She went to hospital with the applicant and only after the fire moved to live with her mother. She had not suffered any other forms of persecution.
84. The applicant gave evidence about the [business]. He stated it was opened in the 11th month of 2056. He stated there were seven people working in the [business] and four outside the [business] working with a tractor. It was a successful business. He closed the company six months after the incident when he was beaten and went to Kathmandu because he could not operate the company, which was in approximately April 2003. The actual business stopped operating the same day the Maoists came [in] October 2002. The second visa applicant did not continue to work in the [business] or any [business]. The Tribunal stated according to the protection visa application form, her occupation prior to coming to Australia was "business-[deleted]". He stated she was living with her mother and not working. The Tribunal asked why the second visa applicant would provide this information in the protection visa application. He stated it was perhaps a misunderstanding.
85. The second visa applicant came on four occasions to visit him in Kathmandu and the last time was before he travelled to Australia. He did not visit her in the village.

86. The applicant gave evidence about his political activities in Nepal. He joined the Nepali Congress Party in 2054 when he was [age deleted: s.431(2)]. The Party was established in 2007 in the Nepalese calendar. The Nepali Congress Party supported the monarchy. He stated that they previously supported them but they changed and now they follow a republican model. Nine other people stood as candidates when he became president of the ward.
87. He joined the National Student Union in 2044 and he was a member for 10 years. He continued to be a member after he stopped studying. The symbol of the National Students Union was a pen with a light and flame and red colour.
88. The Maoists pushed him to resign and he was opposed to this and raised his voice and this occurred in 2059, which was five or 10 days before he was assaulted. It was not the only time he is to speak out against the Maoists. He stated he used to make some comments but the main comments were at the meeting shortly before being assaulted.
89. The Tribunal asked about his claim that he was reported as the main enemy by their spies. The applicant did not know what this claim meant and stated he did not make it. He was the owner of a [business] and received a government tender and this was one of the reasons he was beaten by the Maoists.
90. His family members had not been persecuted. His children have to live in a hostel. The Tribunal asked if this was a boarding school. He stated that when they came to Australia, their children had to live in the boarding school and he paid for this through his savings. He comes from well-established family, they have savings and they opened a [business].
91. The Tribunal stated that according to an interview conducted by a Departmental officer when he was detained having been found working without permission to work and as an unlawful non-citizen, he claimed his main reason in coming to Australia was to work. He stated he did not come to Australia only to work but for protection. The Tribunal asked why he did not apply for a protection visa after arriving in Australia and waited almost 3 years. He stated he did not know about a protection visa because of a lack of English. The Tribunal stated he survived in the community for many years, rented an apartment, according to the compliance interview had a photo ID and bank account, was employed in a laundry for two and a half years and all of this indicated he was resourceful and this cast doubt on his claim that he did not know about a protection visa because he did not know English. The applicant stated in Nepal he did not know anything. He shared accommodation in Australia and did not rent an apartment. He needed a bank account to obtain employment and only worked in the one place since his arrival.
92. The Tribunal stated according to information given in his application for a Bridging E visa, he was going to depart Australia, return to Kathmandu on Thai Airways and stated that he needed to settle a few things first before departure and this may cast doubt on his claim that he had any fear of persecution in Nepal. He stated he was advised about this by his lawyer, he was in a panic, he was told to sign, it was a terrible time and his wife was outside the detention centre crying, and there was no alternative except to help his family and work to survive.
93. The Tribunal asked how the Maoists could locate the agent he was using to travel to Japan and threaten the agent. He stated he was informed about this by his brother-in-law. The Tribunal stated it was hard to believe the Maoists could track him down in Kathmandu, locate

an agent he was using to travel to Japan, threaten the agent and not force the agent to tell them about his location or to provide information about his relative who was dealing with the agent. He stated he was unaware how they can track down the agent. He was told at the last minute that the agent could not go ahead.

94. The Tribunal stated he had arrived in Australia in October 2008 and did not apply for a protection visa until September 2011 and this cast doubt on his claim that he had any fear of persecution in Nepal. He stated he was unaware at the time, did not know English and even missed a hepatitis C injection in a hospital because of lack of English. The Tribunal stated to the second visa applicant that she arrived in Australia in August 2009 and did not apply for a protection visa until September 2011 having travelled to Australia pretending to be someone else's spouse and this cast doubt on her claims for protection. She stated that she felt safe in Australia and wanted to stay. She stated she was tortured for a long time in Nepal.
95. The Tribunal stated that in the written statement lodged with the application, the applicant claimed that his family members received several warnings and threatening letters for him whereas in evidence given in the delegate's interview and in the Tribunal's hearing he stated that his family members were not persecuted. He stated there was a note posted on the [business] approximately 9 or 10 days after he was bashed. It was a warning note.
96. The Tribunal stated that in his written statement he claimed that there were demands for money made by the Maoists but this claim was not made in the delegate's interview or Tribunal's hearing. He stated the Maoists asked for money before he left the local area. They used to collect money from businessmen. The Tribunal stated that the written statement says the demands for money were made to the second visa applicant. He claimed they demanded money and he donated some money.
97. The Tribunal stated in his application he claimed he was left unconscious on the road near his house after being attacked by the Maoists, in his written statement lodged with the application he did not refer to being unconscious, in the delegate's interview he did not say he was left unconscious, and in the Tribunal's hearing neither he nor the second visa applicant claimed he was left unconscious. The Tribunal stated this may cast doubt on whether these claims are true and correct. He stated they beat him and run away. He can show the scars. The Tribunal stated he could provide a medical report if he wished to do this. The Tribunal stated that inconsistent evidence relating to the claimed attack may cast doubt on whether the scars were caused by the Maoists or some other cause such as a motorbike accident. The applicant insisted to show the Tribunal the scars on his legs and he did so. The Tribunal noted there were some scars on both legs around his shins.
98. The Tribunal stated there was inconsistent evidence about the claimed attack [in] October 2002, where the attack took place and who assisted him after the attack took place. He stated that after the incident happened the local people help take him to hospital.
99. The Tribunal stated in the delegate's interview he claimed that he received advice from his friends who warned him against going home after being hospital for five days, whereas he did not refer to this claim in his written statements. He stated they beat him and run away and he could not provide all the details in his written statements.
100. The Tribunal stated that in the delegate's interview he said he after he was beaten, the [business] was not running and after he went to Kathmandu the [business] was closed because he was no longer working there, whereas in his written statement enclosed with the

application he stated that it was only after the house was burned down in June 2005 that the [business] was closed and the warning notice placed on the [business]. The applicant stated the [business] was closed after the incident in October 2002 and the house was burned down in 2005.

101. The Tribunal stated in his written statements he claimed the Maoists came to his village because they could not find him so they took his family out of the house and burned it down whereas the delegate's interview he claimed that they set fire to the house and then ran away and there was no reference to the Maoists taking his family out of the house before setting fire to it. He stated they told them to leave the house but left their belongings in the house.
102. The Tribunal stated it was hard to believe he left the position of president of the local ward in 2002 but they did not conduct any election or replace him until the present. He stated after that there were no local elections.
103. The Tribunal stated the delegate had accepted some of his claims that he was involved in the Nepali Congress Party, was politically opposed to the Maoists, was elected as president of the village ward and was beaten by the Maoists in October 2002 whereas the Tribunal had identified a number of inconsistencies in the evidence which cast doubt on whether all these claims were true. He stated he was telling the truth. When he spoke up against the Maoists they came to beat him and they said this was the main reason they did this because he thought there should be human rights.
104. The Tribunal stated to the second visa applicant that the Tribunal had concerns about her credibility which may cast doubt on whether her claims for protection were true and correct. She stated whether she said and the applicant has said is true. Whatever they say is true because it is declared on the Gita holy book. She feels it is true.
105. The Tribunal asked if the Maoists had been in contact with his family in Nepal since his departure. He stated there was no contact and that his parents, in particular his father, was very old. The Tribunal stated it was hard to believe the Maoists did not approach his family to find his whereabouts given they were so interested in him having attacked him, burned down his house, tracked him down and threatened the agent and were making daily telephone calls to his wife. He stated as his parents are elderly so they leave them alone. The Tribunal asked about his sisters. He stated he did not know why they did not approach them.
106. The Tribunal asked about his claim in the delegate's interview that a person by the name of [Mr A] was killed and asked about this person. He stated he was a youth leader and he was his friend. He did not know he was killed. The Tribunal stated this may cast doubt on his evidence he was a close friend as he did not know when he was killed. He stated he heard this from the news and feared he might suffer the same fate. He was accused of killing someone, imprisoned and then killed in gaol. He stated this was an example that there was no security in Nepal. He stated this person was active party member and they could make any excuse to kill him. He stated that he was targeted by the Maoists and the Maoists are now in the government.
107. The Tribunal stated that if it did not accept their claims for protection, it may also find there were not substantial grounds for believing there is a real risk they will suffer significant harm if returned to Nepal. The applicant stated the security in Nepal is very weak. A Supreme Court judge and his guard were recently killed. Maoists are in government but also running a revolution. Members of the Nepali Congress Party and the Maoists share power. The

Maoists are still continuing to take people's properties. They had divided into two parties and can take revenge at any time. The Maoists had 20,000 members and have now reduced this to 3,000, which means there are 17,000 Maoists in the local area biding their time.

108. The Tribunal asked about the documents he provided to the Department. He stated these were not recent documents and not created for the purpose of staying in Australia. He stated they can be checked in Nepal. The documents were quite old. He stated there were no inconsistencies, the business was closed and there was a warning notice. The Tribunal asked if the business was closed because of the warning notice or it was put up after closure. He stated when he went to hospital, nobody ran the business and when the second visa applicant went to the [business] she saw the warning letter and decided to close it. The second visa applicant stated this was 9 or 10 days after the incident in October 2002. She saw the warning notice. She stated the applicant was in the local area hospital where they treated him. The applicant did not see the notice.
109. The Tribunal asked if the applicant had any further evidence or information they wish to present the Tribunal. The applicant stated they did not have a lot of evidence because they are not in Nepal. He stated that when they put up the warning letter on the [business], it was closed. The Tribunal asked the second visa applicant if she wished to give any further evidence. She stated she cannot take evidence from Nepal but the truth is this. The applicant stated he feels grief inside him because his children are in Nepal, his parents are elderly and he would like to bring his children to Australia. His younger son may not know him because he has not seen him since he was very young and does not talk to him. He spent 20 lakhs coming to Australia and is happy to live here in a safe environment.
110. After the hearing the Tribunal wrote to the applicants under s.424A of the Act with information that would, subject to their comments or response, form the reason, or part of the reason, for affirming the decision under review. This information related to evidence given by the applicant during the delegate's interview, the delay in lodging the protection visa application and information given by the applicant to the Department when detained [in] August 2011.
111. After reviewing the evidence given in the hearing, the Tribunal realised it had not given the applicant's an opportunity to comment or respond to information relating to the second applicant obtaining a false Nepalese passport, departing Nepal on a false passport and using a passport for the purpose of entering Australia and whether she had any fears of harm if she was prosecuted on return to Nepal. The Tribunal wrote to the applicants and invited them to attend a second hearing.
112. The applicant responded to the Tribunal's correspondence under s.424A [in] August 2012. His representative made a submission in which he stated that the applicant has applied for a protection visa soon after release from immigration detention and there were some errors in completing the forms. He stated this may also have been due to interpreter or translation miscommunication. He stated that the applicant appears to be credible because his written statement is consistent with information given in the Tribunal hearing. He submitted a form 1023.
113. The applicant provided a statutory declaration in which he stated the following. When he claimed that his family members had received warnings, he meant his wife. In his statement he should have said he was left unconscious but it was written as "injury". He claimed that the information relating to the assault was consistent with that of his statement. He stated it

was correct that his friends advised him not return to his village, he did not put everything in writing and clarified his evidence during the interview and hearing. He confirmed that the [business] was closed in 2002 after assaults by the Maoists. In relation to the occupation of the second visa applicant written as a [business] owner, she was not employed immediately before she came to Australia and this was her last employment which was in 2002. In relation to the house fire in 2005, the second visa applicant was living in the house with his parents in 2002 and after the Maoists burned down the house in 2005 she went to live with her parents. He stated that the second visa applicant received several threats and this was not included in the written statement which did not have all the details. In relation to his friend who was killed a month before the delegate's interview, he could not remember the exact date of death in the hearing because he was nervous. In relation to the agent who arranged for him to live in Nepal for Japan, he confirmed that the Maoists threatened the agent which was information given to him by his brother-in-law. The documents he provided are genuine.

114. The applicants appeared before the Tribunal [in] August 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages. The [representative] attended the hearing. The following is a summary of the oral evidence.
115. The applicant provided a colour photograph of a house which appears to have been abandoned. The Tribunal asked about the photograph. The applicant stated this was his home which the Maoists set on fire. The inside of the house was destroyed after being set alight with petrol. No one lived there afterwards. The person who took the photo could not get access to the inside of the house and could not take any photographs of the damage.
116. The Tribunal put to the applicants that the second applicant had obtained a false passport in Nepal, had departed on a false passport and had entered Australia on a false passport and all of these may be criminal matters in Nepal for which the second applicant may face prosecution. The Tribunal stated did not appear to fall within the terms of the Refugees Convention. The applicant stated he was aware that the person using a false passport would be prosecuted. He stated that if the government found out the second applicant had used a false passport, she may be put in gaol. The second visa applicant stated she had to leave because of threats, thought she could stay safely in Australia, had a fear about being prosecuted but her fear was greater in relation to the other issues raised in her case.
117. The applicant also claimed that he had used false documents when coming to Australia because he claimed to be married to someone else and he may be prosecuted for this. He stated that if he was in prison, he may be killed there so it will be better to stay in Australia.
118. The Tribunal asked why neither of the applicants raised these issues in the delegate's interview or first hearing. The applicant stated there were many issues he wanted to raise at a later date and was waiting to be questioned about them. He stated they had a fear of the Maoists. He stated they were not afraid to be imprisoned in Nepal if prosecuted legally for using false documents or a passport. He stated that the evidence he gave was true and correct and there may have been misunderstandings.
119. The Tribunal asked the representative if he wished to make any submissions. He stated that the applicants had provided consistent evidence and there were no discrepancies. They had a genuine fear of persecution. There were some misunderstandings in preparation of the statement lodged with the application because of interpreting.

COUNTRY INFORMATION

120. The Tribunal considered information from external sources regarding human rights conditions in Nepal since the end of the civil war in 2006:
- International Crisis Group 2008, *Nepal's Election and Beyond*, Crisis Group Asia Report N°149, 2 April;
 - 'Incidents of CPN-Maoist targeting other parties since the April 2006 cease-fire' (undated), South Asia Terrorism Portal website <http://www.satp.org/satporctp/countries/nepal/database/targetingpartyceasefire.htm> – Accessed 9 May 2011;
 - 'Four RPP-N Cadres injured in YCL' assault' 2011, *Nepal Mountain News*, 27 April <http://www.nepalmountainnews.com/cms/?p=25286> – Accessed 1 July 2011;
 - US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April;
 - International Crisis Group 2008, *Nepal's Election and Beyond*, Crisis Group Asia Report N°149, 2 April;
 - 'Abduction charge on YCL men' 2010, *eKantipur*, 10 May, <http://www.ekantipur.com/2010/05/10/capital/abduction-charge-on-ycl-men/314039/#> – Accessed 8 September 2010 ;
 - International Crisis Group 2010, *Nepal's Political Rites of Passage*, Asia Report N°194, 29 September;
 - The Carter Center 2011, *Political Party Youth Wings in Nepal*, 28 February, p.12 http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-political-party-youth-wings-022811-en.pdf – Accessed 17 March 2011;
 - International Crisis Group 2011, *Nepal's Fitful Peace Process*, Asia Briefing N°120, 7 April;
 - 'Maoists strike donation fear into shopkeepers' 2010, *The Himalayan Times*, 1 May <http://site.thehimalayantimes.com/fullNews.php?headline=Maoists+strike++donation+fe+ar+into+shopkeepers&NewsID=242137> – Accessed 28 April 2011;
 - 'Crime watch: 'Extortionist' YCL cadres in police net' 2011, *The Kathmandu Post*, 10 May;
 - 'YCL activists held, released' 2010, *The Kathmandu Post*, 28 November <http://www.ekantipur.com/the-kathmandu-post/2010/11/28/nation/ycl-activists-held-released/215398/> – Accessed 28 April 2011;

- ‘YCL cadre held for bid to extort’ 2010, *The Himalayan Times*, 25 November <http://www.thehimalayantimes.com/fullNews.php?headline=YCL+cadre+held+for+bid+to+extort&NewsID=266955> – Accessed 5 January 2012;
 - ‘What went wrong with YCL?’ 2011, *Republica*, 11 August; and, [\\ntssyd\refer\Research\2012\Factiva\NPL What went wrong with YCL.pdf](#)
 - ‘Extortion threat on the decline’ 2011, *The Himalayan Times*, 9 February <http://www.thehimalayantimes.com/fullNews.php?headline=Extortion+threat+on+the+decline+&NewsID=275848> – Accessed 28 April 2011.
121. The Maoists, and their youth wing, the Young Communist League (YCL), committed human rights abuses against their opponents during the civil war and in the period between 2006 and 2008. Human rights conditions have improved significantly in Nepal since the 2008 elections and the demise of the monarchy. The Maoists enjoyed widespread political and community support; and their involvement in human rights abuses has decreased significantly. The only persons who were continuing to be persons of interest to the YCL and the Maoists were those who were politically active against them. Most of the violence between the Maoists/YCL and their opponents was at political rallies.
122. The YCL was established in 2006 “to provide the Maoists with muscle in everyday politics”: International Crisis Group 2010, *Nepal’s Political Rites of Passage*, Asia Report N°194, 29 September, p.10. The YCL has engaged in extortion and other criminal activities but their involvement in those activities has been decreasing: see The Carter Center 2011, Political Party Youth Wings in Nepal, 28 February, p.12 http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-political-party-youth-wings-022811-en.pdf – Accessed 17 March 2011. The Carter Center reported in 2011, that the YCL had been “implicated in extortion, intimidation and violent activities” in the lead up to the 2008 Constituent Assembly elections in Nepal. They reported that government officials, businessmen and ordinary citizens, indicated that the YCL sought forced donations and engaged in unlawful taxation. The YCL cadres “pressured citizens, shopkeepers, and wealthy businessmen for donations ranging from in-kind food and housing contributions up to approximately 500,000 NRs [Nepalese Rupees]”: see The Carter Center 2011, Political Party Youth Wings in Nepal, 28 February, p.12 http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-political-party-youth-wings-022811-en.pdf – Accessed 17 March 2011.¹
123. Extortion was continuing “by the [Maoist] party’s various wings” against “businesses” and that following the end of the civil war in 2006, the YCL was “at the frontline of Maoist economic activity, involved in extortion and various industries...and trades”. The YCL is reportedly “still organised along economic lines”, with a number of active units whose activities either support the party or expand the influence of individuals within the party: International Crisis Group 2011, *Nepal’s Fitful Peace Process*, Asia Briefing N°120, 7 April, pp.1, 11

¹ According to the World Bank, Nepal’s current GDP per capita is US\$490, approximately 41,427 NRs. The World Bank 2011, ‘Nepal Country Overview 2011’, 21 September <http://go.worldbank.org/4IZG6P9JI0> – Accessed 9 January 2012; ‘(USD/NPR) US Dollar to Nepalese Rupee Rate’ 2011, XE.com, 9 January <http://www.xe.com/ucc/convert/?Amount=490&From=USD&To=NPR> – Accessed 9 January 2012.

124. The Maoists have attempted to reign in the YCL's activities; and the authorities have taken action against Maoist/YCL cadres for their involvement in politically motivated violence: see 'Abduction charge on YCL men' 2010, eKantipur, 10 May, <http://www.ekantipur.com/2010/05/10/capital/abduction-charge-on-ycl-men/314039/#> – Accessed 8 September 2010; US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April, Section 1.a; 'Crime watch: 'Extortionist' YCL cadres in police net' 2011, *The Kathmandu Post*, 10 May; 'YCL activists held, released' 2010, *The Kathmandu Post*, 28 November <http://www.ekantipur.com/the-kathmandu-post/2010/11/28/nation/ycl-activists-held-released/215398/> – Accessed 28 April 2011. 'YCL cadre held for bid to extort' 2010, *The Himalayan Times*, 25 November <http://www.thehimalayantimes.com/fullNews.php?headline=YCL+cadre+held+for+bid+to+extort&NewsID=266955> – Accessed 5 January 2012.
125. The Carter Center reported in February 2011 that extortion activities of the YCL have decreased since May 2010; however, donation requests remained common: see The Carter Center 2011, *Political Party Youth Wings in Nepal*, 28 February, p.12 http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-political-party-youth-wings-022811-en.pdf – Accessed 17 March 2011; 'Extortion threat on the decline' 2011, *The Himalayan Times*, 9 February <http://www.thehimalayantimes.com/fullNews.php?headline=Extortion+threat+on+the+decline+&NewsID=275848> – Accessed 28 April 2011.
126. The above information from external sources indicated that Maoists were no longer actively targeting the persons who were targeted during the civil war and between 2006 and 2008; and their ability to target individuals with impunity had decreased significantly since 2008.
127. The following information from external sources deals more broadly with human rights and security conditions in Nepal since the end of the civil war:
- United Nations Office of the High Commissioner for Human Rights 2007, *Human Rights in Nepal: One year after the Comprehensive Peace Agreement*, 12 December;
 - US Department of State 2008, *Country Reports on Human Rights Practices for 2007 – Nepal*, March;
 - 'NEPAL: Business community bemoans worsening security situation' 2007, *IRIN*, 29 August;
 - UN High Commissioner for Human Rights 2008, 'Report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office, including technical cooperation, in Nepal', A/HRC/7/68, UNHCR *Refworld*, 18 February 2008;
 - International Crisis Group 2008, 'Nepal's election and beyond', 2 April; and Haviland, C. 2008, 'Electoral thunderbolt for Nepal', *BBC News*, 15 April.
 - US Department of State 2011, *Country Reports on Human Rights Practices 2010 – Nepal*, 8 April
 - Amnesty International 2011, *Annual Report 2011 - Nepal*, 13 May;

- Freedom House 2010, *Freedom in the World – Nepal (2010)*, June
<http://www.freedomhouse.org/template.cfm?page=363&year=2010&country=7885> – Accessed 10 September 2010;
- Human Rights Watch 2012, *World Report 2012 – Country Summary: Nepal*, 22 January;
- US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Nepal*, 11 March.

128. The Tribunal noted that human rights and security conditions have improved substantially in Nepal for ordinary citizens since the end of the civil war. However, individuals who are politically active against the Maoists continue to suffer targeting by the Maoists.

The Treaty of Peace and Friendship

129. The Tribunal considered information regarding the *Treaty of Peace and Friendship* between India and Nepal. The Treaty enables the citizens of one country to live in the other. Advice was sought from the Department of Foreign Affairs and Trade (DFAT) regarding the operation of the Treaty. DFAT stated that many citizens of Nepal live in India. DFAT was asked whether the Treaty has been incorporated into India's domestic law. It advised that the Treaty has not been incorporated into domestic law in India (Department of Foreign Affairs and Trade 2006, *DFAT Report 554 - RRT Information Request IND30728*, 23 October).

FINDINGS AND REASONS

130. The Tribunal finds that having regard to the original applicants' Nepalese passports presented at the Tribunal's hearings, the Tribunal accepts they are citizens of Nepal and will assess their claims on this basis. The Tribunal finds that the applicants are outside their country of nationality. There is no evidence before the Tribunal to suggest that the applicants have a legally enforceable right to enter and reside in any country other than their country of nationality.
131. The applicant claims that he was elected as a ward president and spoke out against the Maoists. He was a member of the Nepali Congress Party. He was threatened by the Maoists that he should resign from the position of ward president. The Maoists came to his house in October 2002 and seriously assaulted him because he spoke out against the Maoists. This led to his hospitalisation and he left his family's house and went to Kathmandu. His [business] was forced to close. The Maoists came to his family's house in June 2005, forced the family members out of the house, including the second visa applicant, and set fire to the house. The second visa applicant went to live with her parents. The second visa applicant received telephone calls from the Maoists in which they threatened to rape her.
132. The Tribunal raised a number of concerns about the applicants' credibility during the hearing and in correspondence. The Tribunal was also concerned about the delay in lodgement of the protection visa application and statements given to the Departmental officers when the applicant was detected as an unlawful non-citizen. The Tribunal has carefully considered the oral and written evidence given to the Department and the Tribunal and is satisfied that the applicants provided a credible account of their circumstances and it accepts the claims set out above in paragraph 131 and the reasons for the delay in lodgement of the protection visa application. The Tribunal also accepts that when detained by the Department, the applicant

referred to political reasons as to why he could not return to Nepal and whilst still in immigration detention, informed the Department in writing of his intention to apply for a protection visa.

133. The applicants claim they will face similar harm in the future from the Maoists in Nepal because of the applicant's political activities and views. The Tribunal has considered whether their fears are well-founded.
134. The 'well-founded fear' aspect of the definition has a subjective and an objective element: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559. The subjective element of "well-founded fear" concerns the state of mind of the applicant. The Tribunal accepts that the applicants are afraid to return to Nepal for the reasons provided. Nevertheless, for a fear to be well-founded there must also be a factual basis for that fear. In *Chan v MIEA*, the High Court found that a well-founded fear "requires an objective examination of the facts to determine whether the fear is justified": *Chan* per McHugh J at 429. It was further noted that whilst "there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear": *Chan* per Dawson J at 396, and that the Convention, "in speaking of 'well-founded fear of being persecuted', posits that there should be a factual basis for that fear": *Chan* per Dawson J at 412. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation: *Guo* at 572.
135. Information from external sources, summarised above, indicates to the Tribunal that the Maoists are no longer commonly targeting their opponents from the civil war. The Tribunal is satisfied that human rights conditions have improved significantly in Nepal since the 2008 elections. However, the Tribunal finds that despite the significant and positive political developments which have taken place in Nepal since the end of civil war in 2006, and a willingness by the major political parties to end the hostilities, the Maoists are still implicated in political violence against their opponents. Information from external sources indicates that the conflict is commonly restricted to political activists who confront each other at rallies and other similar activities. The information indicates to the Tribunal that political activists targeted by the Maoists are at risk of being subjected to serious physical harm which can be life-threatening.
136. The Tribunal has accepted the applicant's claim that he was elected as a ward president, spoke publicly against the Maoists and on two occasions the Maoists in Nepal indicated their intention to kill him through the assault in which he was seriously injured and setting his family's house on fire; and it is satisfied that he faces similar harm in the reasonably foreseeable future. The Tribunal accepts that the applicant's [business] was closed after the assault by the Maoists that effectively forced him to leave the area. The Tribunal accepts that the second visa applicant was present when the applicant was assaulted and when their house was severely damaged by fire. The Tribunal accepts that the second visa applicant received threats of rape by telephone although considers that whilst the number of threats was exaggerated, this does not affect the Tribunal's assessment that the calls were received which made the second visa applicant fearful for her life and personal security. The Tribunal finds that the essential and significant reason for the harm feared by the applicant is his political opinion. In relation to the second visa applicant, the Tribunal finds that the essential and significant reason for the harm feared by her is as the member of a particular social group as the member of the applicant's family and the applicant's fear of persecution is related to a Convention reason: see 91S of the Act.

137. The Tribunal accepts the applicant's claim that the authorities in Nepal will not be able to provide him with a reasonable level of protection so he can express his views freely and safely in Nepal. The Tribunal accepts that the second visa applicant is also unable to access effective state protection. The Tribunal is satisfied that the applicants' fear of harm by Maoists in Nepal is well-founded.
138. The Tribunal has considered whether the applicants can avoid harm in Nepal by relocating internally. However, it finds that the applicants cannot avoid the harm by relocating within the country as the applicant's political views will attract the adverse interest of the Maoists throughout Nepal and the Maoists have demonstrated their continuing adverse interest in the applicant over several years. The Tribunal does not find it would be reasonable in all the circumstances of the applicants, given their past experiences of persecution and the presence of school-age children within their family unit for them to relocate safely to another part of Nepal.
139. The Tribunal has considered whether the applicants can avoid persecution in Nepal by living in India under the terms of the *Treaty of Peace and Friendship* between India and Nepal. The Tribunal is not satisfied that the applicants have a legally enforceable right to enter and reside in India under the terms of the Treaty. Accordingly, the Tribunal finds the applicants are not excluded from Australia's protection under s.36(3) of the Act.
140. Accordingly, the Tribunal finds that the applicants are at risk of serious harm in Nepal because they have been, and will continue to be, identified as opponents of the Maoists. The Tribunal accepts the applicants' claim that the authorities will not be able to protect them from the Maoists. Accordingly, the Tribunal finds that there is a real chance that the applicants will suffer serious harm by Maoists in Nepal for reasons of either political opinion or membership of a particular social group.

CONCLUSIONS

141. The Tribunal is satisfied that each of the applicants is a person to whom Australia has protection obligations. Therefore the applicants satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

142. The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the *Migration Act 1958*.