

071487719 [2007] RRTA 202 (30 August 2007)

DECISION RECORD

RRT CASE NUMBER: 071487719

DIAC REFERENCE(S): CLF2007/42541

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Suseela Durvasula

DATE DECISION SIGNED: 30 August 2007

PLACE OF DECISION: Sydney

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

**STATEMENT OF DECISION AND REASONS
APPLICATION FOR REVIEW**

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Nepal, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.

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

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

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for

the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

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

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

Definition of 'refugee'

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

to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be

enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

When determining whether a particular applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal should recognise the difficulties often faced by asylum seekers in providing supporting evidence and should give the benefit of the doubt to an applicant who is generally credible but unable to substantiate all of his or her claims. However, it is not required to accept uncritically each and every assertion made by an applicant. Further, the Tribunal need not have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Nor is it obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v*

MIEA & Anor [1994] FCA unrep6786; (1994) 34 ALD 347 at 348 per Heerey J and Kopalapillai v MIMA (1998) 86 FCR 547.

CLAIMS AND EVIDENCE

The Tribunal has before it the Departmental and Tribunal files relating to the applicant.

Protection visa application

The information in the applicant's protection visa application indicates that she is a Nepalese national in her thirties. She was born in city A, Nepal. She completed high school and attended city A Campus for few years. She has not worked. The applicant is married with a couple of children. She lived most of her life in city A and city B and lived in Kathmandu before coming to Australia. The applicant arrived in Australia on a visa. The applicant's sibling lives in Australia.

With the protection visa application, the applicant submitted a handwritten statement in the Nepali language. An English translation of this statement was subsequently provided to the Department. In her application and her statement, the applicant states that she fears harm from the Maoists as she is a supporter of the Nepali Congress Party, she is against Maoists and she is the wife of a teacher.

Review application

After lodging the review application, the applicant provided a statutory declaration, in which she states:

- Her [family] are currently residing in different parts of Nepal.
- She was compelled to leave Nepal because she was under the surveillance of the Maoists.
- Since [year], she has been a supporter of Nepali Congress and she has faith in democracy, not in Communism. She started to speak out against Maoist atrocities.
- Due to her anti-Maoist behaviour she was threatened by them on many occasions. The Maoists used to come to her house and demanded food, shelter and donations. She tried to meet their demands.
- Her husband was a school teacher. School teachers were a prime target of the Maoists. Having witnessed atrocities against school teachers, her husband resigned from his job and fled to [country] in [month and year].
- After her husband went overseas, the Maoists continued to come to her house, threaten her and ask for donations. As they knew her husband was overseas, their demands increased. She told them that her husband did not earn enough to pay the donations.
- She asked her husband to return from overseas as she did not feel safe without male protection.
- She made several complaints to the police and army but the authorities did nothing. Instead, they threatened to put her into gaol for supporting the Maoists.
- Her husband returned to Nepal in [month and year].

- The Maoists came to her house to collect donations and her husband gave them money. About [number of] days later the Maoists came to her house and assaulted her for lying to them. She was taken to a nearby Medical Hall for treatment. She reported the incident to the police but they did nothing. She was scared and stayed inside the house.
- After [number of] weeks, the Maoists came to her house and asked for money. As she did not give them any money they assaulted her again. When she regained consciousness she was at a medical centre.
- She then moved to Kathmandu and stayed with relatives. However, she witnessed Maoists who were active in Kathmandu. As she was the main target in the family and her life was not safe, she left Nepal.

The applicant also submitted few medical certificates from a doctor. The first certificate gives details of the applicant's injuries as a result of a physical assault and states '*History of scuffle with outsider. She was beaten.*' The second certificate a month later, gives details of the applicant's injuries as a result of a physical assault and states, '*attack by strangers*'.

In a submission, the applicant's representative states that the applicant fears persecution because of her political opinion (she is a strong supporter of the Nepali Congress Party and pleaded against Communism) and her membership of a particular social group (she is a victim of the Maoists). The applicant's husband was compelled to resign from his teaching profession and was ordered to become loyal to the Maoists under coercion. The representative provided a number of articles regarding the current situation in Nepal.

Tribunal hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's relative. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages. The applicant voluntarily presented her passport at the hearing and a copy was placed on the Tribunal file. The passport was issued at city B.

The applicant told the Tribunal that she was born in city A and moved to city B after her marriage. She did not work after her marriage. The applicant later stated that she lived with her family in city C. Her husband worked as a teacher for many years. While he worked as a teacher, the Maoists used to come to the school and ask him for money which he would give to them. He eventually resigned from his job and went overseas as the Maoists were torturing the teachers. The Maoists never harmed her husband.

The Maoists would also come to the applicant's house and ask for money, but she refused to give them any money. She spoke out against the Maoists telling other villagers how they used the money to buy weapons. This lasted for many years. The Tribunal asked the applicant if the Maoists actually carried out any threats against her or her family when she refused to give them money during this period. The applicant stated that Maoists did not carry out any threats, even while her husband was overseas. The first time they ill treated her was after her husband returned from overseas. The Tribunal put to the applicant that if the Maoists had been demanding

money from her for a number of years, it seemed inconsistent that they would not have harmed her earlier if she had refused to give them money and had spoken out against them as she claimed. The applicant stated that her husband used to give the Maoists money but she would always refuse.

The Tribunal asked the applicant a number of times if there were any other reasons why the Maoists threatened her. She repeated that the Maoists threatened her because she refused to give them money.

The Tribunal put to the applicant that in her statutory declaration to the Tribunal, she had claimed that the Maoists threatened her because she was a supporter of the Nepali Congress Party and had spoken out against them. The applicant then stated that she was a supporter of the Nepali Congress Party. She used to tell others in the village about the good deeds and achievements of the Congress Party and inspire others to join the Party. The Tribunal asked the applicant to describe the objectives and ideology of the Nepali Congress Party. The applicant stated that the Party was a democratic party and named the current president and a few other leaders. The Party looked after people's honour and promoted respect for one's parents, brothers and sisters. The Party did good things for the village.

The Tribunal asked the applicant to describe the achievements of the Congress Party and what she said to other people to inspire them to join the Party. The applicant then stated that she was not a strong follower of the Congress Party and did not know that much about it. The Tribunal put to the applicant that it had concerns that she did not know much about the Congress Party despite her claims that she was a supporter and promoted the Congress Party when speaking out against the Maoists. The applicant repeated that she was not an active follower of the Congress Party.

The applicant stated that the first time the Maoists attacked her. On the first occasion, the applicant's husband was present but they did not attack him and only attacked her. The Tribunal asked the applicant why they did not attack her husband if he was a former school teacher and the Maoists had previously targeted school teachers. The applicant stated that her husband listened to the Maoists and gave them money but she always refused. The second time she was attacked her husband was not there. She fainted and woke up at a medical centre in city C. She was not sure how she got there.

The Tribunal asked the applicant when and why she obtained the medical certificates she had presented to the Tribunal. The applicant stated that she obtained the medical certificates at the time of the attacks. The Tribunal put to the applicant that if it did not accept other aspects of her claims, it may not accept that the medical certificates establish that she was harmed by Maoists.

After the attacks, the applicant became scared and stayed at home most of the time. After the peace talks commenced and the Maoists came out in the open, she thought they would harm her and she started to live in Kathmandu. While in Kathmandu she lived with her sibling and other friends and relatives. She had to move from place to place as the Maoists were looking for her. She did not feel safe in Kathmandu.

The Tribunal asked the applicant when she moved to Kathmandu. The applicant initially said that she lived in Kathmandu for more than a year before she came to

Australia. The Tribunal put to her that as she came to Australia in a particular year, she would have moved to Kathmandu an year before her arrival in Australia. The Tribunal asked the applicant why she had remained in her village for more than one year after the attacks if she feared for her safety there.

The applicant then stated that she moved to Kathmandu in the later months of the particular Nepalese year. The Tribunal put to the applicant that this was inconsistent with her earlier evidence to the Tribunal. The applicant stated that she could not remember exactly but she was thought she moved in that time, just after the Maoists attacked her.

The Tribunal asked the applicant why, if she had moved to Kathmandu and she feared for her safety there, she waited for few years to obtain a passport to leave Nepal. The applicant stated that she waited to see if the situation improved with the peace talks. She moved from place to place in Kathmandu. She thought about going to another country but she could not go there as women are discriminated against and the Nepalese are harassed there. The applicant stated that she did not return to city C or city B to see her family after she moved to Kathmandu.

The applicant stated that her husband did not move with her to Kathmandu. He remained in city C in the family home. He remains there now and is safe. Her one child is living with her mother in her hometown village. Her other child stays in a boarding school in Kathmandu as her mother cannot look after all children. Neither her children nor her parents have had problems with the Maoists. The Tribunal asked the applicant why her husband remained in the family home if she was in danger from the Maoists. The applicant stated that her husband reluctantly does what the Maoists tell him to do so they do not harm him. He goes with them, carries things and does other chores for them. The Maoists had not harmed him as a way of getting to her.

Evidence of applicant's relative

The applicant's relative told the Tribunal that the applicant's husband was a teacher and the Maoists often came to their house and asked for food and money. In Kathmandu the applicant was moving from one place to another, so he and his wife invited her to come to Australia. He spoke of the general political problems in Nepal. The Tribunal asked the applicant's relative if he knew when the applicant moved to Kathmandu. He stated that it was about over years ago and she lived there for more than one year before coming to Australia.

FINDINGS AND REASONS

Based on the applicant's evidence and a copy of her passport, which was provided to the Tribunal at the hearing, the Tribunal finds that she is a national of Nepal. The Tribunal accepts her evidence regarding her identity, nationality and date of birth.

The applicant claims that she will be persecuted by the Maoists if she returns to Nepal and that the Nepalese state is unable to offer her protection. The applicant claims that she will be persecuted by the Maoists for three reasons – she is the wife of a school teacher, she is a supporter of the Nepal Congress Party and she herself was against the Maoists as she spoke out against them and refused to give them money.

Claims to have been persecuted by Maoists because of support for Nepali Congress Party and speaking out against Maoists.

The applicant claims that she was persecuted by Maoists because she supported the Nepali Congress Party and spoke out in support of the Congress Party and against the Maoists. The Tribunal does not accept the applicant's claims that she was a supporter of the Nepali Congress Party or that she spoke out against the Maoists. At the hearing, the applicant demonstrated very limited knowledge of the Nepali Congress Party's political objectives, ideology or its past achievements. She was only able to state that the party believed in democracy, but was unable to provide further details. When the Tribunal asked her what she told others about the Congress Party to inspire them to join the party, the applicant was unable to provide further details and told the Tribunal that she did not know much about the Congress Party. She could only provide limited details as to what she said when she spoke out against Maoists.

The Tribunal accepts that the applicant was not claiming to be an active member of the Congress Party and that she was only claiming to be a supporter. Nevertheless, given her claims that she actively spoke to others about the achievements of the Congress Party to inspire them to join the party and spoke out against the Maoists, the Tribunal would have expected her to provide more information about the Congress Party's key objectives and achievements and what she said to others to inspire them to join the party and not support the Maoists.

At the hearing, the applicant did not directly raise the claim that she was targeted by the Maoists because of her support for the Nepali Congress Party, despite some prompting by the Tribunal. This also leads the Tribunal to doubt her claim that she was a supporter of the Party and was targeted by the Maoists for that reason.

The Tribunal does not accept that the applicant was a supporter of the Nepali Congress Party and that she spoke out against the Maoists as she has claimed. The Tribunal does not accept that the Maoists harmed her for that reason. It follows that the Tribunal does not accept that the applicant would support the Nepali Congress Party and would speak out against the Maoists and would be harmed by the Maoists for that reason if she returned to Nepal. The Tribunal is not satisfied that the applicant has a well founded fear of persecution for reasons of her support for the Nepali Congress Party or because she spoke out against the Maoists.

Claims to have been persecuted by Maoists because of refusal to give Maoists money, speaking out against Maoists and because applicant was the wife of a school teacher.

The Tribunal accepts that the applicant's husband worked as a school teacher for many years. The Tribunal does not accept the applicant's other claims for the reasons outlined below.

Firstly, the applicant's own evidence was that the Maoists did not actually harm her or her family for many years, despite her claims that she regularly spoke out against them, refused to give them money that the Maoists were targeting school teachers and her husband was working as a school teacher. The applicant told the Tribunal that they did not harm her because her husband used to appease the Maoists by giving

them money at the school. However, the applicant stated that the Maoists did not harm her while her husband was overseas and she was not giving them money.

The Tribunal considers that if the Maoists were interested in harming the applicant, and if she was actually speaking out against them and refusing to give them money over a number of years as she claims, the Maoists would not have waited for many years to attack her or her family. Therefore, the Tribunal does not accept the applicant's claim that she suffered past harm from the Maoists because she is the wife of a school teacher, because she spoke out against them or refused to give them money.

Secondly, the applicant claims that she was attacked by Maoists in city C, yet her family continued to live unharmed in the same area after the applicant when to Kathmandu and Australia. Her evidence casts doubt on her claims that she was of interest to the Maoists at all. Her husband continues to live unharmed in city C in the family home and her child lives with the applicant's mother in her home village. The applicant also claimed that although her husband was present when the Maoists attacked her, they did not attack him. The applicant claims that her husband is living safely in the same area as he complies with the Maoist's demands. This evidence does not explain to the Tribunal's satisfaction, how her husband is able to live safely in the same area if the Maoists were interested in harming the applicant. The Tribunal considers that if the Maoists were interested in harming the applicant, they would not have refrained from attacking her husband during the claimed attack, or after the applicant left her home town, or at least demanded to know the applicant's whereabouts after she went to Kathmandu.

Thirdly, the applicant provided internally inconsistent evidence at the Tribunal hearing as to when she left city C to move to Kathmandu. The Tribunal has considered the implications of both versions of the applicant's evidence. The applicant initially told the Tribunal that she was in Kathmandu for approximately a year before she came to Australia, which means that she would have moved to Kathmandu only almost year before. This evidence was also corroborated by the applicant's relative. If that was the case, it means that the applicant remained in city C for more than one year after she was allegedly attacked by the Maoists. The Tribunal considers that if the applicant had a well-founded fear of being persecuted by Maoists in the reasonably foreseeable future, she would not have remained in her village for more than one year before moving to Kathmandu or elsewhere.

The applicant later changed her evidence at the hearing and told the Tribunal that she moved to Kathmandu a few months after the claimed attacks. If that was the case, the applicant remained in Kathmandu for almost two years before she was issued a passport. At the hearing, the applicant was not able to explain to the Tribunal's satisfaction why she remained in Kathmandu for two years without taking steps to leave Nepal, if she had a well-founded fear of being harmed by Maoists. The Tribunal has had regard to the applicant's claim that she moved from place to place in Kathmandu as she feared for her safety. That evidence, however, does not explain to the Tribunal's satisfaction, why the applicant waited almost 2 years to apply for a passport while she lived in Kathmandu. The Tribunal considers that if the applicant had a well-founded fear of being persecuted by the Maoists in Kathmandu or

elsewhere in Nepal, she would not have remained in Kathmandu for almost two years before taking steps to leave the country.

The Tribunal has had regard to the medical certificates provided by the Tribunal but is not satisfied that these certificates in themselves, establish that the applicant was attacked by Maoists as she claims. The Tribunal has had regard to the evidence of the applicant's relative, but is not satisfied that this evidence establishes that the applicant was targeted by Maoists as she claims. Given the Tribunal's concerns about other aspects of the applicant's evidence, the Tribunal is not satisfied that the medical certificates and her relative's evidence establishes that the applicant was harmed by Maoists in the past or that there is a real chance that the applicant could be persecuted by Maoists in the reasonably foreseeable future if she returns to Nepal.

The Tribunal does not accepted the applicant's claims that she was harmed by Maoists in the past because she was the wife of a school teacher, because she refused to give the Maoists money, because she was against the Maoists and spoke out against them or because she was a supporter of the Nepali Congress Party. It follows that the Tribunal does not accept the applicant's claims that she was threatened by the Maoists, that she was physically attacked by the Maoists twice in same year, that she had to leave her home village because of fear of harm from the Maoists or that she feared harm from the Maoists in Kathmandu.

As the Tribunal has not accepted the applicant's claims of past harm at the hands of the Maoists, the Tribunal does not accept that the applicant would speak out against the Maoists or refuse to give the Maoists money if she returned to Nepal in the reasonably foreseeable future. It follows that the Tribunal does not accept that there is a real chance that the Maoists would harm the applicant in the future because she would refuse to give them money and would speak out against them. The Tribunal has not accepted that the applicant suffered past harm at the hands of the Maoists because she is the wife of a former school teacher. It follows that the Tribunal does not accept that there is a real chance that the Maoists would harm the applicant in the future because she is the wife of a former school teacher. Overall, the Tribunal does not accept that there is a real chance that the applicant could be persecuted by Maoists in the reasonably foreseeable future if she returns to Nepal. The applicant has not raised claims that she fears future harm from any other groups or people in Nepal and no such claims arise on the evidence before the Tribunal.

The Tribunal does not accept that the applicant has a well-founded fear of being persecuted for reasons of her political opinion or her membership of any particular social groups such as 'wives of school teachers targeted by Maoists' or 'people who speak out against Maoists and refuse to give money to the Maoists' or for any other Convention reason.

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in paragraph 36(2)(a) for a protection visa.

DECISION

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