

1201558 [2012] RRTA 411 (15 June 2012)

DECISION RECORD

RRT CASE NUMBER:	1201558
DIAC REFERENCE(S):	CLF2011/139436
COUNTRY OF REFERENCE:	Nepal
TRIBUNAL MEMBER:	Susan Pinto
DATE:	15 June 2012
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

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Nepal, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2011. The applicant arrived in Australia [in] July 2009.
3. The delegate refused to grant the visa [in] January 2012, and the applicant 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 as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

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

Complementary protection criterion

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

CLAIMS AND EVIDENCE

18. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Application to the Department

19. When lodging the application to the Department, the applicant indicated that he is a citizen of Nepal, born on [age deleted: s.431(2)]. The applicant indicated that he speaks, reads and writes English and Nepali. The applicant indicated that he arrived in Australia [in] July 2009 on a student visa. He indicated that he was a student prior to his arrival in Australia and that he has worked as a kitchen hand whilst in Australia.
20. The applicant indicated that he resided in Kathmandu from birth and that he had 14 years of education in Kathmandu.
21. The applicant indicated that his parents reside in Nepal.
22. The applicant states that he returned to his country [in] July 2010 to get his book published.
23. In response to question 41 as to why he left Nepal, the applicant stated the following:

Since Nepal is a country with many heritage where its cultures welcome rest of the world. It was January 2009 when I published my book called “[Title A]”, I was very happy.

As I remember my country situation was going worst and worst day by day and still the situation is same, my country have no proper government. It was after my higher education I got my book published.

Couples of my political poems used to get published in a regular and national wide newspapers, I was scared if people started fighting for races as Maoist killed unaccountable peoples for their selfishness aback those ten years.

I remember the first day some one called me and said “if you have heard writers are lost and not even dead” it was often. At the same time many people were flying to Australia and my father just want me to stop writing. So I came to Australia on [date] October 2009 as a student which was only the fast and easy way for my security at that time.

24. In response to question 43 as to what he fears may happen if he returns to his country, the applicant states that he would have to stop writing and it is not possible because he has a book ready for publication and the applicant may be in the same situation as other writers who are “lost” The applicant thought after a year that everything was better so he returned to his country thinking that he will publish another book named “[Title B]”. The applicant’s father told him to go back as soon as possible because the telephone was ringing even when he was in Australia. The applicant returned within 15 days with his book unpublished.
25. In response to question 44 as to whom he thinks will harm him, the applicant states that the situation in Nepal is such that if one man is angry with another he will kill him. The applicant states that there are no human rights and no democracy. It also only has electricity for 10 to 14 hours per day and no water to drink.
26. The applicant states, in response to question 44, that he believes that this will happen to him because he has a book ready where it has “much more country related things”. He states that one of his poems was published in [newspapers] in Sydney. He states that people who did not like his activities before will suddenly act as a result of his second attempt.
27. The applicant states, in response to question 46, that he does not believe that the government will assist him because there is no proper government.
28. In support of the application, the applicant provided a book, titled ‘[Title A]’, written by himself and a photocopy of “My unpublished book, ‘[Title B]’. The poems are untranslated.

Department interview

29. The applicant was interviewed by the delegate [in] January 2012. The Tribunal has listened to the CD Rom recording of the interview and a summary of the applicant’s evidence follows:

The applicant was advised that the Department could not consider any documents which have not been translated and that the delegate could only consider what he said about them, rather than the documents themselves. The applicant stated that his first book was published in January 2009 and it was also published in the newspapers. After the book was published, the applicant received some threatening telephone

calls. When asked what the book is about, the applicant stated that he likes people to think broadly and they do not want his writings. When asked for an example of what he said in his poems, the applicant stated that there is no proper government and they do not anything right for the people. When asked for an example, the applicant stated that he wrote about all of the political parties. When asked whether he took a particular view, the applicant stated that he said that there should be change and think of the people and the country. He wanted to stop the violence and the unsettled conditions. The applicant said that he wanted them to stop taking bribes and that they should do things for the country and not for themselves. The applicant accused politicians and the government of taking bribes. They can do nothing. The applicant wanted them to form a stable government. Every Nepalese wants to leave because their life is insecure. The applicant's father wanted him to come to Australia. The applicant was asked why he did not go to India. The applicant stated that he had no knowledge of it and everything was done by his father. The applicant believed that India was also not safe for him because political decisions in Nepal are linked with India and that is why his father did not want him to go.

The applicant confirmed that he returned to Nepal after a year because he wanted to publish his book. The applicant returned to publish his book and stayed for only 12 or 13 days. He wants to publish the book one day and he cannot stop writing although everyone wants him to stop writing. When asked about the content of the poems, the applicant stated that he does not want people to lose their culture and they also have some religion and they are also anti-corruption. The political parties are killing people from different religions and his poems are about those issues. The applicant believes that this is the main problem in Nepal. When asked if anyone supported his view, the applicant stated that they did not and no-one supports his views.

When asked if there were any reviews or discussions of his book. The applicant stated that he has many things but he does not have them at the moment. The reviews said that he was a good writer and he should write more. The applicant was asked why he returned if he feared harm. The applicant stated that he thought that he could return to see his friends. The applicant's father did not want him to publish the book. The applicant just stayed at home when he returned to Nepal.

The applicant came to Australia as a student. He had finished his diploma and bachelor course in Australia. He attended college in Australia but he had economic problems and he did not want to attend because he had already studied those things. He paid his fees but did not attend. The applicant studied for about 3 to 4 months and got a new CoE and then studied for 3 to 4 months. The applicant has been working as a kitchen hand for 3 days per week for a few years. He just stays at home the rest of the time and reads on the internet.

When asked why he did not apply for protection earlier if he came to Australia because he feared harm in Nepal. The applicant stated that he did not know about protection visa or that there was any way he could stay in Australia legally. The applicant consulted the internet when he only had a month left on his visa. The applicant cannot write or do anything if he returns to Nepal. The applicant was advised that the poems appear to be general. When asked if he has named anyone, the applicant stated that he has not but he has written general things about Nepalese doing things and told them to stop doing things. The applicant has not blamed any individual and everyone does not think about the country. The applicant stated that he has told the Maoists that he has killed many people during the civil war. When asked if he has named the Maoists, the applicant stated that he has not pointed out the Maoists but he has talked about violence generally but he has not said specifically anything about the Maoists. He has also written about the violence. He has not

written specifically about the Monarchy. The applicant loves the king but he has not written anything specific about the Monarch.

The delegate stated that general poems about corruption would not appear to result in any problems for him. When asked why he cannot return, the applicant stated that many writers, including newspaper writers have been killed. The applicant believes that people are killed for no reason and a Muslim was killed recently and nobody knew. Some people came on motorcycles. The applicant may be killed one day in the same way. The delegate commented that there are no reports of targeting of writers in that way.

The applicant was asked whether there are any particular people who may harm him. The applicant stated that anyone will do anything for money and people are killed for no reasons. The delegate stated that they would have to have a reason. The applicant stated that he does not know who does not want him to write again. The applicant is aware that some senior writers from Nepal have gone to the United States and Canada.

When asked if there is anything further he wishes to add, the applicant stated that the main thing is that he wants to write the book and his views will some day cause him problems in his country. People in Nepal do not have work or things to pass their time.

Department's decision

30. In refusing to grant the visa, the delegate found that although the applicant claimed to fear for his safety he did not at any time attempt to seek safety in India. The delegate also found that despite his claimed fear he stayed in Nepal for several months while his visa and travel to Australia were arranged by his father. The delegate did not accept that the applicant would have problems for expressing general political views which are likely to be shared by many Nepalese. The delegate also found that the delay in the lodgement of the application was not consistent with the applicant's claims to fear harm in Nepal.

Application for review

31. Immediately before the hearing, the applicant provided the following documents to the Tribunal:
- Letter from [name deleted: s.431(2)], Chief Editor of [Publisher 1], dated [May] 2012 stating that the applicant is a good writer and has written poems against "wrong tradition and conservativeness of the people. He states that the "tradition and conservative people did not like his literature and they began to threaten him nay times by phone and mobile" He states that the applicant could not stay in Nepal and went to Australia as a student. He also states that when he returned to Nepal he was threated from "same group of opinion" He states that it was very difficult for him to stay in Nepal and he returned to Australia. He states that there is "great agitation each and every day by different group of opinion" and that the main target of agitators and agitation are editors and writers in such a critical position as the applicant.
 - Translations of some poems by the applicant, titled [titles deleted: s.431(2)].

- Article from the *Himalayan Times*, dated 21 May 2012 discussing activists of the Nepal Federation of Indigenous Nationalities selectively targeting media persons and media house to enforce their strike. It also refers to their threats to “finish off” journalists.

Tribunal hearing

32. The applicant appeared before the Tribunal [in] May 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 relevant evidence is summarised below.
33. The Tribunal explained the Refugees Convention and the Complementary Protection provisions to the applicant. The applicant confirmed that he is a citizen of Nepal and that he arrived in Australia on a student visa in July 2009. The applicant commenced a Diploma [course]. He studied for 2 to 3 months but did not want to study anymore because the subjects were very similar to those that he had undertaken in Nepal. The applicant re-enrolled again in 2010 and studied for about a month, but he did not have any money and had to stop studying. The applicant has not completed any studies whilst he has been in Australia. The Tribunal queried what the applicant’s plans were given that he had stopped studying. The applicant stated that he had published a book and there were telephone calls. The applicant’s father answered the telephone and told him that he should go far away. The applicant returned to Nepal but had to come back to Australia.
34. The Tribunal queried when the applicant published his book. The applicant stated that it was in February/March 2009. It was published by [Publisher 2]. The Tribunal stated that it could find no record of either [Publisher 2] or [Publisher 1]. When asked how much the book cost, the applicant stated that it cost 50 rupees which is equivalent to about 55 cents. When asked how many books were sold, the applicant stated that [number deleted: s.431(2)] copies were printed but he does not know the exact number of books sold.
35. The Tribunal queried what happened after the book was published. The applicant stated that about 2 to 3 days later his father received a telephone call threatening the applicant. When asked again when his father received the threatening telephone call, the applicant stated that it was 1 or 2 weeks after the publication of the book. The Tribunal commented that the applicant had previously said that it was 2 to 3 days later. The applicant stated that it was probably about a week after the book was published. When asked what the person said to his father, the applicant stated that the person said that people can be killed and dead bodies can be discovered. The person accused the applicant of trying to change Nepal and what is customary in Nepal.
36. The Tribunal queried whether there were any more telephone calls after that time before he left for Australia. The applicant stated that he does not know whether there were any other telephone calls after that time. The applicant does not know because he was keeping busy with preparing for coming to Australia and studying for his IELTS test. It also took him 2 to 3 weeks to prepare his passport application. When asked why his father would not have told him about any threats, the applicant stated that his father would not have wanted to worry him or make in too stressed. When asked whether anyone harmed him, the applicant stated that they did not but there was immense pressure on him from his family and he began to regret being a writer.

37. The Tribunal queried whether the applicant went anywhere else such as away from Kathmandu or to India. The applicant stated that he did not and there was pressure from his father to leave for Australia. When asked again whether he is aware of any other telephone calls before he came to Australia, the applicant stated that as far as he knows there was only one telephone call. The Tribunal advised the applicant that his statement indicates that there was more than 1 call. The applicant stated that he mentioned only one call but there may have been more. His father has told him that there were more telephone calls, but he did not want him to know about them.
38. The Tribunal advised the applicant that it has read the translated poems and it has considerable difficulty seeing that there is anything political or critical of the government or any particular people or parties in his poems. The Tribunal commented that they appear to be very gentle poems and it is difficult to see how they could have caused anyone to threaten him. The applicant stated that the contents give out messages as to whether someone can be pro-monarchy and whether there is freedom of the press. The applicant also stated that he has a few more poems that are being translated and he would submit those. The Tribunal advised the applicant that he has made an application for protection based on the alleged political content of his poems and it is of concern that he has not provided those poems. The Tribunal asked the applicant if he could explain how the poems that he has provided to the Tribunal are political and asked if he could identify the parts that are political. The applicant referred to the poem “[title deleted: s.431(2)]” and stated that it has some negative points. The Tribunal commented that there is a mention in the poem of “strikes” in Nepal but it is well known that there are frequent strikes in Nepal. The Tribunal again commented that it has considerable difficulty seeing how any of his poems have any political content. The applicant stated that these are his views and he has also talked about indigenous people. When the Tribunal again advised the applicant that it has difficulty understanding why anyone would consider that his poems were political or critical, the applicant stated that it is not only political views which can cause problems but even a simple change in society can cause problems.
39. The Tribunal advised the applicant that the independent evidence that it has referred to does not indicate that people are unable to express criticism of the political situation or to express their views and there is no evidence that poets or writers are attacked or threatened for doing so. The Tribunal also advised the applicant that although journalists have been attacked and threatened for criticising the government and the Maoists there is no evidence that persons such as himself are unable to do so or have had difficulties. The applicant stated that there is an example in the *[publication deleted; S.431(2)]* article he has provided and he can also provide other articles. The Tribunal queried why the applicant would not have considered it important to have provided such articles previously. The applicant stated that he would have to get it from the archives and for some reason although his family sent him some documents they did not send him everything.
40. The Tribunal queried why the applicant returned to Nepal for a visit if he was fearful for his safety. The applicant stated that he had no one in Australia and he had written a book and wanted to have it published. He had a one way ticket and was not planning on returning to Australia. When asked if anything happened whilst he was in Nepal for a visit, the applicant stated that nothing happened. It was his intention to print his book but his father put pressure on him not to have the book published and he returned to Australia. He did not stay in Nepal for more than 10 to 12 days. The Tribunal asked the applicant whether he feared harm in Nepal when he returned to Australia. The applicant stated that he had written things

in the past. When asked again whether he returned to Australia because he feared harm, the applicant stated that it was quite natural to have that fear but it was his passion to write and he would prefer to live in Nepal.

41. The Tribunal queried why the applicant delayed lodging the application for 2 years if he was fearful of not being able to continue to write in Nepal. The applicant stated that he did not know anything about it and he was on a valid visa so it was only when it was about to expire that he explored other ways of staying in Australia. The Tribunal advised the applicant that he was in Australia on a temporary visa which was granted for him to study and he was not doing so and it is difficult to accept that he would have delayed lodging the application for so long if he feared harm in Nepal. The applicant stated that his intentions were not to stay in Australia but he cannot return because of the turmoil in Nepal.
42. The Tribunal queried how many telephone calls his father received. The applicant stated that whilst he was in Nepal he knows of the one, but his father has said that they kept coming and he does not know the exact number. The applicant would have to ask his father to find out.
43. The Tribunal asked the applicant what newspapers his poems were published in. The applicant stated that they were in [Publication 3]. The applicant provided the Tribunal with 2 newspaper reports and stated that they mention that his poems have been published. When asked whether he has the originals of the newspaper reports, the applicant stated that he would have to retrieve them from the archives. When asked why he would not have considered it important to provide those documents, the applicant stated that his family sent them and he is not sure why they did not send the originals. The applicant asked if the interpreter could translate the newspaper reports. The Tribunal agreed and the interpreter indicated that the newspapers refer to the applicant's articles and that they discuss the collection of poems which have been popular. They state that since school times, the applicant has been writing about people and life and he is a progressive writer who has expressed his feelings.
44. The Tribunal advised the applicant that it has difficulty accepting that he would have any problems if he returned to Nepal. The Tribunal also stated that he does not appear to have a fear of returning to Nepal. The applicant stated that it is true the first time he came to Australia that he was a youth and some youths are not driven by fear. For example, they will ride motorcycles at high speed. If the applicant returns he could be the victim of conflict of ethnicity and fighting. When asked again whether he fears returning to Nepal, the applicant stated that he does. When asked why he has that fear, the applicant stated that he wanted to stay with his family in Nepal, but the situation was not favourable and he wants to be able to write and make himself known in Nepal. He wants to publish his books and express strong feelings and wants his generation to know about his poems and he would not be able to fulfil his dreams if he returns to Nepal because he cannot stop writing.
45. The Tribunal discussed with the applicant the documents which he wished to provide. The Tribunal agreed that it would wait until [June] 2012 for the applicant to provide any further documents.

Post hearing documentation

46. Following the Tribunal hearing, the applicant provided the following additional documentation to the Tribunal:

- Poem titled '[title deleted: s.431(2)]', by the applicant, published in [Publication 4], [page number deleted: s.431(2)]. The poem refers to the [civil war].
- Poem titled '[title deleted: s.431(2)]', by the applicant, published in [Publication 3], [April] 2009. The poem refers to [destiny].
- Poems titled [titles deleted: s.431(2)], published in '[Title A]'.

Independent evidence

Current political situation in Nepal

47. In January 2012, Human Rights Watch described Nepal's political and peace processes as "stalled", and the country marred by "instability" and "weak governance". Furthermore, "[t]he government has made little progress in realizing economic, social, and cultural rights, and reports of lawlessness persist in many parts of the country, especially in the Terai and eastern hills. Armed groups and ethnic organizations have been involved in killings and extortion with impunity".¹
48. Prolonged political instability in the capital and ongoing tensions in the Terai are primarily due to the repeated failure of the Constituent Assembly (CA) to draft a constitution. In late May 2012, the CA missed its fourth deadline since 2008 to reach an agreement on a new constitution.² *IRIN News* reports that the main sticking remains the issue of the model of federalism to be adopted; "[o]n 15 May, the CA leaders made a hurried decision to restructure the former Hindu monarchy into 11 federal states, based on 'multi-ethnic federalism', meaning all ethnic groups, not just one ethnic group, would live in a single undivided state... This rather than 'identity and capacity based federalism', in which a single ethnic group and its ability to be self-sustaining, along with geographical and economic considerations, would be the model used... Unable to reach an agreement, the CA requested another three-month extension, but this was rejected by the Supreme Court on 24 May, which directed the government to promulgate a new constitution by the 27 May deadline".³
49. After four years and four term extensions, the CA was finally dissolved in May 2012. An editorial in *Republica* argues that the full consequences of this failure are yet to be understood; "[t]he fallout of the failure of the CA to carry out its responsibility will be clear in the days and weeks ahead. But a few things can be said for certain: the immediate post-CA climate is likely to be extremely fractious. Given the failure of the political actors across the board, it will also provide plenty of space for regressive forces".⁴ Controversially, the parliamentary Communist Party Nepal –Maoist (CPN-M) has formed a caretaker government and new elections are slated for November 2012.⁵

¹ Human Rights Watch 2012, *Annual Report – Nepal*, January

² 'Nepal: Political impasse deepens economic uncertainty' 2012, *IRIN News*, UNHCR Refworld, 30 May <<http://www.unhcr.org/refworld/docid/4fc8ab2b2.html>> Accessed 13 June 2012

³ 'NEPAL: Divided over federalism' 2012, *IRIN News*, 25 May <<http://www.irinnews.org/Report/95526/NEPAL-Divided-over-federalism>> Accessed 13 June 2012

⁴ CA's demise 2012, *Republica*, 28 May <http://myrepublica.com/portal/index.php?action=news_details&news_id=35603> Accessed 13 June 2012

⁵ 'PM tries to woo foreign envoys' 2012, *The Himalayan Times*, source: *Himalayan News Service*, 11 June <<http://thehimalayantimes.com/fullNews.php?headline=PM+tries+to+woo+foreign+envoys+&NewsID=335716>> Accessed 12 June 2012; 'NC leader says caretaker govt has no moral right to bring new budget' 2012, *Nepal*

50. The International Crisis Group made the observation in late 2010 that despite the repeated failures of Nepal's political classes to reach political consensus of key issues, "Nepal is not in chaos":
51. Its transitions may be messy but they are not anarchic – and most likely never will be. There is structure beneath the surface of apparently random events. A sophisticated political culture shapes party behaviour. It defines the parameters for revolt, even when rebels appear to present an existential threat to the status quo. There are rules of the game that must be acknowledged and honoured, as much in the breach as the observance. Even revolution proceeds in accordance with preordained rites.⁶
52. On another positive note, in April 2012 the Maoists reached an agreement with the Nepalese Army to incorporate members of the People's Liberation Army (PLA) into the army's ranks.⁷ This is likely to further reduce the chances of a resumption of full-scale armed conflict. Political violence is more likely to be perpetrated by the various youth militias of Nepal's major political parties, most notably the Maoist's Young Communist League (YCL), the Marxist-Leninist's Youth Force, and Congress's Tarun Dal. One of the 'functions' of these youth groups has been described as "paramilitary".⁸ Some youth militia members have been implicated in politically motivated murders.⁹
53. Despite an end to the civil war, the writ of the state remains absent in parts of the country, most notably in the Terai. A number of armed Madhesi separatist groups have formed in the Terai, including: Janatantrik Terai Mukti Morcha (JTMM); the Madhesi Mukti Tigers (MMT); Samyukta Janatantrik Tarai Mukti Morcha (SJTMM); Liberation Tigers of Terai Elam; the Terai Cobras; the Madhesi Virus Killers; the Terai Army; and the National Defence Army.¹⁰ In addition, the Institute for Minority Rights (IMR) reports that there are "over one hundred criminal groups" active in the Eastern and Southern Terai. The IMR

News, 11 June <<http://www.nepalnews.com/home/index.php/news/1/19408-nc-leader-says-caretaker-govt-has-no-moral-right-to-bring-new-budget.html>> Accessed 13 June 2012 ; 'BMF urges President Yadav to seek ways to remove PM Bhattarai' 2012, *Nepal News*, 2 June

<<http://www.nepalnews.com/home/index.php/news/2/19214-bmf-urges-president-yadav-to-see-ways-to-remove-pm-bhattarai.html>> Accessed 13 June 2012

⁶ International Crisis Group 2010, *Nepal's Political Rites of Passage*, Asia Report N°194, 29 September, p.1

⁷ 'A journey that began in Delhi reaches its conclusion' 2012, *The Hindu*, 16 April

<<http://www.thehindu.com/opinion/interview/article3318077.ece?homepage=true>> Accessed 13 June 2012

⁸ The Carter Center 2011, *Clashes Between Political Party Youth Wings Have Decreased But YCL And UML Youth Force Continue To Seek Financial Gain*, 28 February, p.1, pp.3-4

<http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/nepal-political-party-youth-wings-022811-en.pdf> Accessed 17 March 2011

⁹ International Crisis Group 2010, *Nepal's Political Rites of Passage*, Asia Report N°194, 29 September, p.2;

'Tarun Dal involves murdering Youth Force cadre' 2011, *Nepal Everest News*, 29 August

<<http://www.nepaleverestnews.com/en/?p=2453>> Accessed 2 September 2011; 'PM vows action against killers' 2010, *Himalayan News Service*, 10 July

<<http://www.thehimalayantimes.com/rssReference.php?headline=PM+vows+action+against+killers&NewsID=249340>> Accessed 12 July 2010

¹⁰ International Crisis Group 2007, *Nepal's Troubled Tarai Region*, Asia Report N°136, 9 July, p.i; 'NEPAL: Small arms fill power vacuum' 2008, *IRIN News*, 14 May

<<http://www.irinnews.org/Report.aspx?ReportId=78188>> Accessed 19 July 2010; US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – Nepal*, 8 April, Introduction

describes these groups as an “increasingly unpredictable catalyst for extreme violence and criminality, with kidnapping for ransom becoming like a cottage industry”.¹¹

Freedom of the press and speech

54. The United States Department of State report for 2011 (May 2012) states the following in relation to freedom of speech and the press in Nepal:

The law provides for freedom of speech and press, and the government generally respected these rights in practice. However, in some cases the government failed to effectively enforce the law.

Freedom of Speech: Generally citizens felt they could voice their opinions freely. However, the government limited freedom of expression for the Tibetan community. For example, 30 Regional Tibetan Youth Club members gathered at a community hall in the Boudhanath neighborhood of Kathmandu for a 24-hour hunger strike on April 18-19 to protest against the Kirti monastery crackdown in eastern Tibet. Police ordered individuals, including women, wearing “free Tibet” T-shirts to remove them (including taking off one in public) and put on shirts without political slogans, but they were permitted to continue the protest and hunger strike.

Freedom of Press: The independent media were active and expressed a wide variety of views without restriction. However, impunity for past attacks on members of the press may lead to self-censorship, according to the Federation for Nepali Journalists (FNJ), an organization that promotes journalists’ rights. Radio remained the primary source of information for 90 percent of the population.

Violence and Harassment: There were several instances of police interfering with the press covering political stories. For example, on June 19, the Home Ministry instructed security personnel to prevent journalists from entering Singha Durbar, the central administrative office of the government in Kathmandu, during a politically sensitive meeting. After intense pressure from the media, journalists were allowed to enter Singha Durbar late the following day.

On June 5, *Nagarik* reporter Khilanath Dhakal was attacked in Biratnagar after writing a story about Youth Action Nepal (YAN), the youth wing of the Communist Party of Nepal–Unified Marxist Leninist political party. YAN leaders allegedly masterminded the attack, which left Dhakal seriously injured. YAN central leader Mahesh Basnet openly challenged the police to arrest YAN regional leader Parshu Ram Basnet, who was widely assumed to have ordered the attack; Mahesh Basnet also threatened to shut down *Nagarik* and throw its editor in chief in jail for writing negative stories about YAN. The incident and Mahesh Basnet’s subsequent statements received extensive media coverage. At year’s end Parshu Ram Basnet was charged but had not been arrested and remained at large.

Criminal gangs and armed groups affiliated with political parties deliberately targeted journalists throughout the country. According to the FNJ, there were 24 threats and 23 attacks targeting journalists, resulting in one death during the year. Reporters in remote areas outside Kathmandu, in particular, were susceptible to threats and

¹¹ Institute for Minority Rights 2010, *Human Rights and Political Transition in Nepal*, EURAC website <<http://www.eurac.edu/en/research/institutes/imr/Documents/07%20Human%20Rights%20Nepal.pdf>> Accessed 19 July 2010

violence in response to stories they wrote. Rarely were the persons accused in these cases brought to trial. According to the FNJ, the government did not take sufficient measures to preserve the safety and independence of the media, and individuals who attacked or killed journalists were rarely prosecuted.

Censorship or Content Restrictions: The interim constitution protects media licenses from revocation based on the content of what is printed or broadcast. Although government-owned stations have legal cover to operate independently from direct government control, indirect political influence sometimes led to self-censorship. In July Nepal TV deleted a question about the Maoists from an interview with a foreign diplomat conducted by an independent production company. According to Nepal TV, an employee felt the question would be insulting to the Maoist leadership. After questions were raised about the incident, the interview was rebroadcast in its entirety.

The Maoists also influenced media outlets through their powerful trade unions. In the Tarai and the eastern hills, armed groups coerced journalists, resulting in self-censorship and fear for personal safety. Armed groups and political parties burned copies of newspapers they found objectionable.

Internet Freedom

There were no reports that the government monitored e-mail or Internet chat rooms, and individuals and groups could engage in the expression of views via the Internet, including by e-mail. In contrast with 2010, there were no reports of government restrictions on access to the Internet. The Home Ministry's efforts in 2010 to block Internet sites considered obscene were met with mixed reactions from the public and raised concerns about freedom of expression among some members of the press and free speech advocates, as some non obscene content was reportedly blocked as well. However, the government reversed its decision and did not impose similar restrictions on Internet freedom in 2011.

FINDINGS AND REASONS

55. The applicant has provided a passport from Nepal. In the absence of any evidence to the contrary, the Tribunal accepts that the applicant is a national of Nepal and has assessed the applicant's claims against Nepal as his country of nationality.
56. The applicant claims that he published a book of poems, titled '[Title A]' at the beginning of 2009. The applicant claims that soon after the books were published, his father received a telephone call threatening the applicant because of the nature of the political nature of the poems and their criticism of aspects of Nepalese society. The applicant claims that his father arranged for him to leave for Australia on a student visa. The applicant claims that he returned to Nepal in 2010 to publish his latest book of poems but it was only for a short visit because his father pressured him to return to Australia and told him that he could not have his poems published. The applicant claims that his father has received further threatening telephone calls in his absence and may have also received other telephone calls prior to the applicant's departure from Nepal, but he did not tell the applicant about these calls. The applicant has claimed that he fears returning to Nepal because he will be unable to continue writing and expressing his views.
57. The Tribunal accepts that the applicant has had a book of poems published. The Tribunal does not accept that there was widespread reporting of the publication of his poems, but accepts on the basis of the newspaper reports that he provided at the hearing that the

publication of his book of poems was reported in [Publication 3] in Nepal. The Tribunal does not accept that the applicant's father was threatened or that he genuinely fears harm upon his return to Nepal. The Tribunal's consideration of the evidence and its reasons for reaching these conclusions follows.

58. The Tribunal firstly considers that the applicant's claims that the publication of his poems resulted in telephone threats to his father to be not credible. The applicant has claimed that it was due to the political content and critical nature of his poems that he was threatened. Whilst the Tribunal accepts that poetry can be subject to differing interpretations, as discussed at length with the applicant during the hearing, the poems that the applicant has had translated and provided to the Tribunal do not appear to be critical of the government, any political groups or individuals, or to be overtly or covertly political in any way. Nor is the Tribunal satisfied that there is any evidence that they specifically accuse any politicians or the government of taking bribes. Although the applicant was given an opportunity during the hearing to explain how his poems were critical or political in nature, the applicant was only able to point to one poem which referred to strikes in Nepal, eventually stating that it is not just political views which can cause problems and it is also a simple change in society that can result in problems.
59. The Tribunal is not satisfied that the applicant was able to satisfactorily explain during the hearing how his poems are either overtly or covertly critical of the government, any political parties or particular people, such that they would have resulted in threats regarding his safety to his father. The applicant was also given further opportunity after the hearing to provide further translated poems to support his claims that they were critical of the government and different groups such that they resulted in threats. Whilst the Tribunal accepts that there is some mention in the poem, '[title deleted: s.431(2)]' to ammunition, weapons and security sirens, the Tribunal does not accept, even allowing for differing interpretations of his poetry, that there is any mention of any political party, individual or anything which could be perceived as criticism of the government or that his poems indicate that he is advocating for change. The Tribunal does not accept, therefore, despite being given an opportunity during the hearing and following the hearing, that the applicant has satisfactorily explained why or how his poems could be perceived as critical of the government, political parties or individuals, or how they advocated for change such that they resulted in threats to him. The Tribunal considers that the applicant's evidence in relation to this issue raises serious doubts as to the credibility of his claims to have received threats in Nepal.
60. In addition, the Tribunal is not satisfied that the independent evidence establishes that people in Nepal are unable to express their views or that there are limitations imposed on writers and poets and the content of the material that they produce. Although the Tribunal accepts that the independent evidence and a report provided by the applicant indicates that journalists have been harmed and threatened in the past for reporting and criticising the Maoists and associated parties, the Tribunal is not satisfied that there is any evidence that poets or writers have been harmed or threatened for doing so. In any event, the Tribunal is not satisfied that the applicant's poems express any views against the Maoists or other political parties, or that they accuse the government or politicians of taking bribes such that they would have resulted in the applicant being viewed with an adverse political opinion from the Maoists or any other political parties. The Tribunal does not, therefore, accept that the independent evidence supports the applicant's claims to have been harmed for writing poetry which has, at best, very limited political content. The Tribunal considers that this raises

further doubts in relation to the applicant's claims to have been the subject of threats in the past in Nepal.

61. The Tribunal also considers that the applicant's evidence during the hearing as to the threats was vague and unpersuasive. When asked at the Tribunal hearing about the telephone calls, the applicant initially stated that there was only 1 telephone call, but then stated after the Tribunal advised him that his statement indicates that there was more than one call that he did not know because his father did not want to worry him, but he believes there was more than 1 call. Similarly, when asked at the Tribunal hearing when the telephone threats began, the applicant stated that it was 2 to 3 days after the poems were published, but then stated that it may have been 1 to 2 weeks after the poems were published that his father received the first telephone calls. The applicant also indicated that although there have since been more threats he does not know how many and when they have occurred. The applicant has claimed protection in Australia on the basis of threats that he received in Nepal. The Tribunal does not accept that it is credible that the applicant would not be able to provide consistent and detailed evidence as to the nature and extent of those threats if they had genuinely occurred. The Tribunal considers that the applicant's evidence during the hearing as to threats raises further doubts as to the credibility of the applicant's claims that he was threatened.
62. The Tribunal further considers that the considerable delay in the lodgement of the application raises further doubts as to the credibility of the applicant's claims. The applicant claimed that he was on a valid visa and he did not know about protection visas and for that reason delayed lodging his application for protection until some 2 years after his arrival in Australia. As discussed with the applicant during the hearing, he was in Australia as the holder of a temporary student visa granted to enable him to study in Australia. The applicant's evidence was that he did so for only a short period of time and did not continue his studies. In such circumstances, the Tribunal does not accept that he would have been unaware that his immigration status in Australia was precarious and that he would not have lodged an application for protection at the earliest possible opportunity had he genuinely feared returning to Nepal. The Tribunal is, therefore, not satisfied that the applicant would have not made inquiries regarding remaining permanently in Australia considerably earlier than he did if he genuinely feared harm in Nepal.
63. The Tribunal also considers that the applicant's return to Nepal in 2010 does not establish that he had a genuine fear of harm in Nepal. The applicant claimed that he had intended to return permanently to Nepal at that time but that he returned to Australia because his father told him that he should not stay in Nepal and he could not have his poems published. The Tribunal does not accept that the applicant would willingly return to Nepal in 2010 if he had been threatened and left Nepal for that reason. The Tribunal does not accept that the applicant's return to Nepal indicates that he genuinely fears harm in Nepal. The Tribunal is also not satisfied that the applicant's own evidence indicates that he genuinely fears harm in Nepal and considers that he was somewhat evasive when this issue was discussed during the hearing. When asked a few times about his fear in Nepal, the applicant stated that he is young and perhaps his situation is akin to a young person speeding on a motorcycle who does not have a fear, but later asserted when asked again by the Tribunal that he genuinely has a fear of returning to Nepal. The Tribunal does not accept that the applicant's own evidence establishes that he genuinely fears harm in Nepal. The Tribunal considers that the applicant's evidence during the hearing as to whether he has any fear in Nepal, combined with the delay and the applicant's return to Nepal in 2010, does not indicate that he has a genuine fear of serious harm in Nepal.

64. The Tribunal has found that there are serious doubts in relation to the applicant's claims regarding the content of his poems and his evidence as to the threats resulting from those poems and has also found that the applicant's evidence as to the threats was vague and unpersuasive. The Tribunal has also found that the applicant's own evidence as to whether he has any fear, the delay in the lodgement of the application and his return to Nepal in 2010 is not consistent with a genuine fear of harm in Nepal. The Tribunal is, therefore, not satisfied that the applicant's father has received threats made against the applicant as a result of the publication of his poems. The Tribunal is not, therefore, satisfied that the applicant's evidence is truthful and considers it evident that he has manufactured his claims in an attempt to provide a basis for refugee status in Australia. Whilst the Tribunal has accepted that the applicant has had poems published and also accepts that he wishes to continue writing poems as he has done in the past and is keen to have those poems published upon his return to Nepal. The Tribunal does not accept that the applicant will be unable to do so and is not satisfied that there is a real chance that he will suffer harm as a result of any poetry he wishes to have published in the future.
65. In reaching the above conclusions, the Tribunal has had regard to the letter from [Publisher 1]. As discussed with the applicant at the hearing, the Tribunal could find no mention that organisation when it searched on the Internet during the hearing. Although the Tribunal is prepared to accept that it exists, the Tribunal has found above that the applicant has not been harmed in Nepal and is not satisfied that his poems were such that they resulted in him being threatened. The Tribunal also notes that the letter does not support the applicant's own claims regarding his reasons for returning to Australia. Thus, although the letter states that he was threatened again when he returned to Nepal, the applicant's own evidence during the hearing was that he returned to Nepal because his father told him that he could not publish his books and there were no threats whilst he was there. The Tribunal is not satisfied that the letter contains truthful information and is not satisfied that it overcomes the problematic nature of the applicant's own evidence. The Tribunal is not, therefore, satisfied that it establishes that the applicant has been threatened or that there is a real chance that he will be threatened if he returns to Nepal.
66. The Tribunal has also considered the applicant's general claims about the economic and political situation in Nepal and his claims that he may be the victim of ethnic conflict and fighting. The Tribunal accepts that the political situation remains unstable and accepts his evidence as to economic problems, including electricity and power shortages and that there is ethnic conflict, particularly in the Terai and eastern hills.¹² However, the applicant is from Kathmandu, where he has always resided. The Tribunal does not accept that there is any evidence that the applicant has any political profile such that he will be specifically targeted or that he will be unable to survive financially in Nepal or that the generalised political and economic situation and ethnic conflicts in some parts of Nepal will result in a real chance that the applicant will suffer serious harm upon his return to Nepal for a Convention reason.
67. The Tribunal is not, therefore, satisfied that there is a real chance that the applicant will suffer serious harm for reasons of his political or imputed political opinion or any other Convention reason if he returns to Nepal now or in the reasonably foreseeable future. Accordingly, the Tribunal finds that the applicant does not have a well founded fear of persecution in Nepal.

¹² See independent evidence above.

CONCLUSIONS

68. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
69. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant has suffered harm in the past and is not satisfied that he will do so in the future. Although the Tribunal has accepted that there are generalised economic and political problems in Nepal and ethnic conflicts in the Terai and some other areas, the Tribunal has found that the applicant has resided in Nepal and has not had any difficulties in the past for these reasons. The Tribunal is, therefore, not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal (the receiving country), there is a real risk that he will suffer significant harm, including arbitrary deprivation of life; the death penalty; torture; cruel or inhuman treatment or punishment; or degrading treatment or punishment. The Tribunal is not, therefore, satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(aa).
70. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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