



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL

IAA reference: IAA18/04684

Date and time of decision: 13 June 2018 08:57:00

M Anderton, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Nepali citizen who feared harm from the Youth Communist League (YCL). On 24 October 2016 he lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790.
2. On 8 August 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate was not satisfied that he had a profile that would indicate he would face a real chance of serious harm or a real risk of significant harm in Nepal.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - The applicant is Nepali citizen of Hindu faith and belongs to [a particular] ethnic group. He was born in [District 1], Western Nepal and moved to Kathmandu in 2002/3 where he completed year [level]. He was in a defacto relationship, which ended in 2013 and has a son [who] lives with the applicant's parents in Kathmandu. The applicant's siblings also live in Kathmandu.
 - The applicant fears he will be attacked by the Youth Communist League (YCL).
 - His family are kingship and did not like the Maoists. The Maoists used to beat his father and brother and hit his mother, so they left the village and went to Kathmandu in 2005.
 - The dispute was 4 or 5 years ago and after it ended he received a beating, where they tied his neck. They did not attack his family but said if they did not donate money they would kill them.
 - They threatened him every 2 or 3 days and seven months ago the YCL beat him. In October or November 2012 he was beaten in [a particular] area of Kathmandu in the evening. Six people stopped him and started shouting, screaming and kicked him off his bike and beat him. Other people arrived to stop the fight. The applicant left his bike and went home. He was injured but not seriously. He told his mother but was too afraid to lodge a police complaint as YCL and Maoists are all over Nepal.
 - Every now and then they would ask for money, so he kept moving from hotels and his mother told him to leave the country.

Refugee assessment

6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-

founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

8. I accept the applicant is a Nepal citizen who speaks Nepali, Hindi and some English and has completed year [level] education. I accept he is of [a particular] ethnicity. The applicant made no claims of harm based on his religion or ethnicity and I am not satisfied that he faces any harm in that respect in the future.

Early harm and Move to Kathmandu

9. The applicant claimed his family moved from [District 1] to Kathmandu to avoid harm from the Maoists in 2005. He claimed the family were kingship (or supporters of the King). He claimed his father and brother were beaten and his mother hit. However, he did not elaborate on when this occurred or the circumstances. Further, the applicant moved to Kathmandu in 2002/3 to complete his schooling. It was also evident from the protection interview that the applicant’s parents still had a farm (not in Kathmandu), and they lived off the sale of its harvests, while living in Kathmandu. I do not accept the family moved to Kathmandu to avoid harm. Further, it was evident the applicant had previously moved to Kathmandu for his schooling. I consider the family moved to Kathmandu for improved lifestyle and education for the children. I do not accept the applicant’s family were harmed or that they moved to Kathmandu to avoid harm.

10. While his family may have been in favour of the monarchy in 2005 and did not like the Maoists, monarchical rule was abolished in 2008 and Nepal became a republic. While the Maoists formed government, it was short lived, resigning in May 2009. In any event, I consider the political and security situation in Nepal has significantly improved compared to 2005 as there have been elections, a new coalition Government and constitution in 2015. Further, the applicant confirmed that his family were not involved in any political protests or activities. While not claimed, I am not satisfied that the applicant or his family are involved in politics or that the applicant faces a real chance of any harm in the future in that regard.

YCL dispute

11. In his arrival interview, the applicant claimed he left Nepal due to a dispute with YCL 4 or 5 years ago and a similar situation which occurred in late 2012. I note, despite being asked about the dispute a number of times, the applicant did not specify what the dispute or incident was in his arrival interview or in his SHEV application. I consider it is difficult to believe that he would not have been more specific or explained the alleged incident or dispute if it had in fact occurred.
12. It was not until his protection interview that the applicant elaborated and claimed he was on his bike when he was hit by a YCL car in 2009 and they argued and fought. Passers-by broke up the fight and told him not to argue as they were YCL. His leg was sprained but was not serious and he went home. The applicant confirmed that the 2009 incident may have been an accident, or could have been done knowingly, but he was uncertain. He claimed the same people recognised him in November 2012 and beat him, put a rope around his neck and asked for money for the car accident, but he managed to escape.
13. I consider the applicant's account was vague and lacked details and was not spontaneous or free flowing. The delegate asked the applicant to describe and explain the incidents, but each time the applicant's responses were short and lacked detail or any elaboration. For instance, he did not explain how he managed to escape from 3 or 4 men or how he escaped with a rope around his neck. He just said he escaped. He did not describe the men or the car or the extent of any damage to the car or bike, if any. He did not recall where he was travelling to or from. His account was also not consistent. For instance, initially he claimed he was on the side road, but later in the protection interview he said he was on the main road. Further, in his arrival interview he claimed he was asked for money a number of times but in his protection interview he stated YCL asked for money only in the November 2012 incident.
14. I also consider the applicant's account that men recognised him 3 years later lacks credibility. Further, the applicant claimed his mother continued to see them in the area, but his mother had not been at either of the incidents so could not have identified the same men.
15. Further, I do not accept that he moved around to hotels and did not stay at home as he confirmed at his arrival interview that he had been living at the same address prior to his departure for 7 or 8 years. He confirmed the same address in his application also for the same period.
16. The delegate noted the applicant had applied for a visa to [Country 1] in 2008. The applicant initially denied this and when evidence was put to him he acknowledged he went to [Country 1] embassy with his family but his mother did not tell him she had applied for a visa. The delegate noted credibility concerns and that this occurred well before his claims of harm from YCL. However, I do not consider anything turns on the applicant's family application for a [Country 1] visa in 2008.
17. I consider the applicant has developed his account during the application process and was not recounting true events. I consider if he had been involved in a car accident as claimed that he would have mentioned that, particularly given that the interviewer (at the arrival interview) asked him a number of times to elaborate on the claimed dispute incident. Further, he did not mention the car accident in his SHEV application.
18. Further, having listened to the protection interview I consider the applicant's account was not spontaneous or free flowing, was vague and lacked details, such that I do not consider he

was recounting a true event. Further, as discussed above, I consider his account lacked credibility.

19. I do not accept that the applicant may have been involved in a car and bike accident with the YCL. I do not accept that YCL beat him, tied a rope around his neck or demanded money from him or were looking for him. I do not accept he was targeted by YCL or anyone. I consider the applicant has fabricated his claims in their entirety.
20. Country information in the referred material indicates that YCL influence greatly diminished in 2012. Since then there have been elections and a new Constitution. DFAT assessed while there was violence in the aftermath of the new Constitution, the overall risk is low. Further, and in any event, the applicant confirmed he was not involved in any politics and he did not claim that this might change.
21. I do not accept the applicant faces a real chance of any harm in the future from YCL, Maoists or anyone.
22. The applicant departed Nepal legally. While not claimed, on the evidence I am not satisfied that the applicant faces any harm as a returnee to Nepal. Country information indicates that there is significant movement in and out of Nepal and DFAT assesses returnees are unlikely to suffer any social stigma upon return to Nepal or suffer adverse treatment by the Government. I am not satisfied there is a real chance the applicant would be harmed by authorities or anyone because he applied for asylum or is returned on a temporary travel document.
23. Having considered the country information and the applicant's circumstances, I do not accept that the applicant faces a real chance of any harm on the basis of his race, ethnicity, political opinion, religion or particular social group.

Refugee: conclusion

24. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

25. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

26. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or

- the person will be subjected to degrading treatment or punishment.
27. I have considered the applicant's circumstances whether he faces a real risk of significant harm upon return to Nepal.
28. As discussed above, I have not accepted the applicant's claims extortion or harm from Maoists or the YCL. I have not accepted he faces a real chance of any harm on the bases claimed. For the same reason and applying the authority *in MIAC v SZQRB* [2013]FCAFC33, I am not satisfied the applicant will face a real risk of harm of if removed to Sri Lanka.

Complementary protection: conclusion

29. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicant a protection visa.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of 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 non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.