

REFUGEE STATUS APPEALS
AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76254

AT AUCKLAND

<u>Before:</u>	A R Mackey (Chairperson) J Baddeley (Member)
<u>Counsel for the Appellant:</u>	P Moses
<u>Appearing for the Department of Labour:</u>	No Appearance
<u>Date of Hearing:</u>	13 & 14 August 2008
<u>Date of Decision:</u>	16 September 2008

DECISION DELIVERED BY J BADDELEY

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Myanmar.

INTRODUCTION

[2] The appellant arrived in New Zealand on 3 March 2008. He made an application for refugee status on 10 March 2008. He was interviewed by the refugee status officer on 4 April 2008 and 15 April 2008. His application was declined in a decision issued on 26 June 2008. There followed an appeal to this Authority.

THE APPELLANT'S CASE

[3] The appellant is a 44 year old married man, an ethnic Rohingya who was born in Sittwe, Rakhine State, Myanmar. He is the eldest of three boys and has

one older and one younger sister. The appellant's father was a trader. He traded within Myanmar from Rakhine State into the Irrawaddy and Yangon. His father was forced to give up trading about 10 years ago when the government prevented Rohingya travelling outside their immediate residential area.

[4] In 1983, the appellant married his first wife. They had two children and were divorced in 1986. The appellant, after leaving school, worked part-time in a shop in Sittwe until 1985 when he left Sittwe for Yangon to obtain secure and more remunerative employment. He had learnt that the government planned to impose strict travel restrictions on Rohingya to prevent them moving within Rakhine State or outside Rakhine State to other areas in Myanmar. He moved to Yangon before these restrictions were imposed. Thereafter he has been unable to return to Sittwe even to attend his mother's funeral in 1987. As a Rohingya he was unable to travel overnight outside the ward in which he lived and could not travel outside Yangon to another city or overseas.

[5] The appellant married his second wife in 1987. There are four children of that marriage. In Yangon the appellant worked in a shop owned by a Myanmar. He and his wife lived with the appellant's uncles in a rental property until 1993 when their second child was born and they moved to their own rented apartment. The appellant attempted unsuccessfully to set up his own business but Rohingya were not granted business licences. As a Rohingya he was unable to legally register his marriage. He could not legally register his children's births and his children were forbidden tertiary education.

[6] The pervasive discrimination meted out to Rohingya caused the appellant to join protests against the Myanmar military regime. The first of these was the student uprising in August 1988. The appellant marched in the demonstration. After this demonstration a Rohingya party, the National Democratic Party for Human Rights (NDPHR) was formed. It supported the aims of the National League for Democracy (NLD) the principal opposition party in Myanmar. The appellant attended party meetings of the NDPHR where he obtained pamphlets which he distributed to the public. After the 1990 elections when the Myanmar military ignored the electoral victory of the NLD, the regime became vigilant in cracking down on its political opponents. The appellant had become friendly with a pro-democracy student leader, AA who fled to Thailand after the demonstrations in 1988. The appellant was one of a group of pro-democracy sympathisers who kept AA informed about what was happening in Myanmar. AA then disseminated

this information overseas.

[7] The Myanmar authorities became aware that the appellant was communicating with AA and in December 1990 they arrested him and interrogated him about his political activities. The appellant was detained for a month and seriously mistreated. He still has injuries from that mistreatment. He was released after he had signed an undertaking to refrain from political activities. This was the first of many detentions and interrogations. The appellant always denied any political involvement. The authorities kept him under surveillance and arrested and interrogated him with varying frequency from 1990 until 1999. In 1999 he was detained for five days because he had attended NLD meetings and thereafter taken for questioning twice a month for six months.

[8] AA did not return to Myanmar but another of the appellant's acquaintances in the NDPHR was arrested and killed by the authorities in 1995. One of the leaders of the NDPHR, Anwar Hoque was arrested and imprisoned for 30 years. His wife and daughters were also imprisoned. His sons have been granted refugee status in Europe.

[9] In 1994, the appellant obtained a passport. He used the services of an agent because Rohingya (who are not recognised as Myanmar citizens) could not legally obtain passports. He paid the agent the equivalent of US\$300 from his own savings and borrowed money from relatives. He decided to leave Myanmar because the government would not allow Rohingya to obtain business licences, travel around the country or register their children's births or allow them to attend tertiary education. He decided to join his brothers in Malaysia.

[10] The oldest of his brothers, BB had moved to Malaysia in 1990 and married a Malay woman and established his own business. The appellant's two other brothers subsequently left for Malaysia in 1998 and 2000. Neither of them has ever returned to Myanmar. They have both applied for refugee status with UNHCR in Malaysia and are both awaiting resettlement.

[11] The appellant travelled to Malaysia in 2000. He was employed by BB in his business. On his arrival the appellant registered with an agency, ABIM, contracted to UNHCR to examine Rohingya refugee applicants in order to ascertain their bona fides. Every six months he returned to ABIM to continue the processing of his claim. In 2004, he was issued with a UNHCR registration card (produced to

the Authority).

[12] The appellant's wife and children followed him to Malaysia in 2002. The appellant had to pay bribes to an agent for his wife's passport. His wife is Rohingya so her passport had to be obtained illegally. His family was included in his refugee application to the UNHCR in Malaysia.

[13] Like his two brothers, the appellant used his UNHCR card for identification purposes in Malaysia. It did not guarantee them any right to remain in Malaysia but the Malaysian authorities did not return them to Myanmar because the Myanmar government would not allow Rohingya to enter Myanmar as they do not recognise them as Myanmar citizens. Many Rohingya were sent by the Malaysian authorities to the Thai/Malaysian border and from there they returned eventually to Malaysia. The appellant's brothers who do not have Myanmar passports cannot return to Myanmar and have never done so.

[14] In 2005, the appellant's wife and children returned to Myanmar. They had been experiencing difficulties renewing their residence permits in Malaysia and their youngest daughter was ill. His wife was told by military intelligence in Myanmar that if the appellant returned he would not be subjected to any further interrogations or detentions.

[15] In March 2006, prompted by a deterioration in his daughter's health, he returned to Myanmar. The day after his arrival he was arrested from his home by the intelligence services. He was taken for questioning and held for two days. He was mistreated. He was asked about his political activities in Malaysia and made to sign an undertaking that he would not have contact with the political opposition. He did not return home after his release but stayed with friends until he returned to Malaysia three weeks later.

[16] In February 2007 the appellant's daughter again became ill. He returned again to Myanmar and a week after his arrival he was detained by intelligence services and interrogated and again mistreated. His wife's father bribed the intelligence service officials to release the appellant. He was released after five days. On his release he stayed in hiding with various friends and relatives.

[17] His wife and children returned to Malaysia in May 2007. The appellant waited until the agent could arrange his safe departure with the connivance of corrupt officials at the airport and he then followed his family, returning to Malaysia

on 13 May 2007. His eldest daughter could not renew her visa in Malaysia and she returned to Myanmar where she remains living with her maternal grandfather. The appellant was able to return to Malaysia because he had a work visa issued in respect of his employment with his brother's business.

[18] While in Malaysia the appellant became involved in the political activities of Myanmar opposition groups. In 2006 he attended meetings of the Myanmar Federation Party (MFP). In 2007 the Malaysian branch of the NDPHR was established. He joined it in February 2007, attended meetings and gave donations to the party. He attended a celebration to mark the birthday of Aung San Suu Kyi, the NLD leader, on 9 June 2007. He also attended demonstrations on 28 September 2007 to protest the killing of Buddhist monks and civilians by the Myanmar government in demonstrations there. He attended a demonstration commemorating the "Four eights" student protest in Myanmar in August 1988. In these events, the appellant participated only as one of the crowd.

[19] The appellant heard that people who had participated in these demonstrations were photographed by informers and their activities reported on to the Myanmar authorities. He heard of people who were killed on their return to Myanmar for participating in these demonstrations.

[20] The appellant's wife and children (other than his eldest daughter) remain in Malaysia however they have no right to permanently reside there. Similarly the appellant has no right permanently to remain in Malaysia. He fears returning to Myanmar because of the adverse interest the Myanmar authorities have in him for his activities in Myanmar and also his participation in the NDPHR in Malaysia. He also fears discrimination amounting to persecution in Myanmar because of his ethnicity, a Rohingya.

[21] The appellant described how he was discriminated against as a Rohingya. Rohingya were readily distinguishable from Myanmar because of their darker complexions, their dress and their accent. The appellant was unable to move freely about Myanmar. If he wished to leave the ward in which he lived and stay elsewhere overnight he had to get permission to do so. Long distance travel within Myanmar was prohibited hence his inability to return to Sittwe for his mother's funeral or to trade in Myanmar. He was prevented from performing the Islamic ritual of *jamat* which requires Muslims to visit other mosques and pray there.

[22] When a Myanmar citizen turns 18 years old he must apply for a national identity card. The appellant had frequently made such an application but was always refused because he is Rohingya. The identity card was required to obtain a passport and enrol children. The Rohingya had to pay bribes in order to register their children in schools and tertiary education was denied them. The appellant had to pay bribes to officials in order to obtain his passport and on the last occasion he left the country he had to ensure that his departure coincided with the presence of airport officials who had been bribed by his agent.

[23] Although his marriage was registered with the local mosque, he could not register it with the Myanmar government. Similarly his children's births could not be officially registered.

[24] The regime's hostility to Rohingya was proclaimed in public places by banners announcing that Rohingya will be made to disappear by making it impossible for them to exist.

[25] The appellant has a Myanmar passport. It is issued in his official Myanmar name. He had to renounce his Rohingya name when he was still a child because it caused him problems at school. The name on his passport has the addition of an extra name added on the agent's instructions to allay official suspicion. The passport was obtained by the payment of bribes. It does not show on its face that he is Rohingya. Rohingya are not recognised as citizens by the Myanmar authorities. However the appellant could return to Myanmar on that illegally obtained passport and remain there. His two younger brothers, who left Myanmar illegally, have been in Malaysia since 2000 and 1998 respectively. They have no right of return to Myanmar and are effectively stateless.

Documents produced

[26] The appellant filed with the Authority on 12 August 2008 an updated statement, submissions of counsel, country information concerning demonstrations in Malaysia and correspondence from the NDPHR (Malaysia). On 13 August the appellant also provided a further email from the NDPHR and a copy of the appellant's NDPHR membership application form. The appellant's counsel filed final submissions with enclosures on 27 August 2008. All this material has been taken into account in this decision.

THE ISSUES

[27] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[28] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[29] Before determining the abovementioned issues an assessment must first be made of the appellant's credibility. The Authority found the appellant to be a generally credible witness. We accept his account of life in Myanmar, his political activities there and the adverse attention (including detentions) which he attracted. It also accepts that he remained in Malaysia and registered with the UNHCR as a refugee. His UNHCR registration card produced to the Authority attests to this. The account of his political activities with NDPHR in Malaysia in 2006 and 2007 did not emerge until immediately before his appeal hearing. His explanation for failing to disclose this earlier to the RSB was that he had been asked about cultural (not political) activities only. The Authority is sceptical about this explanation but, in view of the documentary material provided (a membership application and emails from the general secretary Malaysia branch of NDPHR in exile) we accept that the appellant was involved with the NDPHR in Malaysia.

Discrimination against Rohingya

[30] Country information confirms the appellant's account of the pervasive discrimination suffered by Rohingya. In *"On the run for 17 years: a regular*

secondary movement of Rohingyas in a protracted refugee situation” Resa Tokunaga, the Australian National University International Workshop: “Now you see them now you don’t” (7-9 January 2008) the author notes:

“Rohingyas have been subject to forced migration since 1978 and ever since some one million of Rohingyas fled from Rakhine state. The 1978 crack down on Rohingyas under the name of foreigner registration provoked a mass exodus of 200,000 people to Bangladesh. Later on 180,000 were forcibly repatriated without international monitoring. Discrimination against Rohingyas institutionalised when the citizenship law (1982) excluding Rohingyas from a list of 135 authorised ethnic groups, as a result, Rohingyas are, by law, not a citizen therefore they are stateless. Again mass expulsion of 250,000 took place in 1991/92, in this time UNHCR intervened and established a relief operation in 19 to 20 camps.”

[31] The racial discrimination against Rohingya is also described in *The state of the world’s minorities 2008 – Myanmar* Refworld UNHCR (11 March 2008):

“In his June 2007 report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlighted the case of the Rohingyas, a Muslim ethnic minority living in northern Rakhine state, western Myanmar. According to the report the Rohingyas are targeted because of their ethnicity and suffer widespread discrimination at the hands of the authorities. Rohingyas are unable to qualify for citizenship and their freedom of movement is severely restricted because they cannot afford to pay the fee needed for official authorisation to travel outside of their villages; they are also unable to access medical and educational services.

[32] The government restricts Rohingyas’ movements within Myanmar. See *United States Department of State Country Reports on Human Rights Practices for 2007: Myanmar* (11 March 2008):

“Although the government restricted freedom of movement, most citizens were able to travel within the country. Exceptions included Muslims travelling to, from and within Rakhine state as well as some opposition political party members.”

Rohingya are also prevented from owning land or property. (Refer United Kingdom Home Office Operational Guidance Note: Myanmar (31 October 2007)):

“Though the Rohingya have been living in Myanmar for hundreds of years, they are denied citizenship, are forbidden from marrying or travelling without permission and have no legal right to own land or property.”

[33] The appellant was able to obtain a passport, secure a release from detention in 2007 and leave the country by the use of bribes. His contention that corruption is endemic is confirmed in the report of Corruption Perception Index published by Transparency International which lists Myanmar as the worst state for corruption (ranking 179 equally with Somalia) http://www.transparency.org/policyresearch/surveys_indexes/cpi/2007.

[34] The appellant is not recognised as a citizen of Myanmar and therefore is deprived of the rights enjoyed by citizens: the right to leave the country and return, the right to register his marriage and his children's births, the right to travel within Myanmar, the right to establish his own business, and his children's rights to tertiary education.

[35] Freedom of movement is a core human right recognised in Article 12 International Covenant on Civil and Political Rights (ICCPR) which states:

"Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own."

[36] The only permissible derogation from that right are those restrictions which are provided by law necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with other rights recognised in the present covenant.

[37] No derogation is permissible from Article 12.4 of the ICCPR which states:

"4. No one shall be arbitrarily deprived of the right to enter his own country."

[38] The breach of these core human rights enshrined in Article 12 is sufficient on its own to constitute discrimination amounting to persecution. In the appellant's case when this is added to the other discriminatory treatment outlined above, the Authority finds that the appellant's predicament easily meets the test of serious harm amounting to being persecuted.

Political profile

[39] The appellant participated in anti-regime protests in 1988. He continued his opposition to the regime, providing information to a well known dissident abroad. When this came to the authorities' attention he was detained and badly mistreated. Thereafter he was kept under surveillance and taken in for interrogation from time to time. The Myanmar oppression of political dissent is well known. The appellant's account of interrogation and detention was supported by country information describing the regime's methods of suppressing dissent in United States Department of State *Country Reports on Human Rights Practices for 2007: Myanmar* (11 March 2008):

“The government’s human rights record worsened during the year. The regime continued to abridge the right of citizens to change the government. Government security forces killed at least 30 demonstrators during their suppression of pro-democracy protests in September, and they continue to allow custodial deaths to occur and committed other extra-judicial killings, disappearances, rape and torture ... the government abused prisoners and detainees, held persons in harsh and life-threatening conditions, routinely used incommunicado detention and imprisoned citizens arbitrarily for political motives ... the government routinely infringed on citizens’ privacy and restricted freedom of speech, press, assembly, association, religion and movement.”

[40] On the two occasions he returned to Myanmar (in 2006 and 2007) the appellant was detained and interrogated by the authorities on suspicion of continued involvement in anti-regime activities. On the last occasion he remained in hiding after his release fearing further detention. The authorities would be immediately aware of his presence were he to return to Myanmar. Their attitude to political dissent has not relaxed and the appellant can expect to be detained, interrogated and mistreated on return.

[41] The Authority finds that the appellant will come to the attention of the authorities on return or soon after his arrival. He is unable to live anywhere outside the ward where he is registered. There he is known to the local intelligence services. There is a real chance that he will be detained again, mistreated and interrogated to ascertain whether he has been involved in political opposition activities abroad. Such interrogation and detention (which is likely to be ongoing as it was in the past) amounts to serious harm for a Convention reason (political opinion) and thereby satisfies the definition of being persecuted.

[42] There is no Internal Protection Alternative available to him because of the restrictions on his movements imposed on all Rohingya. He is unable to move from his home area, the site of persecution. In any event as a Rohingya, the discrimination amounting to persecution is universal throughout Myanmar.

[43] The Authority concludes that the appellant faces a real chance of being persecuted on return. This persecution is for reason of his political opinion and his race (Rohingya).

CONCLUSION

[57] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

.....
J Baddeley
Member