

1106101 [2011] RRTA 1024 (6 December 2011)

DECISION RECORD

RRT CASE NUMBER: 1106101

DIAC REFERENCE(S): CLF2010/159322

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 6 December 2011

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be stateless and formerly a resident in Burma (Myanmar), arrived in Australia for the first time on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2009 and applied to the Department of Immigration and Citizenship for the visa [in] November 2010. The delegate decided to refuse to grant the visa [in] May 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] June 2011 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. 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.

10. 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 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. 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.

18. 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.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department’s file relating to the applicant. The Tribunal has had regard to the material referred to in the delegate’s decision and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal [in] October 2011 and [in] November 2011 to give evidence and present arguments. The Tribunal hearings were conducted with the assistance of interpreters in the Burmese and English languages.
21. The applicant was represented in relation to the review by a registered migration agent.

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22. The applicant stated in his protection visa application that he was born in Myanmar. He stated that he was stateless.
23. The applicant indicated that he was born in Yangon on [date deleted: s.431(2)]; he was fluent in Burmese and he had basic use of English; he was Tamil; a Hindu; married [in] August 2009; he had seventeen years of education; and he worked as a [vocation deleted: s.431(2)] since 2008. The applicant indicated that his wife and two siblings were living in Burma. He did not provide details regarding his parents. He indicated that in 2009 he visited Australia, India, Singapore and Malaysia; and in September 2010, he visited India again.
24. The applicant claimed that he was subjected to persecution by the authorities in Burma for reasons of race and political opinion.
25. The applicant stated that in 1989 the security forces murdered his uncle because of his ethnic background and political beliefs. He claimed that in February 1990 his father was detained and forced to work in a combat zone for three weeks. The applicant claimed that in 1996 his father was detained again by the military and sentenced to three years in prison for his involvement in anti-government activities. He indicated that his father was released in 2000.
The applicant claimed that when he was a tertiary student he became involved in the “pro-democracy student movement”. He stated that in June 2003 he was arrested for his “pro human rights activities” and detained for two weeks. He claimed that in detention he was subjected to treatment which amounted to torture. He stated that his father secured his release by bribing officials.
26. The applicant stated that after his release he resumed his studies and maintained a low political profile. He claimed that he was under surveillance by the authorities. He stated that he participated in the short lived protest movement of 2007. He claimed that when Cyclone

Nargis hit Burma he [volunteered] and he provided information to overseas agencies regarding the situation in Burma.

27. The applicant stated that he was selected to represent the Hindu community for the [details relating to conference deleted: s.431(2)]. He stated that he was chosen because he was [an active person] in “promoting human rights and welfare amongst” the Hindu “community”. He stated that he gave an undertaking to the authorities in Burma that he would not participate in any anti-government activities while he was overseas. He stated that when he returned to Burma he was interrogated at the airport.
28. The applicant stated that two months after he returned to Burma he travelled to Singapore, Malaysia, and India, seeking medical treatment for his uncle. The applicant claimed that he had to pay bribes to get his “departure form” approved by the authorities in Burma.
29. The applicant claimed that in February 2010 he attempted to form a political party to contest the elections. He stated that he was detained, taken to a detention centre, interrogated, beaten, tortured, and then released after three weeks when he agreed to “no longer participate in political activities” He stated that he had to pay bribes to secure his release. The applicant stated that he went to India with a view of getting a visa to Australia but found when he arrived there that it was not possible to obtain a visa from India. He stated that he returned to Burma [in] September 2010 and from there an agent was able to obtain an Australian visa for him with the use of bribes and connections. He stated that while he was preparing to leave Burma, one of his friends, [name deleted: s.431(2)], was arrested by the military [in] October 2010 because of his involvement in anti-government activities. He stated that he feared similar treatment from the authorities for the same reason.
30. The delegate obtained a copy of the applicant’s *Business (Short Stay) visa* application relating to the [conference]. The application is on file. The applicant submitted documents relating to his family background. He indicated that he had a Burmese *Citizenship Scrutiny Card*.
31. The Department received a submission from the applicant with a letter from the Chairperson of the *Burmese Community Welfare Group*, dated [in] March 2011. The author states that the applicant was involved in political activities against the military government in Burma. He states that the applicant was targeted by the authorities in Burma for political reasons.
32. The applicant submitted a document issued by the *Ministry of Defence* in Yangon, [in] November 2010, relating to the applicant’s “association with unlawful political parties, propagandizing untruthful matters about 2010 elections and also passing information to [the] foreign media” The document states that the applicant is required to make a commitment that he will not participate in such activities in the future. He is instructed to appear before the Yangon Division of the *Military Affairs Unit* [on a further date in] November 2010 to discuss these matters. The order was issued by [details deleted: s.431(2)].

Interview with the delegate

33. The applicant was interviewed by the delegate [in] May 2011. The Tribunal has listened to the interview.
34. The applicant submitted a letter from [Dr A], dated [in] May 2011. [Dr A] indicates that he knew the applicant in Burma and that he was aware that the applicant was a student activist “planning to make political demonstration” The witness states that by the end of 2003 he had

lost contact with the applicant but he was aware that the applicant had been arrested in Yangon because of his involvement in anti-government activities.

35. The applicant indicated at the interview that he was stateless. He stated that he applied for citizenship but it was not granted to him. He stated that his parents were born in Burma but they were not citizens of Burma. The delegate noted a reference in the application form that the applicant was a "Rohingya" The applicant stated he was not Rohingya. He stated that his agent made a mistake. He indicated that he was a Tamil Hindu.
36. The applicant repeated his written claims relating to his political activities in Burma and the difficulties he had with the authorities. He repeated his claim that on two occasions, in 2003 and 2010, he was detained and mistreated by the authorities because he participated in activities against the government.
37. The delegate indicated to the applicant that he found it difficult to accept that the applicant was a person of adverse interest to the authorities in Burma or that he fled from Burma without the knowledge and approval of the government. The applicant stated that his departure from Burma was arranged by a broker. He stated that the broker facilitated his departure from Burma and he used bribery and connections to leave the country.
38. The applicant stated that if he is forced to return to Burma he will be detained and persecuted for political reasons. He stated that since he fled from Burma, his father has been detained twice. He claimed that his father was asked questions about the applicant's location and activities. The applicant stated that his father was detained in December 2010 for five days and for a similar period in January 2011.
39. The applicant claimed that his wife was harassed by the authorities in Burma after he left the country. He stated that members of his family have been targeted because the authorities were unable to find him. The applicant stated that he has political views against the government of Burma and he will seek to express those views in the future. He stated that he will not be able to avoid persecution in Burma because the authorities are continuing to target political opponents.

The delegate's decision

40. The delegate rejected the applicant's claim that he was a stateless person. He found that the applicant was a citizen of Myanmar. He found that the applicant's claims relating to his involvement in anti-government activities, and the associated difficulties he had with the authorities in Burma, lacked credibility. The delegate was not satisfied that the applicant was subjected to persecution in Burma or that he faced a real chance of persecution if he returns to Burma.

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41. The Tribunal received a submission from the applicant's migration agent [in] June 2011. The adviser submitted documents which were previously provided to the Department, including the summons from the *Ministry of Defence*, dated [in] November 2010, and the letter from the *Burmese Community Welfare Group*, dated [in] March 2011.
42. The applicant provided a statement dated [in] June 2011. He stated that he did not agree with the delegate's assessment of his claims. He stated again that he was a stateless Tamil Hindu

from Myanmar who was subjected to persecution by the authorities in Burma because he participated in activities against the government.

43. The applicant submitted an article titled *The Indian Community in Myanmar*, dated 26 November 2009, which in his view supported his claim that he was stateless. The paper, written by Dr Suryanarayan from the University of Madras, states that the Indian population in Myanmar is estimated to be 2.9 million persons, of which 2.5 million are classified as ‘people of Indian origin’; 2000 were Indian citizens; and 400,000 were stateless.
44. The Tribunal received a further submission from the applicant’s adviser [in] October 2011. He submitted the following documents:
 - a submission repeating the applicant’s claims and arguing that the applicant’s fear was well-founded;
 - two statements from [name deleted: s.431(2)] from the *Burmese Community Welfare Group*, including the statement which was provided previously to the Department and dated [in] March 2011, and another similar letter, dated [in] October 2011, essentially repeating the same evidence regarding the applicant’s political opinion and his activities against the military government in Burma;
 - a statutory declaration from [Mr B], dated [in] September 2011, stating that he was aware that the applicant participated in the *Saffron Revolution* in 2007, and he was forced to flee the country to avoid further harm by the authorities;
 - the letter from [Dr A], which was submitted to the Department at the interview with the delegate;
 - a membership card issued to the applicant by the *Democracy and Peace* party, in Burmese without a translation;
 - two other documents in Burmese without a translation;
 - the notice from the *Ministry of Defence*, issued [in] November 2010, and previously submitted to the Department;
 - four photographs of the applicant attending a demonstration in Canberra;
 - articles relating to a former army officer, Mr Nay Myo Zin, who was sentenced on 26 August 2011 to a “lengthy prison term for possessing an e-mail critical of the military”; and,
 - documents relating to an examination undertaken by the applicant in Sydney [in] November 2010.

The hearing – [in] October 2011

45. The applicant attended the hearing with one witness, [Mr B], and a support person, his adviser, and an observer from the adviser’s office.

46. The applicant repeated the claims he provided to the Department. He stated that he was a stateless person who faced a life of disadvantage in Burma because of his ethnic background and political profile. He stated that his father was a poor person who was targeted previously because of his political activities against the government. He stated that his father was in prison from 1997 until 2000 for political reasons.
47. The applicant claimed that he became involved in political activities when he was a tertiary student and he indicated that in 2003 he was detained and held in prison for two weeks. He claimed that he was mistreated by the authorities. The applicant claimed that his father secured his release by paying bribes.
48. The applicant claimed that in 2010 he tried to form a political party with other political activists. He stated that he was again detained by the authorities and on that occasion he was held for five days. The applicant claimed that after he left the country he was issued a summons to appear before the authorities and to discuss his political activities. He stated that his father was detained and his wife was harassed when he failed to respond to the summons. He claimed that he held strong views against the government of Burma which he expressed in Burma and Australia. The applicant claimed that he will continue to express his views against the government in Burma.
49. The Tribunal discussed with the applicant his claim that he was a poor disadvantaged and stateless person from Burma. The Tribunal noted that the applicant had reached a high standard of education and commented that it was a standard that most Burmese did not reach. The applicant stated that his family and community assisted him. He was asked if his Burmese passport was a genuine passport. He stated that it was a genuine passport which had been obtained through a broker. The Tribunal noted that he travelled with the passport several times in and out of Burma, including the visit to [Australia], and he visited various other countries in Asia. The Tribunal commented that the applicant's ability to undertake these activities did not in the Tribunal's view support his claim that he was a poor disadvantaged and stateless person from Burma. The Tribunal commented that he appeared to be a privileged person with good education and career opportunities, the ability to travel freely in and out of the country, which most Burmese citizens are unable to do, and with opportunities to represent the country in an international forum. The applicant stated that he was poor and disadvantaged.
50. The Tribunal commented that the applicant's ability to enter and leave the country several times did not in the Tribunal's view support his claim that he was a person of adverse interest to the authorities in Burma. The applicant stated that his family was poor and his father borrowed money to support his education and lifestyle. He stated that relatives and the Indian community assisted him. The applicant stated that he was chosen for the [conference] because he was one of the few India Hindus from Burma who had achieved a high standard of education. He stated that his travel was only made possible through the use of a broker and by paying bribes. He stated that the broker was able to bypass all the vetting procedures which would normally have prevented him from leaving the country.
51. The Tribunal referred to the applicant's *Application for a Business (Short Stay) visa*, which was lodged [in] October 2010, a copy of which is on the Department's protection visa file. The Tribunal noted that in that application there are references to his *Citizenship Scrutiny Card* and his Buddhist religion. The Tribunal commented that his *Citizenship Scrutiny Card* suggested that he was a citizen of Myanmar. The Tribunal noted that the *Family Members List* he submitted indicated that some members of his family were Buddhists and others were

Hindus. He was asked if some members of his family were ethnic Burmese and others were Indian. He stated that they were all Indian and Hindus. He stated that the documents he provided in support of that application were fabricated by the broker and they did not represent his actual circumstances. He stated that he could do nothing in Burma without those documents so his community and family bought them for him.

52. The Tribunal asked the applicant's adviser if he was aware of the applicant's *Application for a Business (Short Stay) visa* and whether he had discussed with the applicant the documents which were submitted in support of that earlier application. The adviser stated that they had the documents.
53. The Tribunal indicated to the applicant that it had doubts as to whether he was providing a credible account of his circumstances. The Tribunal commented that his ability to reach a high level of education, to hold a Myanmar passport, to travel overseas, and to represent the government of Myanmar in an overseas forum, suggested to the Tribunal that he was not a 'stateless' disadvantaged and oppressed individual from Burma. The applicant stated that the interpreter was not interpreting his responses accurately. He stated that he required a more competent interpreter to properly respond to the Tribunal's comments.
54. The Tribunal adjourned the hearing and arranged for a second hearing with a different interpreter.

Submission after the first hearing

55. The adviser indicated to the Tribunal after the hearing that he had not seen the documents relating to the applicant's earlier applications to the Department and he had not approached the Department for access to those documents. The adviser erroneously insisted that the Tribunal had the authority to give him copies of those documents. He was advised that documents from the Department's file had to be obtained under the *Freedom of Information (FOI)* provisions.
56. The Tribunal received a submission from the applicant's adviser [in] November 2011. He stated that there were errors in the application form but those errors should not be used by decision-makers to support credibility findings as it was "unrealistic to expect that applicants" have the capacity to identify errors in English when English was not their first language.
57. The adviser further stated that poor interpreting at the Department interview and at the hearing with the Tribunal had distressed the applicant and they stood by their "original" submission to the RRT regarding the "errors that occur in the evidence" He argued that the Tribunal should adopt a liberal approach when considering the applicant's credibility.
58. The adviser submitted documents, without comment, relating to the applicant's medical training.
59. The adviser submitted a statutory declaration, from [Ms C], a witness who stated that she worked with Burmese political activists on the Thai border. She stated that in her experience political activists escaping from Burma had to use false passports to cross the border. [Ms C] stated that none of the political activists she worked with in Thailand returned to Burma after they successfully fled the country.

60. The Tribunal received a submission from [Mr D], Amnesty International Australia, dated [in] November 2011. [Mr D] indicated that he would be providing a “country information report focussing on the realities faced by people who are suspected of being involved with the Saffron Revolution in Burma”. He asked that no decision be made until his submission has been received and considered.

The hearing – [in] November 2011

61. The applicant attended the second hearing with the same persons who attended the earlier hearing. The applicant essentially repeated the claims he provided previously.
62. The Tribunal commented again that the documents submitted by the applicant to the Department, and his ability to travel in and out of Burma on a Myanmar passport, indicated to the Tribunal that he was a citizen of Myanmar. The applicant stated that his identification documents were genuine but fraudulently obtained as he was not a citizen of Burma.
63. The Tribunal commented that political activists from Burma, who attract the adverse interest of the authorities, tend not to be able to enter and leave the country as frequently or as easily as he was able to do. The Tribunal referred to the letter he submitted from [Ms C] and commented that in her experience political activists who fled the country did not return there. The applicant stated that he was protected and supported by the Indian community in Burma. He stated that certain persons from the community are chosen to succeed and to represent the community in various forums. He stated that he was fortunate to be one of those chosen persons. He stated that despite his high education, and documents which enabled him to travel, he was not safe from the authorities in Burma. He stated that he was detained and mistreated before and he faced similar harm in the future because he was committed activist against the government in Burma.
64. The applicant stated that [he had to return] to Burma because he had given an undertaking to the authorities and, if he failed to return, his family would have been targeted. He claimed that it was not until 2010, when it became apparent to him that he could face a lengthy prison term or life-threatening harm by the military, because of his political activities, that he reluctantly fled from the country. He stated that he was hoping to migrate to another country rather than seek refugee status. He indicated that the latter option posed inherent dangers for family members who remained in Burma. The applicant repeated his claim that when the authorities were unable to locate him, they detained his father on two occasions and they harassed his wife.
65. The Tribunal took evidence from the applicant’s witness, [Mr B] He stated that he was friend of the applicant’s uncle, who had recently fled from Burma to Thailand, and he was aware of the applicant’s involvement in political activities against the military regime in Burma and the associated difficulties he had with the authorities. [Mr B] stated that he fled from Burma before the applicant. He indicated that he was subsequently granted a protection visa in Australia. He that he saw the applicant at demonstrations in Burma during the 2007 uprising. The Tribunal discussed with the witness the applicant’s family circumstances. [Mr B] stated that the applicant was not from a wealthy family but he had financial support from the Indian community. He stated that the applicant was chosen to represent the community and they assisted him to reach the high level of education he was able to reach and to access other privileges which would otherwise not have been available to him. The witness stated that like him, the applicant was not granted citizenship and his documents did not represent his actual circumstances. He stated that the applicant’s documents were purchased. He stated that

corruption was endemic in Burma and persons from disadvantaged groups, such as his own group of Rohingyas, or the Indian community as in the applicant's case, are forced to purchase documents so they can access education, to travel, to obtain work, or to avoid harassment from the authorities. He stated that persons like him and the applicant were fortunate because they were able to buy the documents. He stated that many other persons from their communities were not as fortunate and they have to endure the government's oppression.

66. The Tribunal referred to a recent editorial in the *Sydney Morning Herald*, by the newspaper's, international editor, Peter Hartcher, and commented that the opinion represented, in the Tribunal's view, what many commentators were now saying about Burma. The Tribunal commented that observers and commentators were reporting that the new government of Burma had taken steps to improve the country's human rights record and to increase its engagement with the international community (see *Sydney Morning Herald* 2011, "How far can Burma bend for change?" by Peter Hartcher, 18 October, at <http://www.smh.com.au/opinion/politics/how-far-can-burma-bend-for-change-20111017-1ltco.html#ixzz1bk71DXRt>).
67. The applicant stated that conditions in Burma have not improved. He stated that the government's recent attempts to present a more favourable image to the world was not a genuine attempt to improve human rights conditions in the country. He stated that the government wanted to end its isolation and to encourage more economic activity. He stated that the government was targeting government critics as it did before. He stated that the same people run the government and the military in Burma.
68. The Tribunal noted that the United Nations envoy to Burma stated that despite the government's recent attempts to improve the human rights conditions, he was aware that human rights abuses continue:

UNITED NATIONS, Oct. 20 (UPI) -- Despite positive political developments in Myanmar, the government has a long way to go in addressing human rights concerns, a U.N. official said.

Last week, the government in Myanmar released around 200 prisoners as part of a general amnesty given to an estimated 6,300 detainees. The release followed an appeal to the government from the head of the state-backed National Human Rights Commission to set free prisoners accused of ordinary crimes so they can participate in "nation-building tasks."

Tomas Ojea Quintana, the U.N. special envoy on human rights in Myanmar, told the U.N. General Assembly that despite the political progress, he was receiving allegations of human rights violations. "Measures to ensure justice and accountability, including access to the truth, are essential for Myanmar to face its past and current human rights challenges and to move forward toward national reconciliation," he said in a statement.

Human Rights Watch staff members expressed concern about ethnic violence in northern Myanmar. The organization in September said sexual violence and torture against ethnic communities were on the rise in that region.

Quintana said those complaints, along with reports of military forces using prisoners as human shields, showed there was much work to be done in Myanmar. (*United Press International* 2011, "U.N. says Myanmar has more work to do", 20 October, at

http://www.upiasia.com/Top_News/Special/2011/10/20/UN-says-Myanmar-has-more-work-to-do/UPI-32311319132708/).

69. The Tribunal noted that *The Sydney Morning Herald*, reported on 7 November 2011, in 'Burma reforms open ballots for Suu Kyi's Party' by Lindsay Murdoch, that the National League of Democracy (NLD) will be permitted to register as a political party and it may contest the upcoming municipal elections. The applicant stated that it remains to be seen whether the NLD will be permitted to function freely. He stated that the government's reforms were only a public relations exercise to impress foreign governments. He stated that the reforms did not benefit the people of Burma. The Tribunal noted that the article refers to ongoing continuing concerns regarding the government's human rights record and the detention of political prisoners:

Human rights organisations are urging the US and other Western nations, including Australia, not to allow the government's positive actions to obscure serious human rights problems still persisting in the country of 50 million mostly impoverished people.

"The real test will be the reaction when Burmese citizens try to avail themselves of their rights," said Elaine Pearson, deputy Asia director at Human Rights Watch.

"Atrocities against civilians in conflict zones, torture of political prisoners and courts that justify repression have been features of the first year of nominally civilian rule as much as the announced reforms," she said.

Amnesty International has voiced grave concern about 15 Burmese political prisoners who are reportedly being denied drinking water as punishment for going on hunger strike.

The London-based organisation also says that U Gambira, a monk who was one of the leaders of the country's 2007 anti-government protests, known as the "Saffron Revolution", is seriously ill in prison, where he has been shackled and badly beaten.

Australia has told Burma's leaders that Canberra will not lift sanctions until a substantial number of political prisoners are released (see <http://www.smh.com.au/world/burma-reforms-open-ballots-for-suu-kyis-party-20111106-1n1x2.html#ixzz1cyMaeiQE>).

70. The Tribunal asked the applicant if he maintained contact with his uncle in Thailand. The applicant stated that he did have contact with his uncle but it was difficult to reach him because of poor coverage. The Tribunal indicated that it wanted to obtain evidence from his uncle in Thailand. The applicant stated that he did not recall his uncle's telephone number but he would provide it to the Tribunal after the hearing.
71. The adviser was invited to provide submissions. He referred to the applicant's claims and he gave the Tribunal two documents which reiterated the applicant's claims.

Submissions after the hearing

72. The Tribunal received a submission from the applicant's adviser on [a further date in] November 2011. He provided the name and contact details for the applicant's uncle in Thailand. He indicated that there were communication difficulties for various reasons. The applicant offered to arrange the interview for the Tribunal.

73. The Tribunal received a submission from the applicant's adviser on [the following day]. He provided a statutory declaration relating to his conversation with the applicant's uncle in Thailand. He provided details of the conversation and the uncle's responses to the adviser's questions. The witness reportedly confirmed the applicant's claims relating to his involvement in political activities against the government of Burma and the difficulties he encountered with the authorities in Burma for this reason. He reportedly verified the applicant's claim that he was not a citizen of Burma and that the documents he had, relating to his alleged citizenship, were fraudulently obtained. The adviser provided two other statutory declarations, from persons associated with his firm, who stated that the adviser's statutory declaration represented an accurate account of the conversation he had with the witness.
74. The adviser submitted a statement from [Mr E], dated [in] October 2011. [Mr E] stated that he was a Rohingya from Burma who was granted a protection visa in Australia. He stated that he met the applicant in Australia and they discussed their similar situations. He stated that like the applicant he used connections and a broker to obtain the documents he needed so he could access tertiary education and flee the country. The witness stated that those opportunities were not available to him as a stateless person but the fraudulently obtained documents enabled him to access the rights and privileges which were commonly available to the citizens of Burma.
75. The adviser submitted a statutory declaration from [Mr F], dated November 2010. He stated that he was a stateless person from Burma who was granted a protection visa in Australia. He stated that he had to use a broker to facilitate his departure from Burma. [Mr F] stated that he met the applicant in Australia and he could verify that as a member of the Indian minority, the applicant suffered "agonies and discriminations" in Burma.
76. The adviser provided a "supplementary submission" regarding the applicant's claims. He argued that the applicant presented a credible account of his circumstances. He stated that his fear of harm was well-founded.
77. The adviser made a further submission [in] November 2011. He provided the contact details of a person at a Hindu temple who was able to verify the applicant's claim that he was a Hindu.
78. The Tribunal received a "country information report" from the Refugee Caseworker, Amnesty International Australia, [in] November 2011. The report indicates that the authorities in Burma were implicated in human rights violations against ethnic minorities in Burma, including the Indian community. The report indicates that Burmese Indians are denied citizenship and they resort to the assistance of brokers, agents, and corrupt government officials, to obtain the documents they require to travel, study, or to undertake other activities which would otherwise be available to them if they were citizens of Burma. The report deals with the treatment of political activists and indicates that the authorities in Burma continue to target political activist and to quash dissent.
79. The Tribunal made several unsuccessful attempts to contact the applicant's uncle in Thailand.

FINDINGS AND REASONS

80. The applicant claims to be a stateless person from Burma. He claims that he was born in Burma and that Burma is his country of former habitual residence. The applicant claims that

he entered Australia with a genuine Myanmar passport which was fraudulently obtained through bribery and connections.

81. The applicant further claims that he has been politically active against the former and current governments of Burma. He claims that he was detained in 2003 and 2010 because he participated in activities against the government. He claims that he was a person of concern to the authorities in Burma at the time when he departed the country and that members of his family were targeted because he fled the country. He claims that he has strong political views against the government of Burma and that he will seek to express those views in the reasonably foreseeable future.
82. The Tribunal accepts that the applicant has political views against the current government of Burma. However, it has formed the view that he exaggerated his other claims to enhance the application. The Tribunal does not consider it appropriate to take an overly stringent approach to questions of credibility but neither does it consider it appropriate to accept all claims uncritically.¹ The *Handbook on Procedures and Criteria for Determining Refugee Status*, suggests that it is “frequently necessary to give the applicant the benefit of the doubt... [but only after]... all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility”.²
83. The Tribunal has doubts as to whether the applicant is the poor, disadvantaged, stateless, and targeted person, he claims to be. The Tribunal has formed the view that his ability to enter and leave Burma many times, his access to citizenship documents, access to travel opportunities, his high level of tertiary education, and his ability to represent the country in an international forum, does not in the Tribunal's view support his claim that he was either disadvantaged, stateless, or a person of adverse interest to the authorities in Burma. The Tribunal has formed the view that the applicant exaggerated the disadvantage and targeting he suffered in Burma to enhance his protection visa application.
84. Nevertheless, despite the above considerations, the has considered the persuasive evidence provided by the applicant's witnesses regarding his political views, and it has decided to give him the benefit of the doubt and to accept two of his major claims. The Tribunal accepts the applicant's claim that Burma is his country of former habitual residence; and his other major claim that he has strong views against the government of Burma which he will seek to express in the reasonably foreseeable future.
85. Information from external sources indicates to the Tribunal that despite a few recent positive signs from the government of Burma that it may abandon its harsh attitude towards dissidents; the authorities in Burma continue to perpetrate human rights abuses against political activists. The Tribunal has noted that several hundred political prisoners have recently been released by the government. However, thousands of political prisoners remain in prison and more are being detained and mistreated for criticising the military and the government. The information indicates that political dissidents in Burma are subjected to serious and

¹ *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Beaumont J at 451, *Sivalingam v Minister for Immigration and Multicultural Affairs* (MIMA) (unreported, Federal Court of Australia, O'Connor, Branson, & Marshall JJ, 17 September 1998), *Aruliah v MIMA* (unreported, Federal Court of Australia, Marshall J, 1 October 1997) at 6, *Sellamuthu v MIMA* (1999) 90 FCR 287 per Hill J at paragraph 40.

² United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, Geneva, paragraphs 203 and 204.

sometimes life-threatening harm by the authorities. The Tribunal finds that persons who are targeted by the authorities have no opportunity to defend themselves.

86. The Tribunal is not satisfied that the applicant will be able to express his political views safely and freely in Burma. The Tribunal finds that if the applicant expresses his views against the government in Burma he may be subjected to human rights abuses by the authorities, including arbitrary arrest and torture, without the opportunity to defend himself. The Tribunal finds that the applicant cannot avoid the harm he anticipates by relocating within the country as the military and the authorities continue to quash dissent throughout the country. The Tribunal has formed the view that the applicant does not face a substantial risk of harm by the authorities in Burma. However, neither is it satisfied that the risk of harm is remote or insubstantial or a far-fetched possibility.
87. Accordingly, the Tribunal finds that there is a real chance that the applicant will be subjected to persecution by the government of Burma for reasons of political opinion.

CONCLUSIONS

88. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

89. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.