

1107430 [2011] RRTA 790 (8 September 2011)

DECISION RECORD

RRT CASE NUMBER: 1107430

DIAC REFERENCE(S): CLF2011/72806

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 8 September 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 a citizen of Burma (Myanmar), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2011 and applied to the Department of Immigration and Citizenship for the visa [in] May 2011. The delegate decided to refuse to grant the visa [in] July 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] July 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 was represented in relation to the review by a registered migration agent.

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21. The applicant stated in his protection visa application that he was born in [Town 1] on [date deleted: s.431(2)]. He stated that at birth he was a citizen of Burma but at the time of application he was stateless. The applicant stated that he lost his citizenship in 1982 when the *1982 Citizenship Law* of Burma came into force. He indicated that he spoke Rohingya and Burmese; he belonged to the Rohingya ethnic group; his religion was Islam; he was married in [Town 1] [in] May 1971; he lived at the same Yangon address for approximately ten years before he came to Australia; he was in hiding for several months before he departed the country; he had eight years of education; he was self-employed in [Town 1], selling vegetables, from 1963 until 1991; he was a casual worker at a Yangon market from 1991 until 2007 and he worked at another Yangon market as a sales person from 2007 until November 2011. The applicant stated that his wife and eight of his nine children lived in Burma and he had a son living in Australia. The applicant provided a copy of his Burmese passport; an untranslated document relating to his identity; and a letter from the [official deleted: s.431(2)] of the Burmese Rohingya Community in Australia, dated [in] May 2011, stating that the applicant was a Rohingya from Arakan State in Burma. The author expressed an opinion that the applicant was at risk of being subjected to human rights violations in Burma.
22. The applicant claimed that he faced ongoing difficulties with the authorities in Burma because of his ethnicity and political opinion. He claimed that he was detained and questioned several times; the first time being in 1978 after he was accused of assisting Rohingya Muslims fleeing the authorities. He claimed that in April 1978 he was sentenced without trial to prison for 18 months. The applicant stated that he was subjected to torture in detention and released in February 1979.
23. The applicant claimed that in 1991, during what he referred to as an “extermination campaign” against Rohingyas by the government, the authorities attempted to detain him. He stated that when they failed to find him but they took his wife. The applicant claimed that his wife was held for three days and mistreated by the authorities. He stated that he did not consider [Town 1] to be a safe place for him so he hired a broker

to facilitate the illegal relocation of the family to Yangon. The applicant claimed that they moved to Yangon in October 1991. He claimed that he maintained a low profile because he did not want to attract the adverse interest of the authorities. He claimed that in 1996 he was detained for one month and mistreated during a government campaign against Muslims. He stated that he was again detained in 2001, during civil disturbances by Rohingya youths in Sittwe, and he was told not to participate in any protest activities. The applicant claimed that he participated in the September 2007 protests against the military government but he was able to avoid arrest.

24. The applicant claimed that in 2010 he actively campaigned for the boycott of the elections. He stated that he objected to the election because it was “an organised event that would ensure the continuity of the military government with civilian faces” He stated that the needs of the Rohingya community were ignored in the elections. The applicant claimed that after the elections the authorities began to target Rohingyas who criticised the election process. He claimed that he considered himself to be at risk of arrest so he went into hiding and he remained in hiding until an agent was able to arrange a “safe and secret exit from Burma” The applicant claimed that if he returned to Burma he would be at risk of serious harm for his race, as a Rohingya, religion, statelessness, and his political opinion against the government.
25. The Department received a submission from the applicant’s adviser [in] June 2011. The adviser argued that the applicant suffered severe discrimination and persecution in Burma for reasons of his Rohingya ethnicity, religion, and political opinion. She submitted human rights reports from external sources relating to human rights conditions in Burma and she argued that the applicant’s fear of harm was well-founded.
26. The applicant was interviewed by the delegate [in] July 2011. The applicant’s son attended the interview and provided evidence. The Tribunal has listened to the interview. The applicant essentially repeated his claims. He stated that if he returns to Burma he will be killed by the authorities for leaving the country illegally.
27. The delegate accepted that the applicant was a Rohingya Muslim from Burma. He was not satisfied however that the applicant was a person of interest to the authorities in Burma. The delegate found that the applicant led a stable and prosperous life in Yangon and he did not accept that the applicant had a genuine fear of persecution based on his political opinion or any other Convention reason.

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28. The Tribunal received a submission from the applicant’s adviser [in] August 2011. The adviser provided the following documents:
 - a statutory declaration from the applicant, dated [in] August 2011, in which he repeated his claims and he provided comments regarding the delegate’s findings;
 - a statutory declaration from the applicant’s son in Australia, [name deleted: s.431(2)], dated [in] August 2011, in which he confirmed the applicant’s claims and provided more details regarding the difficulties his father experienced with the authorities in Burma;

- a statutory declaration from an Australia citizen, [name deleted: s.431(2)], dated [in] August 2011, who stated that he was a Rohingya from [Town 1], in Arakan State, and he participated in political activities with the applicant in [Town 1] in 1990;
- a similar statutory declaration from another Australia citizen, [name deleted: s.431(2)], dated [in] August 2011, who stated that he was a distant relative of the applicant and he could confirm the applicant's claims regarding the difficulties he had with the authorities in Burma;
- a statutory declaration from an Australian citizen, [name deleted: s.431(2)], dated [in] August 2011, a Rohingya Muslim from Burma, who stated that he lived in Rangoon at the same time as the applicant and he was aware that the applicant was detained and tortured by the authorities in 1997 after he attended protest activities at the end of 1996;
- a statutory declaration from an Australian citizen, [name deleted: s.431(2)], dated [in] August 2011, who stated that he was previously a stateless Rohingya from Arakan State, who confirmed that while they both lived in [Town 1] he witnessed the applicant being involved in political activities relating to the Rohingya community;
- a statutory declaration from an Australia citizen, [name deleted: s.431(2)], who stated that he and the applicant were from the same village in Burma and he witnessed the applicant sacrifice "a lot for Rohingya people and village";
- a medical certificate relating to the applicant's health difficulties;
- a letter from his doctor, dated [in] August 2011, stating that the applicant was suffering from depression and other mental health difficulties;
- a letter from [agency deleted: s.431(2)], dated [in] June 2011, stating that the applicant suffered from various mental and physical health problems;
- a letter from the [official deleted: s.431(2)], of [organisations deleted: s.431(2)], dated [in] July 2011, based in Yangon, stating that the applicant's son was able to study in Turkey after being awarded a scholarship by the [agency deleted: s.431(2)]; and,
- seven articles from various media sources relating to human rights violations against the Rohingya community in Burma, descriptions of demonstrations which the applicant claimed to have attended, and the targeting of the small Rohingya community in Yangon.

29. The applicant argued in his statement that his account of political events in Burma was accurate. He argued that the delegate's information regarding those events, and the findings he made regarding the applicant's credibility, were based on incorrect information and false assumptions relating to the applicant's alleged prosperous lifestyle. The applicant stated that he was forced to leave Arakan to avoid further ongoing harassment from the authorities. He stated that in Yangon he was only able to

remain there with the aid of corrupt officials. He provided information regarding his living conditions in Yangon and what he had to do to remain there.

Information from external sources

30. The Tribunal considered information from external sources provided by the applicant and relating to the treatment of Rohingyas in Burma. The Tribunal also considered the following reports relating to human rights conditions in Burma and the treatment of Rohingyas:
- ‘Myanmar’ 2011, *The New York Times*, 31 January;
 - ‘Myanmar (Burma)’ 2010, *Political Handbook of the World Online Edition*, originally published in Banks, A., Muller, T., Overstreet, W., and Isacoff, J. (eds.) 2010, *Political Handbook of the World 2010*, Washington: CQ Press;
 - Freedom House 2010, *Freedom in the World – Burma/Myanmar (2010)*, June;
 - US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – Burma*, 11 March;
 - ‘Ex-military dominate Myanmar’s new cabinet: official’ 2011, Google News, source: *AFP*, 11 February;
 - UK Home Office 2010, *Country of Origin Information Report – Burma (Union of Myanmar)*, 23 July;
 - Mydans, S. 2011, ‘Myanmar Hardens Stance on Opposition’, *The New York Times*, 20 February;
 - US Department of State 2010, *International Religious Freedom Report for 2010 – Burma*, 17 November;
 - Minority Rights Group International 2010, *State of the World’s Minorities and Indigenous Peoples 2010*, 1 July. (CISNET Burma CX246002);
 - Beech, H. 2009, ‘A closer look at Burma’s ethnic minorities’, *Time Magazine*, 30 January. (CISNET Burma CX222313);
 - United States Commission on International Religious Freedom (USCIRF) 2010, *Annual Report 2010 – Countries of Particular Concern: Burma (Myanmar)*, 29 April. (CISLIB Burma 18628);
 - DIMA Country Information Service 2005, *Country Information Report No. 05/60 – Burmese passport and departure procedures*, (sourced from DFAT advice of 12 October 2005), 14 October. (CISNET Burma CX137106);
 - Thet, M. 2010, ‘Burma begins issuing machine-readable passports’, *Mizzima*, 30 March. (CISNET Burma CX254658);
 - ‘Overview of corruption in Burma (Myanmar)’ 2009, The U4 Anti-Corruption Resource Centre and Helpdesk, Transparency International website, June <http://www.u4.no/helpdesk/helpdesk/query.cfm?id=205> – Accessed 8 June 2010; and,

- International Crisis Group 2011, 'Myanmar's Post-Election Landscape', Asia Briefing N°118, 7 March.

31. The Tribunal considered the following background information regarding the circumstances of the Rohingya community in Burma and persons suspected of involvement in anti-government activities:

- Minority Rights Group International 2008, *State of the World's Minorities – Events of 2007*, Minority Rights Group International website;
- Ekeh, C. & Smith, M. 2007, *Minorities in Burma*, Minority Rights Group International website, 30 October;
- Minority Rights Group International 2007, *World Directory of Minorities and Indigenous Peoples – Myanmar/Burma: Overview*, UNHCR Refworld;
- United States Commission on International Religious Freedom 2009, *USCIRF Annual Report – Countries of Particular Concern: Burma*, Refworld;
- US Department of State 2006, *Burma International Religious Freedom Report 2006*, 15 September;
- US Department of State 2006, *Burma Country Reports on Human Rights Practices – 2005*, 8 March;
- Department of Foreign Affairs and Trade 2003, *Country Information Report No. 76/03*, 24 April CISNET Burma CX77914;
- Human Rights Watch 2000, *Malaysia/Burma living in limbo Burmese Rohingyas in Malaysia*, July;
- Department of Foreign Affairs and Trade 2006, *Country Information Report No. 06/67*, 16 November. CISNET Burma CX165216;
- US Department of State 2009, *2008 Country Reports on Human Rights Practices – Burma*, 25 February;
- Human Rights Watch 2008, *Vote to Nowhere – The May 2008 Constitutional Referendum in Burma*, May;
- Freedom House 2008, 'Burma (Myanmar)', in *Freedom in the World 2008*;
- Human Rights Watch 2007, *Crackdown – Repression of the 2007 Popular Protests in Burma*, Volume 19, No. 18(C), December;
- 'Myanmar detains dozens of opposition members' 2009, *Yahoo News*, (source: *Associated Press*), 19 July;
- '87-year old opposition member imprisoned' 2009, *Democratic Voice of Burma*, 14 July;
- 'Lengthy sentences for opposition prayer arrestees' 2009, *Democratic Voice of Burma*, 18 June; and,

- ‘Harsh Sentences for Myanmar Dissidents’ 2008, *Amnesty International*, 13 November.

FINDINGS AND REASONS

32. The applicant claims to be a stateless Rohingya from Burma. He claims that he was born in Burma and that Burma is his country of former habitual residence. He claims that he is not a citizen of Burma and that he has no right to enter and reside in any other country. The applicant claims that the Burmese passport he used to enter Australia is a document he obtained from corrupt officials and with the aid of an agent. The Tribunal has considered the applicant’s claims and the evidence he provided relating to his identity and background. It accepts that he is a Rohingya from Burma and that his country of former habitual residence is Burma. The Tribunal accepts the applicant’s claim that he has no right to enter and reside in any other country and that he has been denied citizenship in Burma because he is a Rohingya. Accordingly, the Tribunal finds that the country of reference in this matter is Burma, the applicant’s country of former habitual residence
33. The applicant claims that he belongs to the Rohingyas ethnic group of Burma and that he faced ongoing discrimination and other forms of mistreatment by the authorities in Burma because of his ethnic background. He claims that he was subjected to ongoing harassment from the authorities because of his involvement in political activities in Arakan State and in Yangon. The applicant claims that he expressed his views regarding the last election in Burma and he subsequently found it necessary to flee the country to avoid further difficulties with the authorities. He claims that if he returns to Burma he will be subjected to life-threatening harm by the authorities for a combination of reasons, including his ethnicity, political opinion, his false passport, and a perception by the authorities that he is a dissident.
34. The Tribunal accepts the applicant’s claim that he has strong views against the former and current governments of Burma and that he has expressed those views over many years. The Tribunal accepts the applicant’s claim that he was harassed by the authorities in Burma for being a Rohingya and for expressing his political views.
35. After considering information from external sources relating to the treatment of Rohingya Muslims from Arakan State by the government of Burma, the Tribunal accepts the applicant’s claim that Rohingyas are a particularly vulnerable ethnic group in Burma and it accepts that the community has been subjected to ongoing discrimination and harassment by the authorities in Burma since they were denied citizenship rights in 1982. The Tribunal accepts the applicant’s claim that the authorities in Burma target Rohingya Muslims from Arakan State with impunity.
36. The Tribunal has formed the view that the applicant faces the additional risk of harm by the authorities in Burma because of his previous political activities and his current political views against the government. The Tribunal has accepted the applicant’s claim that he was targeted before by the authorities because he expressed views against the government and it finds that he faces a similar risk in the future for the same reason. The Tribunal has considered the recent political developments in Burma and the transition of the military government to a civilian administration. However, despite these developments, the Tribunal is not satisfied that human rights conditions have

improved sufficiently in Burma to allow the applicant to return there safely in the reasonably foreseeable future.

37. The Tribunal finds that the applicant cannot avoid the harm he anticipates in Burma by relocating within the country as the military and the authorities restrict the movement and activities of Rohingyas throughout the country. The Tribunal has formed the view that the applicant may not face a substantial risk of harm by the authorities in Burma but neither is it satisfied that the risk of harm is remote or insubstantial or a far-fetched possibility.
38. Accordingly, the Tribunal finds that there is a real chance that the applicant will be subjected to persecution in Burma for reasons of race and political opinion.

CONCLUSIONS

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

DECISION

40. 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.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer: EHENDE