

0903555 [2010] RRTA 31 (15 January 2010)

DECISION RECORD

RRT CASE NUMBER: 0903555

DIAC REFERENCE(S): CLF2009/21806

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Peter Tyler

DATE: 15 January 2010

PLACE OF DECISION: Melbourne

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 [in] January 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2009. The delegate decided to refuse to grant the visa [in] April 2009 and notified the applicant of the decision and her review rights by letter [on the same date].
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] May 2009 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 and *Applicant S v MIMA* (2004) 217 CLR 387.
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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
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.
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 also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Application for Protection Visa

20. The following written claims are contained in a statutory declaration lodged with the protection visa application lodged [in]February 2009:

I, [the applicant] (Chinese [name]), of [address] in the State of Victoria, Home Duties, make the following declaration under the Statutory Declarations Act 1959:

1. I make this statutory declaration in support of my application for a Protection visa. I have been advised that in order to be able to work while my application is being processed, I must lodge an application for a protection visa by [date] February 2009. As a result, I have had to prepare my application very quickly. I may wish to provide further information about my claims in future.

2. I am a Burmese citizen and I am of Karen ethnicity. My religion is Buddhist. I came to Australia on [date] January 2009 on a three month visitor's Class TR visa (sub class 676). I am 48 years of age, and I am married with one child. My husband [name] is in hiding in Burma, and my son [name], born on [date], is now a permanent resident of Australia.

3. For many years my husband and I have been harassed, discriminated against and more recently persecuted by the Burmese authorities for three reasons. The first reason is because we are both Karen Burmese. The second reason is that I am Buddhist, and openly supported the Buddhist monks following their uprising against the Burmese authorities in 2007. The third reason is that I support the National League for Democracy (the NLD) and its leader, Aung Sang Su Kyi.

4. In 2006, my husband and I began the arrangements for our son [name] to be adopted by an Australian citizen and live in Australia, because we feared that if he remained in Burma, he would face the same persecution and discrimination that we have faced. We thought that if he could live in Australia, he would have the opportunity to live a secure and safe life. His visa was granted on 2 September 2008, and my husband and I accompanied him to this country, arriving on 11 January 2009, to help him settle in to his new home. To do this, we obtained visitors visas to travel to Australia. My husband returned to Burma on 30 January 2009, and I planned to stay longer to help my son settle into his new school, but immediately after returning, the authorities demanded money from my husband. Before we left Burma, they had demanded we pay them 2 million kyat, which is about \$A20,000. My husband was told that if he failed to pay, his business would be closed down and he would be physically harmed. When the authorities learned that my husband had returned home to Burma this year, they came to the house asking for more money, saying that as we could afford to travel to

Australia, we could pay more. They demanded 5 million kyat, which is about A\$80,000. There is no way that my husband can afford to pay this amount. He did not have the money they demanded, so asked if he could go and get the money. He then left the house and went into hiding. I do not know where he is at present, and cannot contact him. He will not tell me where he is, for fear of the phones being tapped or letters read by the authorities, and that he might be found. He has telephoned me, and told me not to return, as the authorities will come to our house if I do return, and threaten and harm me if I cannot say where he is living, or pay them any more money. As it is the Burmese Government authorities whom I fear, I cannot expect any protection from them or from any other person or authority.

5. This incident, which has led to me applying for protection because I now fear returning to Burma, comes at the end of many years of being discriminated against and persecuted by the Burmese Government. The following incidents are some examples of how I and my family have been treated by the Burmese authorities. It never occurred to me to seek protection until I received a call from my husband telling me not to return home.

6. My husband has his own business operating two trucks, and for at least the last six years the Burmese authorities have extorted a lot of money from us because we are Karen which we could not afford to pay. The authorities have come to our house and demanded money, and have also taken our trucks for their own use when they wanted to do so. The trucks were often returned damaged. They refused to pay for repairs or petrol, and when the trucks were repaired by my husband, they took them again when it suited them.

7. The worst incident occurred in December 2007, when the military authorities again came to our house asking for money. We had so many demands for money made so many times, that my husband stood up to the military, and said he could not pay, whereupon they punched and kicked him. When I told them to stop, they started to attack me as well. I was punched and kicked on the face and body, and as the soldiers were wearing boots, it was very painful. My nose was bleeding and my face became very swollen. I was very frightened of what might happen to us. The military authorities threatened us by saying that we must not complain about being attacked, and must pay whatever they asked for. We had to obey their orders, and pay what they demanded. We were told that if we failed to do so, we could be harmed, put in jail for any length of time, or be tortured and killed. We knew that we had no rights because we were Karen people, and they disapproved of our behaviour supporting monks and also for supporting the NLD.

8. After Cyclone Nargis devastated large areas of Burma, I wanted to help Karen people who had suffered loss in the area of Myaungmya in the Irrawaddy Delta. The Burmese authorities demanded money from us to pay to victims, but my husband and I refused to pay, saying we wanted to support people directly. We were not permitted to do this, and to avoid punishment had to pay a large amount to the authorities before we were able to help the Karen victims of the cyclone.

9. On other occasions we have had Karen family members from Myaungmya staying with us, which has not pleased the authorities, especially when there were children staying so they could attend school. The Burmese Government does not approve of Karen children obtaining education. When such activities came to their notice, they again demanded money from us.

10. I have been very involved in the Buddhist community and its activities in Rangoon, and there is a Buddhist temple near our house. When I have helped the monks by giving them food, or supporting them in other ways, it has upset the authorities when they have known about it. After the monks uprising in 2007, my house was searched by police, who believed that I might be hiding monks in the house. I was threatened with harm if I assisted the monks.

11. Many small events have also occurred over the years where the Burmese authorities have discriminated against me and my husband. For example, whenever there was a festival or activity, they demanded we pay them money which we had no choice but to pay. We have always been checked on, even if we try and keep our activities secret. The authorities say they know we support the NLD and its leader, even if we deny that we do. They know this because NLD members have always visited our house.

12. I am very frightened of being harmed by the Burmese authorities if I return to Burma on my own. Although I live with my husband's parents and his two sisters, they are mostly away from home, and I would be in the house by myself. I am still very upset by the attack on me in December 2007, and fear that I may be tortured again, or imprisoned or killed if the authorities try to extort money from me, or force me to say where my husband is. I am sure that they will try and get information

13. In light of the above, I am seeking protection as a refugee in Australia.

Application for Review

21. Following the primary decision to refuse the protection visa an application for review was lodged [in] May 2009.
22. [In] July 2009 the Tribunal received a letter from the applicant's representative enclosing a statutory declaration from the applicant stating as follows:

I, [the applicant], of [address], in the State of Victoria, homemaker, make the following declaration under the Statutory Declarations Act 1959:

THAT:

I am a Burmese national of mixed Karen and Chinese ethnicity. I am a Buddhist. I am an applicant for review of a decision by the Department of Immigration and Citizenship (DIAC) to refuse the grant of a Protection visa. My Protection visa application was prepared in a hurry because I was advised that I had to lodge my application within 45 days of arrival in Australia in order to have work rights I make this statutory declaration to provide further information in support of my application for review before the Refugee Review Tribunal (RRT) and to respond to certain issues raised in DIAC's decision to refuse my Protection visa application. In doing so, I continue to rely on all evidence previously provided by me or on my behalf in support of my claims, except where stated below.

I confirm that I continue to fear persecution from the Burmese authorities for reasons of my (part) Karen ethnicity and my assistance to the Karen community, my support for the National League for Democracy (NLD) and my actual and imputed anti-government political opinion, as a result of my support for the Buddhist monks' protest in 2007 and my assistance to Cyclone Nargis victims.

Further information in support of my claims

Both of my parents are of mixed Karen and Chinese ethnicity and were born in Irrawaddy Division. They moved to Rangoon before I was born. My father died when I was young. My mother had to work and couldn't look after me and my siblings, so my auntie (my father's sister) helped raise me while I was at school and I mostly lived with her. My auntie is officially Karen so at school, I was known as a Karen. When I got my own national ID, my ethnicity was listed as Chinese. I believe this is because my father had Chinese written on his ID. My husband, [name], is also mixed Karen/Chinese. His

ID also states that he is Chinese. However, our neighbours know that we are ethnically Karen as well.

I left school in about Year 9 and got a job as a shop assistant. Later, I worked as a hairdresser for several years and then worked as a shop assistant again. This information is set out in my Protection visa application form but was accidentally put in the wrong order.

I wish to provide further information in relation to my husband's business. As mentioned in my previous statutory declaration, my husband has had a transport business for several years. He had two trucks which he used to transport goods to different parts of Burma. In my Protection visa application form, it states that my husband operated a car sales business but I think this may have been an interpreting error. My husband did help people he knew buy cars but he doesn't do this anymore. He also worked in a furniture factory.

My Protection visa application form also states that I was a partner in my husband's business but my name is not on any business documents. I helped my husband with his business in whatever way I could. Apart from helping my husband with his business, I stayed at home to look after our son, [name].

In paragraph 6 of my previous statutory declaration, I stated that the Burmese authorities have been extorting money from my husband and me and have been using his trucks without pay for at least the last six years. Actually, the authorities have been doing this for quite a long time but it has gotten worse in the last six years. I am not sure of the amounts the authorities asked for because my husband handled this, but he did tell me that the amounts they demanded increased in the last six years.

I believe that the reasons the authorities started demanding more money from my husband and me about six years ago is because they suspected that we are ethnically Karen and that we were against the government. I believe that they came to suspect that we were Karen because we had many Karen family members coming to stay with us. I believe that the authorities did not like us communicating with Karen people. I also believe that the authorities suspected that we did not support the government because we never went to any public meetings or events in support of the ruling regime. My husband and I do not agree with the policies of the Burmese government. The ruling regime doesn't care about the citizens of Burma. We cannot speak freely and have no rights.

It became difficult for us to afford to keep meeting the authorities' demands for money and use of our trucks. My husband tried to postpone giving them money but when it wasn't given on time, the authorities gave us a lot of trouble. For example, they did not allow my husband to transport goods. We were thus forced to keep on paying the authorities the money they demanded they wanted and letting them use our trucks.

I have described in paragraph 7 of my previous statutory declaration that in December 2007, my husband finally stood up to the military authorities who came to our house to demand money and told them that we were not going to pay them any money. I would like to give more information about this incident. I remember that there were four military authorities that came to our home that day. My husband showed his anger at being treated so badly and the authorities savagely attacked both him and myself. They accused us of being involved with the monks' protest, which had taken place some months before, and of being against the government. They also accused us of having Karen blood. They said that our trucks were travelling around the country and I believe

they suspected that we were using our business to assist in antigovernment activities. The attack on my husband and me, in our own home, was very traumatic.

My support for the 2007 monks' protests

In my previous statutory declaration, I explained that I feared harm from the Burmese authorities because of my support for the monks' protests against the regime in 2007. I would like to provide more information about this.

My home is quite close to a Buddhist temple and monastery called [Monastery A]. As I explained in paragraph 10 of my previous statutory declaration, I have been very involved in the Buddhist community for a long time. I often provided food and medicine for the monks living at the temple and invited them to our house. I also went to an English school located nearby to the temple a few times a week to learn English and I sometimes volunteered there by looking after the children who were taking English lessons. The monastery and the school had good relations with each other and some of the monks also attended English classes. As a result, I also had a good relationship with the monks.

At paragraph 10 of my previous statutory declaration, I stated that the authorities became upset when they found out about me giving food or other support to the monks. By this, I meant in and after 2007.

In September 2007, monks around the country, including in Rangoon, protested against the regime. I recall that the demonstrations started in Rangoon sometime around 20 September 2007. The monks, including those from [Monastery A], marched in the streets. While they marched, I provided support for them by giving them water. I supported the monks because I thought that their actions were right. The monks knew that the people were suffering for many years because of the government and they were trying to help us. Usually, it is the monks who defend the common people of Burma because the government doesn't care about the people's suffering. Therefore, I wanted to show my support for them.

One night around the end of September 2007, the Burmese authorities raided [Monastery A] and arrested many of the monks and took them away. The authorities also tried to confiscate property from the temple. Some monks managed to escape from the monastery. I believe that a handful of them hid in the English school next to the monastery.

A couple of days later, I went to the English school and one of the teachers told me that during the raid, some of the monks from [Monastery A] had come to the school to hide. By the time that I had come to the school, only one monk remained. The teacher asked me if I would agree to take the monk to my house and hide him there. The teacher did not like the military regime and knew that I shared the same view, so I believe this is why he felt that he could ask me to do this. I agreed to help even though I knew it would be dangerous. The monks have helped the people in so many ways that I considered it my duty to help in any way I could.

My husband agreed that we should help this monk, because he also supported the monks' protests. The monk stayed at our home for two nights. We gave him some money so that he would be able to go back to his home village. Not long after this, the Burmese authorities made an announcement that no one was allowed to accept monks in their homes.

As I stated in paragraph 10 of my previous statutory declaration, the military junta came to our home to search whether we had monks staying at our home. This was

sometime in October 2007. They did not search every house, only people who they suspected would help the monks. The authorities asked if we have ever had any monks at our home or if any monks came to visit after the protests. I lied and said no. They threatened us and said that we would be in great trouble if we assisted the monks.

After the authorities searched our home, we continued giving assistance to monks. Some monks from other monasteries came to our home to ask for money to help them go back to their villages. The continuing raids on monasteries from the Burmese authorities meant that the monks were not able to stay there and, as the authorities forbade people from accepting monks into their homes, they had no other choice but to return home. We gave them whatever money we could.

As I have explained above, when the authorities attacked my husband and me in December 2007, they accused us of supporting the monks' protest.

My support for the National League for Democracy

In my previous statutory declaration, I stated that I supported the NLD. I would like to provide further information. Both my husband and I support the NLD. Many of the people who worked and studied at the English school that I went to also supported the NLD and some were NLD members. They often visited me at home. I became involved with the NLD began about three years ago, when I became close with a teacher at my English school called [Person 1], who was an NLD member. [Person 1] knew and worked with Su Su Nway, a well known NLD member, and Phyu Phyu Thin, a well known HIV/AIDS activist and NLD supporter. [Person 1] was doing a lot of good work in the community by organising people to donate blood for victims of AIDS and HIV. He also helped orphans

I was very moved by [Person 1]'s work and I tried to assist him, both financially and also by finding blood donors. My husband did the same. [Person 1] came to our house frequently, about once a week. I believe that the authorities came to know that my husband and I were helping [Person 1] with his work. When the authorities came to our home in December 2007, they said that they knew we were doing anti-government activities and mentioned that we have connections with the NLD. My husband and I continued assisting [Person 1] in his activities until we left Burma.

My assistance to victims of Cyclone Nargis

In paragraph 8 of my statutory declaration, I explained that my husband and I provided assistance to victims of Cyclone Nargis. I would like to provide further information about this. When Cyclone Nargis devastated parts of Burma in May 2008, my husband and I felt compelled to help the people who were suffering from the effects. My husband and I went to Myaungmya, in the Irrawaddy Delta, (where we also had family) with his trucks to give supplies to the cyclone victims. As I described in my previous statutory declaration, we were forced to pay the Burmese authorities before we could assist. We wanted to go a second time but before we were able to go, the authorities found out and said that we could not do this. They wanted the goods for themselves.

After Cyclone Nargis, some family members from Myaungmya came to stay at our house, including their children. The authorities told my husband that our family members had to go back where they came from. The Burmese government wants to hide the fact that the cyclone occurred and wants people from Irrawaddy to remain there. Our family members went back to Myaungmya but later returned and we had to bribe the Burmese authorities.

My assistance to the Karen community

As I have explained in my previous statutory declaration, my husband and I have had many Karen family members from the Myaungmya area in Irrawaddy division visiting us and staying in our home, sometimes for a long time. It was not only family members who stayed with us; we also hosted other Karen villagers who we knew, including our family members' friends. These people came to Rangoon for various reasons, for example, to see doctors, look for work or buy goods for their businesses. When they returned home, we would give them clothing to take back home to the villagers. I believe that this is how the authorities suspected that my husband and I are Karen and they did not like our Karen relatives coming to stay with us.

My husband and I have also provided assistance to Karen communities in the Irrawaddy division. About two years ago, we started helping build a school in [Village A], a village near Myaungmya where mostly Karen people live, including my family members. We bought materials for the school and shipped it to the village.

Events before leaving for Australia and afterwards

I have explained in my previous statutory declaration that before we travelled to Australia, the authorities demanded that we pay 2 million kyat. I do not know how my husband was planning to pay but I believe that he returned to Burma thinking that he could find the money and solve the problem with the authorities. My mother had cancer and my husband also wanted to return to Burma to make sure that she was ok while I stayed to make sure our son was settled in with his adoptive family. My mother has since passed away, in April 2009. I confirm that I have not seen or heard from my husband since he called to warn me not to return and told me that the authorities had come looking for him after his return to Burma and demanded that he pay extra money. I am extremely worried about him.

I fear that if I am forced to go back to Burma, the authorities will target me because I am ethnically Karen and have had close contact with and assisted other Karen people, and because my husband and I are against the government. I believe that the authorities know or suspect that my husband and I are Karen because of the many Karen family members and villagers that have stayed at our home. I believe that the authorities can easily confirm that my husband and I are Karen. The government oppresses Karen people and they have faced a lot of problems in Burma. I believe that the situation is now getting even worse for Karen people.

I fear that my activities in support of the monks' protest in 2007, my husband's and my work with the NLD supporter Person 1] and our assistance to Cyclone Nargis victims will make me a target. Prior to coming to Australia, we have managed to keep paying the authorities whatever they wanted. I believe that the authorities knew that we would continue to pay whatever amount they wanted so that we would not receive any further trouble. My husband is in hiding now and we cannot afford to continue paying off the authorities. I am afraid that they will come after us.

The government has recently put the NLD leader Aung Sang Suu Kyi on trial again and I believe that I will face even greater harm as an NLD supporter in the current climate in Burma. If the authorities can persecute Aung Sang Suu Kyi, they will surely persecute a supporter like me.

I fear that if I return to Burma, I will be arrested, jailed and possibly tortured. As a woman, I fear that I will be at particular risk of harm. The Burmese authorities rape women and mistreat them. I also cannot discount the possibility that as someone with

part Chinese blood, I will also be treated badly by the Burmese authorities. Life is very difficult for Chinese people in Burma I did not mention the difficulties for people of Chinese background before because I believe the main reasons why the authorities will treat me badly is because of my husband's and my part Karen ethnicity, because we have assisted other Karen people and because of the other activities I have previously described.

Response to DIAC decision

I wish to make some comments in relation to the decision of the DIAC delegate to refuse my Protection visa application, noting that where I have not specifically referred to a matter, I should not be taken to accept what the delegate has concluded.

a. The DIAC delegate wrote that my husband and I have made payments to the authorities in the past but objected to any increased amount that had been requested. This is not correct. We were forced to pay whatever the authorities wanted. When my husband refused to pay in December 2007, he was beaten, as was I.

b. The DIAC delegate wrote that I have not provided any document to show that I am officially recorded as being of Karen ethnicity. As I have stated, my ID, which is in Burma, states that I am Chinese but I believe that the authorities can easily confirm that my husband and I are Karen, if they have not done so already. Since I have been in Australia, I have become involved with the Karen community here, who I feel are like my close relatives and which I am able to do without fear here, and will provide photographs of myself at Karen community functions.

c. The DIAC delegate indicated that the fact that I was able to leave Burma on a valid passport and have travelled previously meant that I was not at risk of serious harm from the government. I wish to comment on this. My husband and I received passports because we were in a position to bribe the authorities to get them. My previous travels were with my husband and for the purpose of his business. Again, we were able to take these trips because we bribed the authorities who came to our house before we travelled. We had to promise to pay them even more money when we returned. At the airport, we also had to bribe officials.

My fears of returning to Burma and the recent events, particularly my husband's disappearance and the death of my mother, have made me very distressed. I am afraid for both my husband's safety and for myself. Because of my distress, I am forgetful and find it difficult to concentrate or focus. I am seeking counselling to help me and I ask that the Tribunal take this into account.

23. [In] July 2009 the Tribunal received a letter from the applicant's representative. The representative submitted that the applicant will suffer persecution if she returns to Burma because of her actual and imputed political opinion, her ethnicity (Karen and Chinese) and her gender. It was submitted that the applicant's political opinion was demonstrated in her activities supporting the monk's protest in October 2007; her activities supporting the NLD and her association with NLD members; her activities in assisting the victims of cyclone Nargis; and the cumulative effect of such activities. The representative also addressed the issues of lack of state protection and the inability to relocate within Burma.
24. Enclosed with the letter were certified copies of photos which are stated to be of the applicant in the company of members of the Karen community in Melbourne. The copies of the photos are of very poor quality and indistinct.

Evidence at the Hearing

25. The applicant appeared before the Tribunal on 16 July 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
26. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
27. The applicant told the Tribunal that she was born on [date deleted: s431(2)]. She is married and has one son. She said that she had lived in Rangoon City all her life and was one of five siblings. Two of her siblings are living in Rangoon and the other two are living in Mandalay. She said that she had completed year nine at school and for the past 10 years has been a shop assistant. Her husband runs his own trucking business.
28. The applicant said that she and her husband entered Australia in January 2009 for the purpose of arranging accommodation for their son with a Melbourne-based family of Chinese ethnicity. She said that her husband stayed in Australia for a short period of time and returned to Burma.
29. The applicant claims to be a practising Buddhist and attends the monastery on special occasions. She also claims to be of Karen ethnic origin. She told the Tribunal that there are a number of Karen people living in Rangoon and when asked she said that they were identified as being Karen because of the community to which they belong and that she mixed with the Karen people living in Rangoon. She said that people of pure Karen blood had a distinctive appearance and can be identified. In her case she had Karen relatives from the Irrawaddy Division visit her house for various reasons and because they were required to advise the authorities of their proposed destination when they left their village, the authorities knew that they were staying with the applicant.
30. The applicant claims that many people from the Irrawaddy District are rebellious therefore the government places restrictions on them.
31. According to the applicant the Nargis cyclone in 2008 affected the lot of her friends and relatives, a number of who stayed with the applicant and her husband in Rangoon. The government was unhappy with this and some officials attended her house to send the people back to Irrawaddy. The people left her house for one night and then returned. She claims that she and her husband had to pay bribes to the authorities so that the people could remain in the house. Eventually the people returned to Irrawaddy and the applicant claims that her activities in supporting the people had upset the authorities.
32. The applicant said that she and her husband also donated items such as timber to assist with the reconstruction of the Irrawaddy district and that this also upset the authorities. She said that she did not know how the authorities would have known that they made such donations.
33. During the monks uprising in 2007 the applicant claims that she participated by giving the monks water however, she was not harmed during the rebellion. On one occasion she and her husband hid a monk in their house but the monk had left before the military searched the house. The applicant said that this was her only involvement in the 2007 uprising and that she believes that the monk did not report them to the authorities,

although she believed there were different ways for the authorities to find out about their involvement with the monks.

34. The applicant claimed that she and her husband were not members of the National League for Democracy (NLD) but as she worked with others, including members of the NLD, to assist AIDS victims, she believed that the government knew she was involved in the project and therefore with the NLD.
35. The applicant said that they often had visits from different people from the government. In December 2007 the applicant claims that she and her husband were attacked at their home by four people who, according to her husband, were military investigators. She said that her husband told her that they were attacked because they were from the Karen ethnic group, they communicated with the Karen rebels and were involved with the monks uprising. She also said that they were attacked because her husband refused to give the attackers any money. The applicant said that they were not sent to prison because the people were satisfied with the bribe. They did not report the incident because she believed that nobody would protect them. Neither the applicant nor her husband sought medical treatment for the injuries they sustained.
36. The applicant also said that demands for money were made of her and her husband so that they could keep their business functioning as was the case with everyone who ran a business especially if they were of Karen ethnicity.
37. The applicant told the Tribunal that she and her husband travelled to Australia in January 2009 in order to settle their son into a new home with a Chinese family who had adopted him in 2006.
38. The applicant said that she had been connected to the Karen community since childhood and that her father was of Chinese/Karen mix.
39. The applicant did not intend to apply for asylum when she entered Australia in January 2009. She said that after her husband returned to Burma he contacted her by phone and told her that the problems at home were unsolvable and that the authorities knew they supported the Karen rebellion. Her husband returned to Burma because he believed he would be safe. Other than saying it was because of their past activities, the applicant said that her husband could not explain what had caused his change of mind because she spoke to him over a poor phone line. On being asked, the applicant said she feared returning to Burma because of what her husband told her, being what she had done in the past. She said that life in Burma was very difficult, they lived in constant danger and she had no deep happiness.
40. The Tribunal pointed out the contents of paragraph 4 of the applicant's first statutory declaration where it stated that the reason her husband gave for not wanting her to return was that the authorities were demanding money again and that this differed from what she was now saying as being the reason not to return, namely that she was Karen, she participated in the rebellion and because of things she did in the past. The Tribunal observed that her stories were inconsistent. The applicant responded by saying that she did not put all the details in her statutory declaration because it was done in a hurry and that she was scared when she did the statutory declaration.

41. The Tribunal asked why the applicant and her husband went overseas when demands for money were made by the authorities and the applicant said that they just wanted an extension of time for the payment of the money demanded. The Tribunal said that it could not see how spending money on overseas travel would have helped them to save money to give to the authorities. The applicant said that they did what they had to do.
42. The applicant said that she and her husband were middle-class and that business was difficult.
43. The Tribunal referred to country information that stated that Karen people in the countryside were targeted by the authorities and that this situation did not apply to her because she lived in Rangoon. She said that she fears those problems.
44. The Tribunal pointed out to the applicant that in her initial statutory declarations and during the hearing she had not mentioned that she feared returning to Burma because she was a woman, although this claim was raised in recent submission by her adviser and a recent statutory declaration from the applicant. The applicant was invited to comment on this claim. The applicant said that she is afraid to return to Burma because she is a woman because she had heard of a case of a small girl who was molested by the authorities. Her husband did not tell her not to return because she is a woman. She said that as soon as she gets back to Burma she will be caught because there is no one to protect her. The Tribunal said that her husband was there and would protect her and she said that he is in hiding and she does not know where he is. The Tribunal said that something dramatic must have happened for him to have fled and she said that things have changed and he does not contact her at the moment.
45. The Tribunal expressed its surprise that he has not got a message to her through friends or the like. She said that she asked her older sister, a cousin and a teacher to assist and none of them wants to be involved.
46. The Tribunal pointed out that the applicant had stated earlier that she feared going back to Burma because she was a Buddhist and asked her to clarify if she held a fear because she was a Buddhist or because she helped the monks. The applicant responded that she had fear because she helped the monks and not because she was a Buddhist.
47. At the prompting of the adviser, the Tribunal asked the applicant if she thought she will be persecuted because she is of mixed Karen and Chinese ethnicity and she provide no answer to the question other than to say that Chinese people were discriminated against and life in Burma was hard for them.
48. The representative submitted that the applicant will be persecuted as a failed asylum seeker, that country information is consistent with the claim that the applicant has a profile that would cause the authorities to have an interest in her and that they would know of her activities because of surveillance and the government's general intrusion into people's lives, the applicant would be seen as a member of the Karen ethnic group because she had Karen people stay at her house, that what the applicant's husband told her over the phone when he returned to Burma was a catalyst in creating a well founded fear in the applicant, that the cumulative effects of the applicant's activities would have brought the applicant to the attention of the authorities and that the Tribunal should take into account the applicant's traumatised state of mind in considering the quality of her evidence.

49. The Tribunal stated that while it may accept the applicant's evidence as to her activities in Burma it would have to consider, given that it appeared she did not hold a fear of persecution when she actually entered Australia, how a phone call from her husband containing little if any detail, would create in her a well founded fear of persecution.

Country Information

50. Referring to the pervasive corruption in the country, the US Department of State *Country Reports on Human Rights Practices for 2008* comments that:

Role of the Police and Security Apparatus

The Myanmar Police Force is under direct military command but falls administratively under the Ministry of Home Affairs. Police primarily deal with common crimes and do not handle political crimes. Corruption and impunity were serious problems, due to a government-imposed system whereby police were required to collect funds for their operations. Police typically required victims to pay substantial sums for crime investigations and routinely extorted money from the civilian population. There are no effective legal mechanisms available to investigate security force abuses. The government took no significant measures to reform the security forces ...

Government Corruption and Transparency

The law provides for criminal penalties for official corruption; however, the government rarely and inconsistently enforced the anticorruption statute, and officials frequently engaged in corrupt practices with impunity. A complex and capricious regulatory environment fostered corruption. Authorities usually enforced anticorruption laws only when the regime's senior generals wanted to take action against officials whose egregious corruption had become an embarrassment or when they wanted to punish officials deemed a threat to the senior generals' power. Public officials were not subject to financial disclosure laws (US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Burma*, February,

51. Commenting on the forced donations in Rangoon, *The Irrawaddy* of 27 July 2007 notes that:

Burma's military regime has forced businessmen and merchants in Rangoon to donate cash and commodities to cover the cost of the National Convention...

Some businessmen from the Hlaing Thar Yar industrial zone said the regime has pressured businessmen to donate from 100,000 kyat (US \$80) to 1 million kyat (\$800) to the convention, depending on the size of a business.

The forced donation have contributed to rising basic commodity prices as businesses increase prices to cover donations, said one merchant.

More than 100 businessmen and merchants have donated cash and commodities, such as rice, cooking oil, onions and stationery valued at 53,265,500 kyat (\$42,000), The New Light of Myanmar reported on Thursday (Aung, Htet 2007, 'Rangoon Businessmen Forced to Donate to National Convention', *The Irrawaddy*, 27 July http://www.irrawaddy.org/article.php?art_id=8020 – Accessed 6 July 2009

52. In November 2006 the Department of Foreign Affairs and Trade (DFAT) provided extensive advice on this question. While noting that “[s]ome Burmese returning after engaging in anti-regime activities overseas appear to escape close attention or retribution”, DFAT advises that “there is a high risk the Burmese regime would treat harshly returning Burmese nationals who, the regime considers, have engaged in high profile political activity abroad” DFAT provides an indication of the kinds of political associations that would place a person returning to Burma (or Myanmar) in the “high risk” category (see paragraph 5) and states that: “[a]ny Burmese returning to Burma after a lengthy period overseas would come at least to the attention of their local township authorities and their movements may be monitored for an initial period”. DFAT’s extensive advice on this question follows below:

There is a high risk the Burmese regime would treat harshly Burmese nationals who have engaged in high profile political activity abroad. There is no clear definition of “low-level” political activity. Burmese engaged in high profile anti-regime activities overseas are closely monitored by Burmese authorities. Burma residents assessed as active opponents of the regime can expect to receive particularly close attention from security forces. Severe penalties, including life imprisonment, are routinely imposed for dissent in Burma Defence lawyers are typically neither permitted access to the defendants nor allowed to participate in court proceedings.

...3. Overseas Burmese (including in Australia) classified as strong critics of the regime are monitored closely by Burmese authorities. There is no clear, reliable definition of “low-level” political activity. For example, the Burmese regime considers distribution of pro-democracy materials in Burma as a very serious offence. Severe penalties, including life imprisonment, are routinely imposed for demonstration of dissent in Burma Those accused are usually denied access to legal counsel. On 13 June 2005 life sentences were given to Aung Myo San, Ba Myint, Ba Thint and Khin Kyaw from the National League for Democracy Youth and to That Oo from the Democratic Party for a New Society. They had been arrested in December 2004 for distributing pamphlets and charged under Law 5/96 Section 3 under which it is an offence to demonstrate, protest, campaign, give a public speech, or take any action intended to or having the effect of disturbing the peace and tranquillity of the nation or national reconciliation or the National Convention. Defence lawyers were not permitted any access to the defendants and were not permitted to participate in court proceedings. Most recently, the regime press has indicated that action under Law 5/96 Section 3 is likely for the five leaders of the 88 Student Generation Group detained since 27 September 2006 for calling for national dialogue and reconciliation.

4. There is a pervasive security apparatus in Burma All Burmese residents are monitored by the regime. Anyone assessed as being a potential active opponent of the regime can expect to receive particularly close attention from security forces. Any Burmese returning to Burma after a lengthy period overseas would come at least to the attention of their local township authorities and their movements may be monitored for an initial period. Some Burmese returning after engaging in anti-regime activities overseas appear to escape close attention or retribution. They may well only receive an interview on return to Burma with a warning against continuing any political activities in Burma.

5. But there is a high risk the Burmese regime would treat harshly returning Burmese nationals who, the regime considers, have engaged in high profile political activity abroad. Strong offshore critics of the regime have been treated summarily by the regime on return to Burma. We would expect the regime would classify as “strong critics” any active or high profile members of organisations such as the National Coalition Government of the Union of Burma (NCGUB), the Federation of Trade Unions of Burma (FTUB), the All Burma Students Democratic Front (ABSDF), the Shan State Army-South (SSA-S), the Network for

Democracy and Development (NDD) or the Vigorous Burmese Student Warriors (VBSW). The NCGUB, FTUB, ABSDF and SSA-S were all declared by the Burmese regime on 28 August 2005 as “unlawful associations” under Section 15 (2) of the Unlawful Associations Act for endangering “the law enforcement of the Union of Myanmar, stability of the State and peace and tranquillity of the entire people.” The Australian Coalition for Democracy in Burma has publicly registered its strong support for the “outlawed” NCGUB (Department of Foreign Affairs and Trade 2006, *DFAT Report 564 – RRT Information Request: MMR30908*, 24 November).

53. In June 2006 the Canberra office of the UN High Commissioner for Refugees (UNHCR) provided advice to the Australian government on the return of asylum applicants to Myanmar after being “approached on behalf of three Myanmarese nationals, requesting [UNHCR’s] intervention in relation to their application for Protection visas in Australia”. UNHCR advised as follows:

It is well documented that the prevailing human rights situation in Myanmar is extremely poor. In the context of return to Myanmar, it must be assumed that individuals will be subject to government scrutiny upon arrival. Persons with a political profile are reasonably likely to be subject to disproportionate punishment, and so the question of whether or not an individual has such a profile must be carefully evaluated as part of the refugee status determination process.

Even if an individual does not have a political profile, it is reasonable to believe that any person whom the Myanmar Government suspects to have applied for refugee status abroad, and who has the profile of someone who *may* harbor a political opinion, risks being charged under the *1950 Emergency Provisions Act* upon his or her return to Myanmar, and subjected to disproportionate punishment. For example, while a rejected asylum-seeker (such as a manual laborer) who has been found to be an economic migrant and is unlikely to have been politically active would probably be questioned by the government upon return to Myanmar and later released, someone who has not been politically active but has the profile of an individual who could have been active (such as an intellectual or a student) risks being charged and punished under the Act. Accordingly, UNHCR continues to oppose forced removal of failed asylum-seekers to Myanmar (UN High Commissioner for Refugees 2006, Letter to DIMA: ‘Return of asylum seekers to Myanmar’, 15 June).

FINDINGS AND REASONS

54. The applicant claims to be a national of Burma and arrived in Australia on a Burmese passport. The Tribunal accepts that the applicant is a Burmese national and, for the purposes of the Convention, has therefore assessed her claims against Burma as her country of nationality.
55. The applicant claims that she is of Karen ethnicity and associated with Karen people, she and her husband gave assistance to the victims of cyclone Nargis, she is of Chinese descent and this is noted on her identity card, that she is both Karen and Chinese, she is a Buddhist and that she assisted the monks in the 2007 uprising, that she is seen as being a sympathiser of and associated with the NLD, that she is a woman and a woman without protection, that she and her husband have been victims of demands for bribes by members of the military, that she will be seen as a failed asylum seeker if she returns to Burma and the cumulative effects of the above factors. She also claims to have been involved with the Karen community in Australia and attended functions held by the group. The applicant also claims that she and her husband were targeted for bribes

because they were members of a particular social group, being business proprietors and were attacked in their own home when they refused to pay a bribe

56. Although the Tribunal found the applicant to be vague at times in presenting her evidence, she did not vary from the basic facts of her situation. She tended to become vague and inconsistent in describing motivations for the difficulties she had faced. The Tribunal puts this down to the fact that the motivations for the harm she and her husband suffered were mixed and for multiple reasons therefore difficult to describe.
57. A significant event affecting the applicant and her husband was the attack by the authorities at their home in December 2007. In her initial statutory declaration of 25 February 2009 the applicant stated that the reason for the attack was because the authorities wanted them to pay a further bribe and that on that occasion her husband resisted. In her later statutory declaration of 13 July 2009 and in her oral evidence the applicant stated that the authorities went to her house to demand money and accused the applicant and her husband of being involved in the monk's protest, of being against the government and of having Karen blood. The applicant claimed in her second declaration that the reason for the difference in the description of the events was that her initial declaration was drafted and sworn under pressure of time. The Tribunal has given consideration to the applicant's explanation however it does not accept that an issue as important as the motivation for the attack on her and her husband would not have been accurately and consistently stated from the initiation of her application. Although the applicant states that she prepared the declaration hurriedly for work permit purposes, she lodged her protection application [in] February 2009 and the delegate did not make a decision until [date] April 2009, the Tribunal considers that she could have corrected any inaccuracies or omissions within that period.
58. The Tribunal accepts, and finds plausible, the original evidence of the applicant to the effect that the reason for the attack on this occasion was that the applicant's husband resisted the demands for a bribe by the authorities. Accordingly, the Tribunal finds that the reason for the attack on the applicant and her husband in December 2007 was because of the issue of the bribe and her husband's resistance to the demand.
59. The Tribunal has considered the applicant's claim as a member of the particular social group being a member of the business community and in doing so has had regard to the meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
60. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member

of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

61. The country information set out above indicates that there is a wide spread pattern of conduct by the authorities in demanding money from business owners. On the basis of the evidence, the Tribunal accepts that the applicant and her husband are business people and can be categorised as members of the particular social group known as business people in Burma Further to this, the applicant would have a higher than normal profile within the community because of her ethnicity and her support of the Karen people especially during the Nargis crisis.
62. The Tribunal accepts that the applicant and her husband have been pressured into paying bribes to the authorities from time to time because she and her husband are business owners. The Tribunal also accepts that the applicant's husband was subjected to further demands for money when he returned to Burma at the beginning of 2008 and that such demands are likely to be made into the future. The Tribunal is therefore satisfied that the applicant and her husband face a real chance of extortion by the authorities in the reasonably foreseeable future.
63. The Tribunal recognises that extortion can be motivated for a number of reasons. In the Full Federal Court decision of *Rajaratnam v MIMA* (2001) 62 ALD 73 the majority stated that:

In a particular setting ... extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.
64. In this regard the Tribunal has taken into account the country information concerning the bribes demanded of business people and the applicant's evidence that this was the essential reason for the bribes.
65. Accordingly, the Tribunal finds that the applicant faces a real chance of Convention persecution, now or in the reasonably foreseeable future should she return to Burma and her fear of persecution for a Convention reason is well-founded.
66. Given the above findings, there is no requirement for the Tribunal to examine the applicant's claims relating to the Convention reasons of ethnicity, gender, political opinion, religion and section 91R(3) issues.
67. The Tribunal is satisfied, on the country information available, that the applicant would not have effective protection afforded to her by the Burmese regime, which in this case is itself the perpetrator. The Tribunal finds that as a result the applicant faces a real chance of being seriously harmed for reason of her membership of a particular social group being business people in Burma should she return to Burma (see s.91R(1)(b) and (2)). The Tribunal further finds that the essential and significant reason for such harm is the Convention reason of her membership of a particular social group being a business

person in Burma (see s.91R(1)(a)) and that the harm would involve systematic and discriminatory conduct (see s.91R(1)(c)).

68. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of “practicable”, to expect him or her to seek refuge in another part of the same country. What is “reasonable” in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* [2007] HCA 40 and *SZFDV v MIAC* [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.
69. The Tribunal has considered whether the applicant could reasonably relocate to another part of Myanmar. It finds that the repressive apparatus of the regime is pervasive and aided by a network of local officials in the whole country thus it finds that the applicants’ relocation to other parts of Myanmar is not ‘reasonable’ in the *Randawa* sense as the risk of persecution would not diminish in other locations.

CONCLUSIONS

70. The Tribunal is satisfied that each of the applicants is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants satisfy the criterion set out in s.36(2) for a protection visa and will be entitled to such visas, provided they satisfy the remaining criteria.

DECISION

71. 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’s I.D. prrt44