

1103148 [2011] RRTA 636 (27 July 2011)

DECISION RECORD

RRT CASE NUMBER: 1103148

DIAC REFERENCE(S): CLF2011/5233

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Andrew Rozdilsky

DATE: 27 July 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] December 2010 and applied to the Department of Immigration and Citizenship for the visa [in] January 2011. The delegate decided to refuse to grant the visa [in] March 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] April 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 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.
20. The applicant appeared before the Tribunal [in] July 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
21. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

Protection visa application

22. The applicant worked as a seaman and jumped ship while in port in Sydney in December 2010.
23. The applicant is from a small village in Kachin state, and lived near [location deleted: s.431(2)].
24. The applicant is a Baptist.
25. The applicant claimed that as a minority group, Kachins are harassed, discriminated against and oppressed. He claimed that his home area is a battleground of the Burmese military and Kachin opponents to the military regime.
26. The applicant claimed that villagers had been tortured, detained, raped and that there was pillaging and destruction in the village.
27. The applicant's father was coerced into becoming the head of the village, and was forced to give information on regarding KIA in the area. If he refused to cooperate with the military he was threatened with death. The applicant's father was accused of playing a role as a spy for KIA while pretending to work with the military.
28. [In] October 2009, the applicant's father was arrested, interrogated and tortured for one week.
29. The applicant took the decision to fight against injustice and oppression against the Kachin people. He began to give information regarding the movements of military personnel to KIA. He also gave information regarding abuses by the military against the Kachin.

30. The applicant claimed that the military became suspicious of him and began to look for the applicant. His father told him to hide at his uncle's home.
31. [In] October 2010 the military came to the applicant's house looking for the applicant. His father was assaulted and threatened with death. He was told by his brother not to return to his home village.
32. The applicant fled to Yangon, and left for Singapore to continue work on a [ship] he had worked on previously. He left for Singapore [in] November 2010.
33. The applicant began work on a [ship] [in] November 2010 and arrived in Sydney [in] December 2010.
34. He learned in a telephone call to a friend that his father was rearrested, tortured and that he had died in detention. The military arrested the rest of his family and their whereabouts were unknown. The friend also advised him that the military was looking for him and he was told not to return to Burma.
35. The applicant fears arrest, torture, imprisonment and persecution if he returns to Burma.

Delegate's decision

36. The delegate determined that due to the 1994 ceasefire between the KIA and the Burmese military, troop movement information around his village was of no strategic value. He further noted the applicant's ability to depart Burma twice, his failure to mention details of his father's mistreatment while he was away in his statement, his ability to return to his village without detection, and failure to make a claim for protection earlier.

Statement in support of review application

37. The applicant restated his claims as set out in his review application, and sought to rebut the conclusions drawn by the delegate.
38. He indicated that despite the ceasefire of 1994, there was constant tension between Burmese troops and the KIA, and several skirmishes between them. He claimed that information of Burmese troop movements were vital for the KIA as they were laying mines around the Kachin areas to protect the Kachins from the Burmese who were conscripting Kachin youth into their armies to be porters to carry their weapons.
39. He claimed that the Kachin minority most of whom were Christian that his people were persecuted because of their ethnicity and religion. Their women were raped and the Burmese army plundered their livestock, food and minerals. He provided documentary evidence to support his claims of tension between the Burmese army and the KIA.
40. The applicant explained his ability to depart Yangon airport in December 2009 among a group of 100 crewmen and that their departure was organised through a special clearance by the recruiting agent. With respect to his departure in November 2010, his uncle retained an agent and had to pay a large amount of money to get him safe exit at the airport.
41. The applicant maintained that his father was tortured several times whilst he was out of Burma.

42. He claimed that he only came to learn during his trip back home between September 2010 and October 2010 from his brother that the authorities were looking for him.
43. He did not apply for a protection visa earlier as he did not perceive any danger to his life. He travelled to over 100 countries including the USA twice and 9 times to Australia.
44. Although his father was the head of the village, he was arrested and tortured several times and nothing had happened to other family members. On this occasion, the authorities have targeted his whole family and they have all been detained and they were looking for him.
45. The applicant produced an email indicating that his father was killed and other members of his family have been arrested.
46. His fear is based on his father's position as the village head who for several years had given assistance to the KIA both information about troop movements and food.
47. He also fears persecution as a Kachin and because he is a Christian. He claimed that a pastor was taken away for questioning and his whereabouts are still not known.
48. The applicant claims to regularly worship at the Burmese church in [suburb deleted: s.431(2)], that he recently [participated] in the Kachin Global Action Day in June 2011 at the Burmese embassy in Canberra.

The Tribunal hearing

49. The applicant testified in relation to his fear on return to Burma, reflecting the claims set out in his protection visa application. He testified in relation to his father's role as village chief, in a village of about [population deleted: s.431(2)], and provided documentary evidence to corroborate this claim immediately after the hearing. He testified that his father was coerced into becoming village chief because of his role in the community as an elder in the Baptist church. He also testified regarding his father's role in providing information regarding troop movements to the KIA, and that despite being the village chief, that he faced a number of detentions, serious mistreatment and that following the applicant's departure, that he was arrested by the military together with the rest of his family, and that the rest of his family remain in detention, and that his father died in custody. He testified that he personally witnessed the injuries suffered by his father when he was detained in 2009, including [details of injuries deleted: s.431(2)]. He further testified regarding the coercion of Kachins as "volunteers" for forced labour. The applicant further testified that during his absence between December 2009 and September 2010, that although in contact with his family, he was not apprised of the situation of his father and learned of this only when he returned to Burma in September 2010.
50. The applicant's testimony in large part was a restatement of his written statements attached to his protection visa application, and his statutory declaration to the Tribunal, including his ability to depart Burma, and how he learned about the arrest of his father and his subsequent death and the concurrent arrest of the rest of his family. He also testified regarding his having failed to have claimed protection sooner. He testified that he has no further information regarding his remaining family in Burma. The applicant testified regarding his role [in] a demonstration in Canberra in support of the Kachin community and denouncing human rights abuses against members of the Kachin community. His motivation for his involvement in the demonstration was that he was opposed to the persecution of the Kachin

people, and his support of the KIA. He testified regarding human rights abuses in Burma. He testified about being active in the Burmese church in Australia.

Documentary evidence

51. The Tribunal considered the following documentary evidence in addition to documentary evidence filed by the applicant.

- FREEDOM HOUSE, FREEDOM IN THE WORLD BURMA (MYANMAR), 1 OCTOBER 2010;
- BURMA: AMNESTY INTERNATIONAL REPORT 2010 - MYANMAR, 28 MAY 2010;
- US DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2010 – BURMA, 8 APRIL 2011;
- CX267264: BURMA: KACHIN RAPED, KILLED BY BURMESE TROOPS, DEMOCRATIC VOICE OF BURMA, 20 JUNE, 2011, [HTTP://WWW.DVB.NO/NEWS/KACHIN-RAPED-KILLED-BY-BURMESE-TROOPS/16214](http://www.dvb.no/news/kachin-raped-killed-by-burmes-troops/16214) ;
- CX266901: BURMA: INSTABILITY BECKONS IN WAKE OF KACHIN CONFLICT, IRRAWADDY, THE, 15 JUNE, 2011, [HTTP://WWW.IRRAWADDY.ORG/ARTICLE.PHP?ART_ID=21496](http://www.irrawaddy.org/article.php?art_id=21496) ;
- US DEPARTMENT OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2010, 17 NOVEMBER 2010;
- BURMA: THE FORGOTTEN POLITICAL PRISONERS, BANGKOK POST, 30 AUGUST 2009;
- HUMAN RIGHTS WATCH, VOTE TO NOWHERE – THE MAY 2008 CONSTITUTIONAL REFERENDUM IN BURMA, MAY 2008;
- ‘LENGTHY SENTENCES FOR OPPOSITION PRAYER ARRESTEES’ 2009, DEMOCRATIC VOICE OF BURMA, 18 JUNE 2009;
- ‘BURMA: SUPPRESSED FREEDOM OF SPEECH IN BURMA, REHMONNYA (HURFOM-HUMAN RIGHTS FOUNDATION OF MONLAND), 24 JULY 2008;
- ‘HARSH SENTENCES FOR MYANMAR DISSIDENTS’, AMNESTY INTERNATIONAL, 13 NOVEMBER 2008; AND
- HUMAN RIGHTS WATCH, CRACKDOWN – REPRESSION OF THE 2007 POPULAR PROTESTS IN BURMA, VOLUME 19, NO. 18(C), DECEMBER 2007.

FINDINGS AND REASONS

52. Based on the documentary evidence before it, the Tribunal finds the applicant to be a citizen of Burma (Myanmar) and his claims were assessed against Burma.

53. The Tribunal accepts based on the letter from the Kachin Association of Australia at folio 83 of the DIAC file that the applicant is of Kachin ethnic origin.
54. The applicant provided documentary evidence to corroborate the claims that his father was the village chief. The Tribunal found persuasive his testimony in relation to why his father was chosen to perform this role, given his standing in the community, and that he was coerced into this position and that the motivation of the military regime was that he would be the source of information regarding the KIA and the Kachin community. The applicant's testimony was persuasive in relation to his father's situation, being spontaneous, forthright, and providing corroborating detail.
55. The Tribunal is also satisfied that that the applicant's father was arrested and died in custody, and that the rest of his family have been detained. His testimony was spontaneous, forthright and consistent with the written statements made by him in support of these claims, and his testimony was emotional, and he displayed the demeanour appropriate to the gravity of the events claimed.
56. The Tribunal had some serious concerns regarding the plausibility of the applicant's claims relating to his own role in relaying of information on troop movements to the KIA. The applicant was closely questioned on what specific information he and his father provided to the KIA. His responses were somewhat vague and unpersuasive in relation to the practical relaying of information to the KIA and the content of the information provided. Further, the Tribunal noted that the applicant had spent only between 10 months and a year in Burma in the last five years, and that his time in Burma which form the basis of his claim in relation to his role as a KIA informer was quite limited. The Tribunal also had concerns over the applicant's claims that the KIA would visit his home with the frequency claimed despite a significant Burmese military presence in his village. Despite these concerns, however, the Tribunal is prepared to extend to the applicant the benefit of the doubt regarding his own activities on reporting troop movements to the KIA.
57. The applicant gave credible testimony in relation to his motivation for his support of the KIA, and his involvement in the demonstration was motivated by his opposition to the persecution of the Kachin people, and his support of the KIA. He testified regarding human rights abuses in Burma. The Tribunal finds that the applicant's activities in Australia and genuine political beliefs as expressed in his [participation] in a recent demonstration in Canberra, as depicted in photographic evidence before the Tribunal and his activities in fundraising in support of Kachin refugees and other involvement in the Kachin community, including the upcoming Kachin Global Day of Action are genuine, and not motivated by a desire to strengthen his claims for protection
58. Based on the information from external sources referred to above, the Tribunal finds that the applicant is at risk of serious harm by the authorities in Burma, for reasons of his political opinion. The documentary evidence indicates that dissent is not tolerated in Burma and opponents of the regime are subjected to interrogation, arbitrary detention and torture at the hands of the authorities in Burma. Having accepted the claims made by the applicant regarding the arrest of his father and death in custody, and the detention of members of his family for reasons of political opinion.
59. Accordingly, the Tribunal finds that there is a real chance that the applicant would face arrest, interrogation, torture for reasons of his political opinion now or in the reasonably foreseeable future and that his fear of persecution in Burma is well-founded.

CONCLUSIONS

60. 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

61. 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.