

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 74979

AT AUCKLAND

<u>Before:</u>	K B F Hastie (Chairperson) A N Molloy (Member)
<u>Counsel for the Appellant:</u>	Heval Hylan
<u>Appearing for the NZIS:</u>	No Appearance
<u>Date of Hearing:</u>	19 April 2004
<u>Date of Decision:</u>	25 May 2004

DECISION DELIVERED BY A N MOLLOY

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of the Republic of Myanmar (Burma).

INTRODUCTION

[2] The appellant is a single male of Kachin ethnicity, from the state of Kachin. He is Christian. He arrived in New Zealand on 11 September 1999, and remained here under a succession of permits allowing him to study, the last of which expired on 28 February 2003. The appellant instructed a solicitor with a view to obtaining refugee status shortly before that date.

[3] After interviewing the appellant, the RSB issued a decision declining his application on 25 November 2003. He appeals against that decision.

[4] During the hearing it became apparent that the appellant was in possession of material that was potentially relevant to his claim, which had not been translated due to the lack of Kachin translators in New Zealand. Counsel was provided with

the name of one person who had provided such services to the Authority in the past, but was unable to make contact with him. With the agreement of the Authority, the additional material was then translated by an acquaintance of the appellant. While not entirely satisfactory, this is not the fault of the appellant or his advisers. That material has been taken into consideration for the purposes of this decision, along with the written submissions filed by counsel in advance of the hearing.

THE APPELLANT'S CASE

[5] What follows is a summary of the evidence given by the appellant at the hearing. Its credibility will be evaluated subsequently.

[6] The state of Burma has been subjected to a succession of internal conflicts almost since its inception in 1948. Much of this conflict has involved the desire of the Kachin people for independence. The process by which the state came into existence encompassed certain undertakings to the Kachin people. It was agreed that if those undertakings had not been met within 10 years, that a separate Kachin state would be given independence. Despite the failure to make good on those matters, the regime in power at the end of that period reneged on the promise of independence, giving rise to continuing grievances.

[7] The ongoing conflict has etched its mark upon the appellant's family, many of whom have supported the Kachin Independence Army (KIA) in its struggle on behalf of Kachin rights. The appellant has lost his father, two siblings and one brother-in-law in violent deaths attributable to various conflicts. One brother died when the appellant was a young boy. The appellant's mother was subsequently imprisoned for two years for attending his funeral, because Kachin people were not permitted to be in the area where the funeral took place.

[8] General elections were held throughout the country in 1990. The National League of Democracy (NLD) won the popular vote, however it was prevented from forming a government by the military, which assumed power through force.

[9] Ongoing tensions in the state of Kachin eased in 1994 when a ceasefire was negotiated between the KIA and the military regime. Tertiary institutions re-opened shortly afterwards and the appellant enrolled in a degree course at a

University. Before long he became involved with the Kachin Student Organisation (KSO) on campus. The KSO aimed to promote Kachin literature and culture, and to support Kachin students. One of the appellant's initial tasks was to create a database of Kachin students at the University. This gradually expanded to encompass college students as well.

[10] His zeal and talent for organising brought him some degree of prominence within the KSO and he was elected secretary for the years 1995 and 1996. In 1995 he also joined the Student Union, which was interested in the welfare of students in general, not just those of Kachin ethnicity.

[11] At the end of 1996 three students were detained by the military for talking about political affairs in a public restaurant. The appellant became involved in a series of protests following their arrest and disappearance. The protests lasted for seven days.

[12] When the protests ended, 30 students who had lead the protests were themselves apprehended by the military. The appellant was one of those detained. He was taken to a military camp, where he was beaten and questioned. His release was secured after a week through the intervention of S, a leader of the Baptist Convention of Myanmar. S had played a prominent role in the negotiation of a ceasefire between the KIA and the military regime in 1994, and therefore carried some weight with the regime.

[13] One of the appellant's uncles provided advice and financial assistance to the KSO from time to time. The volatile political situation in 1996 led the uncle to advise the KSO to re-brand itself as the Kachin Literature and Cultural Group (KLCG).

[14] Before being released in 1996, the appellant had to sign a written undertaking by which he promised not to participate in any further political activities. He did not abide by that undertaking. Despite signing that pledge, the appellant was soon appointed the editor of a magazine published annually by the KLCG between 1997 and 1999. The Authority was provided with a copy of the first edition, published in July 1997. The appellant is listed as one of the editors. He contributed articles both under a pseudonym and under his own name.

[15] Before the magazine could be published the appellant had to apply to the

authorities for permission to register the magazine. He and two other editors provided their names and addresses to the relevant administrative body. In order to obtain registration, they had to submit for official approval, draft copies of articles intended for publication.

[16] Because the magazine was to be published in Kachin, the draft articles were translated into Burmese so that the censors could determine whether they contained any subversive material that needed to be excised before publication. The versions provided by the appellant and his fellow editors were sanitised. Once these were approved for publication, the real versions were published in Kachin, complete with the material which had been hidden from official view.

[17] The appellant claimed that the articles contained information which would not have met with approval by the authorities, who frowned upon any content of an historical nature or any comment of a political nature. Articles published under his name and under his editorial control bore all of these hallmarks. This was to cause problems for him and his fellow editors at a later date.

[18] Following the publication of the first edition in July 1997, the appellant stood down as editor. He took responsibility for publishing and distributing subsequent editions of the magazine around various towns and high school campuses throughout the Kachin state. He estimates that about 3,000 copies of the magazine were sold and distributed each year.

[19] In mid 1999 the military authorities detained a KIA member in the north of Myanmar. He had in his possession a copy of the magazine published in July 1997. Some of the military in that location were able to speak and read Kachin, and a brief perusal of the magazine apparently brought its true content to light.

[20] In July 1999, the appellant learned that members of the authorities had searched his home looking for him. They spoke to his sister. Their motivation was derived from the content of the magazine. The other editors, who are also named at the front of the publication, were also the subject of official interest at that time. They fled. The appellant has lost contact with them, but has subsequently learned the fate of one of them, as will be disclosed below.

[21] With financial assistance from his uncle and help arranged through a cousin, the appellant managed to get a forged exit permit and to obtain a passage

out of Myanmar to New Zealand. He was granted a permit which enabled him to study in New Zealand, and completed a course at a bible college here earlier this year.

[22] The authorities continued to show some interest in the appellant after his departure. He learned from his sister that they came in search of him in 2001 and again in February 2003. It was around that time that he also learned of the capture of X, one of his fellow editors. X has been sentenced to a term of 15 years imprisonment, on the basis of his written contribution to the magazine.

[23] When he learnt of X's fate, the appellant considered his position. At the time that he came to New Zealand, he believed that he was doing so as a temporary measure in order to await a safe time to return. In light of the news from home, and the fact that his course was coming to an end, he reached the decision that there was simply no reasonable prospect that the regime would change in Myanmar in the near future. He also believed that his life and liberty might be under threat were he to return to Myanmar.

[24] He therefore sought legal advice for the first time. Prior to doing so, he had not contemplated obtaining refugee status. After receiving advice, he forwarded his application, believing that it was his only remaining option.

[25] The appellant believes that if he were to return to Myanmar he would be arrested and imprisoned for his expression of a political opinion which was sympathetic to the democratic rights of his fellow Kachin ethnic group and which was critical of the ruling regime in Myanmar.

THE ISSUES

[26] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

"... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[27] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the

principal issues are:

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

ASSESSMENT OF THE APPELLANT'S CASE

CREDIBILITY

[28] The appellant gave evidence in an articulate and spontaneous manner. His answers were frequently punctuated with unsolicited detail. His evidence was consistent with the version of events which he had previously advanced and contained no inherently implausible claims such as to impugn his credibility. He also produced documentary evidence to support his claim, in the form of the magazine which he had edited. Finally, his evidence was consistent with country information available to the Authority. While there were aspects of the appellant's claim which created the impression of convenient good fortune, that is not of itself sufficient to undermine its credibility. The appellant is afforded the benefit of any doubt. Accordingly, the Authority accepts his evidence in its entirety.

BACKGROUND COUNTRY INFORMATION

[29] Myanmar has been described as "one of the most ethnically diverse and strife-torn centres in Asia, having faced violent ethnic conflict since independence in 1948", International Crisis Group, *Asia Report No 78*, "Myanmar: Sanctions, engagement or another way forward?" (26 April 2004) p12 (the ICG report). The report continues:

"Over the intervening decades, every significant ethnic group has taken up arms against the central government, at the cost of many hundreds of thousands of lives and incalculable damage to security and development."

[30] According to the United States Department of State *Country Reports on Human Rights Practices 2003: Burma*, 25 February 2004 (the DOS report) Burma is ruled by a "highly authoritarian military regime". That regime has presided in one or another guise since it overthrew the extant government in 1962. The refusal to recognise democratic rights survived the parliamentary election of 1990,

in which 80% of seats contested were won by pro-democratic parties.

[31] According to the ICG report, while the uprising in 1988 and the subsequent election result in 1990 had demonstrated the degree of popular dissatisfaction with military rule, this has not manifested in significant political pressure on the military regime (p11).

[32] In 1997 the military regime re-branded itself the “State Peace and Development Council” (SPDC). It rules by decree. There is no independent judiciary and military control prevails. Members of security forces commit serious human rights abuses with impunity and arrests and detention for expressing dissenting political views occur often; the DOS report.

[33] The DOS report estimated that some 1,300 political prisoners were being held in prison by the end of 2003, a figure broadly echoed by Amnesty International in its press release “Myanmar: Limited human rights improvements – serious concerns persist” AI Index: ASA 16/013/2003 (1 April 2003). The DOS report also states, at paragraph 1 b, that;

“There are laws that prohibit torture; however, members of the security forces reportedly tortured, beat, and otherwise abused prisoners, detainees, and other citizens. They routinely subjected detainees to harsh interrogation techniques designed to intimidate and disorient. There were reports in past years that prisoners were forced to squat or assume stressful, uncomfortable, or painful positions for lengthy periods.”

[34] The situation took another turn on 30 May 2003 when government affiliated forces;

“...attacked an NLD convoy led by party leader Aung San Suu Kyi, leaving several hundred NLD members and pro-democracy supporters missing, under arrest, wounded, raped or dead. Following the attack, Government authorities detained Aung San Suu Kyi, other NLD party officials, and eye witnesses to the attack. ... The Government subsequently banned all NLD political activities, closed down approximately 100 recently reopened NLD offices, detained the entire 9-member NLD Central Executive Committee, and closely monitored the activities of other political parties throughout the country.”

DOS report introduction.

[35] The DOS report also contains the following extract:

“d. Arbitrary Arrest, Detention, or Exile

OCMI officers are responsible for arresting persons suspected of "political crimes" that threaten or could undermine the Government. Upon arrest, OCMI officers, or in some cases police officers, place a hood on the suspect and take him to an

OCMI regional interrogation center. OCMI officers interrogate the arrested person for a period ranging from hours to months and can charge the person with a crime at any time during the interrogation. ...

The Government continued to arrest and detain citizens arbitrarily.”

[36] It is also clear that the government has both the desire and the ability to restrict freedom of speech and freedom of the press. The DOS report describes its performance in these areas as “severe and systematic”. It continues, at Section 2a:

“The Government continued to arrest, detain, convict, and imprison citizens for expressing political opinions critical of the Government, and for distributing or possessing publications in which opposition opinions were expressed.”

[37] The government owns and controls daily newspapers and domestic radio and television broadcasting facilities and subjects publications to pre-publication censorship. Even content of an obliquely political nature is circumscribed. For example, according to the DOS report, five editors of a sports journal were arrested for publishing articles about corruption in local sports. Two of those editors were subsequently charged and, in November 2003, one of them was sentenced to death.

[38] The appellant’s account must be assessed against this general background.

[39] The Authority has already found that there is no basis upon which it can disbelieve the appellant’s account. Accordingly, we accept that the appellant came to the attention of the authorities in 1996 as a defender of free speech. He was detained because of this, and signed a written undertaking promising to refrain from further political activities. He has subsequently been identified as the editor of a magazine which contains political content.

[40] The Authority asked for selected extracts of that magazine to be translated. We have read those translations. While hardly vitriolic, the extracts are critical of the regime, and of the impact of the regime’s policies upon the citizens of Myanmar. This material is likely to be viewed as subversive by the regime in power in Myanmar.

[41] There are potentially aggravating aspects of the appellant’s predicament. First, it is possible that the authorities are aware that the appellant’s involvement in the publication of this material is in breach of the written undertaking which he provided in 1996. It is also possible that they are aware that the permission to

register this magazine was obtained by providing artfully edited versions of the text which was ultimately published. The Authority is satisfied that, even in the absence of those aggravating factors, this material is likely to be viewed by the regime as subversive in its own right.

[42] The appellant left Myanmar in order to avoid detention because of his involvement in the publication of that material. The authorities have maintained an ongoing interest in his whereabouts since his departure. Finally, the authorities have apprehended other co-editors of his, one of whom has been sentenced to a significant period of imprisonment.

[43] The appellant fears that if he were to return to Myanmar, he would be apprehended and subjected to a fate identical or similar to his fellow editor. The Authority finds that there is a real chance that this would occur. The treatment to which he would be subjected in detention would amount to serious harm, tantamount to persecution.

[44] Turning to the principal issues identified, the Authority finds that, objectively, on the facts as found, there is a real chance that the appellant would be persecuted if returned to Myanmar. That persecution would be based upon his political opinion. It is therefore within the ambit of the Refugee Convention. Both issues are accordingly answered in the affirmative.

CONCLUSION

[45] For these reasons, the Authority finds that the appellant is a refugee within the meaning of Article 1A (2) of the Refugee Convention. Refugee status is granted. This appeal is allowed.

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A N Molloy
Member