

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76374

AT WELLINGTON

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| <u>Before:</u> | B L Burson (Member) |
| <u>Counsel for the Appellant:</u> | J Petris |
| <u>Appearing for the Department of Labour:</u> | No Appearance |
| <u>Dates of Hearing:</u> | 28 and 29 September 2009 |
| <u>Date of Decision:</u> | 28 October 2009 |

DECISION

[1] This is an appeal against the decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL) declining the grant of refugee status to the appellant, a national of Burma.

INTRODUCTION

[2] The appellant arrived in New Zealand in November 2008. She claimed refugee status in January 2009. She was interviewed by the RSB on 26 March 2009 which, by decision dated 3 June 2009, declined her claim. The appellant duly appealed to the Authority.

[3] The appellant claims to have a well-founded fear of being persecuted as a result of the government becoming aware of her involvement in facilitating meetings between foreign individuals and leading members of the Burmese opposition. The central issue to be determined in this case is whether the appellant's fears are well-founded.

[4] What follows is a summary of the appellant's evidence given in support of her case. An assessment follows thereafter.

THE APPELLANT'S CASE

[5] The appellant was born in the late 1960s in a rural town called Z. Her parents, like the rest of the town's population, were peasant farmers. The appellant has three other siblings. Two of them remain in Z with her family and assist on the family farm. Her third sibling, a sister is studying at a university in another town. The appellant completed her primary and secondary schooling in the Z area.

[6] In 1986, the appellant gave birth to a son and afterwards travelled to Rangoon in order to learn a particular trade that she was interested in. The appellant served an apprenticeship for approximately one and a half years learning this particular trade, on completion of which she opened her own business. She has worked as a self-employed businesswoman until her departure for New Zealand in 2008. During her time as a businesswoman in Rangoon she also took on students and apprentices and gave them a similar training to that which she had.

[7] In the course of her business, the appellant came into contact with students at the University in Rangoon. As a result of her interaction with these students she became a supporter of the pro-democracy movement that was gathering pace in Burma in the late 1980s. The appellant took part in large-scale demonstrations held outside the University of Rangoon in August 1988. The protests went on for a number of days and were attended by many people. Each day, the security forces forcibly dispersed the protestors only for the crowd to re-gather later in that day or the following day. During this time, the appellant witnessed a number of protestors being shot and arrested. Although she herself managed to escape, by such tactics, the demonstration was eventually suppressed.

[8] Between 1988 and 1990 the appellant attended a number of pro-democracy demonstrations in Rangoon which were also disrupted by the security forces. She was never arrested but she became increasingly scared of being arrested and stopped during her participation in public protests in 1990.

[9] During the late 1980s the appellant resided near a monastery. The building in which the appellant's home was located contained a telephone that was for public use including for use by the monks in the monastery. As Buddhists, Burmese people were obliged to provide the monks with their food and other daily needs. From time to time a particular monk called MM came to the appellant's building and asked for her assistance in calling his brother who was living abroad

at the time. The appellant learnt from MM that the brother had been a dissident and had to flee the authorities in Burma.

[10] Over the course of the next two years the appellant assisted MM in this way on a number of occasions. During their conversations it became clear to MM's brother, AA, with whom the appellant had to speak, that the nature of the appellant's business was such that she had contact with university students and figures associated with members of the military regime. Beginning in approximately 1990, AA began asking the appellant periodically for updates as to what she was being told by her customers in relation to the situation in Burma. The appellant carried on providing this information to AA throughout her time in Burma.

[11] In approximately 1998, AA asked the appellant to undertake other activity for him in Burma. In particular, AA requested the appellant meet a foreign national called BB at the airport and take her to the office of a well-known political opposition figure in Burma. AA counselled the appellant not to drive directly outside the place of the meeting but rather to drive to the immediate vicinity and point out the location to BB to avoid being openly detected by the security forces who may have had the premises under surveillance. The appellant then waited for BB to return to a spot where they had pre-arranged to meet and would then take her sightseeing.

[12] Over the course of the next 10 years, BB visited Burma annually staying for between one or two months. On each occasion, AA requested the appellant drive BB to meetings with prominent dissidents including Daw Aung San Suu Kyi, the leader of the National League for Democracy (NLD), Ko Nyeing Chan, and Ko Thu Ra, aka Zarganar, a well-known comedian and critic of the regime who, in the course of her business, the appellant had come to know. The appellant herself was never part of these meetings and she did not meet the dissidents herself.

[13] Apart from BB, the appellant was also requested to undertake similar activities in respect of five or six other foreign people who travelled to Burma.

[14] In 2000, AA requested the appellant take BB to a particular area of Burma where a foreign company was engaged in mining activity. This was causing massive environmental degradation and AA wanted to get some data in relation to this. BB, MM, and the appellant drove to the area. As the military authorities would not allow BB as a foreigner to enter this area, BB remained at a monastery and the appellant and MM travelled to the area in which the mining operation was

undertaken. MM took video footage of the environmental degradation and the appellant collected soil and water samples. These were then handed to BB at the monastery. She does not know what happened to them but she understood that BB took them back to her country when she left Burma.

[15] The appellant had begun to contemplate travelling to Thailand for furthering her business. She mentioned this to MM who in turn told AA. AA contacted the appellant and suggested that while she was there she meet with a number of families who had fled to Thailand with him. She did so when she travelled there in 2003 and tried to gain donations for her work with an orphanage which she had begun to help by providing food and other aid as best she could.

[16] A month following her return from Thailand, some security officers came to her house. They informed her that she must go with them to the security offices in Rangoon. Once there, the appellant was placed in a cell with a number of other women. She was not given any other information about the reason for her detention. After three or four days of being in the cell, the appellant was taken for questioning. The officer began by asking where she originated from. When she told him she was from Z, the officer asked for her parents' details. Upon giving her parents' details, the officer told her that she was lucky for not getting into more trouble and that because he was a friend of her father, he would see that she was released. The appellant was released a few days later. The appellant's release took some time because the authorities notified her parents of her detention and that somebody had to arrange for her release. However, her parents were in Z and could not come to Rangoon. They therefore contacted her son and informed him of the position. The son met with MM and together they went to the police station. Both the appellant's son and MM had to sign a piece of paper and the appellant was released. The appellant was not mistreated in detention.

[17] Approximately a month later two security officers came to the appellant's business to check up on her. They demanded some money and left. After the appellant's release from detention in 2003 she began worrying about her son's safety. He was now at university attending a commerce course. Some of his friends were politically active and had begun to be arrested. When she herself was arrested, she began feeling increasingly that it might be better for him to be sent overseas once he completed his studies. Her son completed his studies in 2006 and she therefore arranged for him to travel to Malaysia for work to ensure that he was not arrested as a result of his friends' activities.

[18] Until 2007 the appellant understood from AA that he was working for a particular non-governmental organisation (NGO) and that the various foreign nationals being sent to Burma were associated with this group. However, beginning in around about 2007 she understood that AA was now involved with a political party called the ABC Party. This came about because at this time the appellant began asking AA whether the NGO he was involved with would support her work for the orphanage. He explained to her that in order to do so, she should apply to become a member of his organisation which was called the ABC Party. He sent her an application form and she completed this. The appellant herself was not openly concerned about becoming a member of this, let alone being a leader of it, it was simply a device to enable her to secure funding to enable her work with the orphans.

[19] In 2007 AA began asking her to assist with the monk-led protests that had erupted in Burma in around September 2007. He requested that she go to a particular house at the address which he gave her and exchange money on the black market. She was then to take the money to the monastery near to her home and give it to MM. The money was to be used for sustenance for the monks and transportation out of Burma if they needed it. The appellant did this on two occasions. On the second occasion MM told her that it was now getting very dangerous for them because a monk at the monastery had been shot by the security forces. On MM's advice, the appellant now ceased delivering money to the monastery.

[20] On 2-3 May 2008 Burma was hit by Tropical Cyclone Nargis, which, along with an associated storm surge, resulted in substantial injury and loss of life, destruction to property and infrastructure and causing internal population displacement. This gave rise to a need for urgent humanitarian intervention by international organisations and the wider NGO community – see United Nations Office for the Coordination of Humanitarian Affairs (OCHA) *Myanmar: Cyclone Nargis OCHA Situation Report No 7* (10 May 2008). In the immediate aftermath, AA contacted the appellant and informed her that the ABC Party wished to get involved in disaster-relief work. He requested that the appellant go to a black market currency trader at a specific address and obtain funds the ABC Party had sent to Burma. The appellant did so and with this money bought food rations and other materials necessary for disaster relief. She then arranged for this to be transported down into the region most affected by the cyclone. She distributed food aid and provided funding to persons who had been orphaned as a result of the cyclone.

[21] In approximately 2007 BB, who was now in New Zealand, began suggesting to the appellant that she seek a visa to come to New Zealand in order to study English and take other courses. It took some years for the appellant to obtain information necessary for her to be given a New Zealand visa. Eventually this was issued and she arrived in New Zealand in late 2008.

[22] Once in New Zealand, BB offered the appellant the use of a laptop computer and set it up for her so that she could talk to her sister using Google Talk or "Gtalk". Whilst BB had been in Burma she had informed the appellant and her sister on how to use Gtalk and told the appellant that she did not need to use a telephone to communicate. She could do so via the Internet and had her set up an account with Gtalk. The appellant used this from time to time to communicate with BB.

[23] Some two weeks after the appellant arrived in New Zealand the appellant managed to get in contact with her sister via Gtalk. The pair exchanged pleasantries and information about the family. Her sister did not mention anything specific about Burma apart from saying the situation was generally still bad.

[24] A few days after that BB showed the appellant an Internet copy of an article in the *Irrawaddy News* which made the appellant quite upset. The article referred to the sentencing of Zarganar, who had been detained, to 50 or 60 years' imprisonment. The article also mentioned the detention and sentencing, to many years' imprisonment, of other well-known dissidents with whom BB had met whilst in Burma with the assistance of the appellant. A person who was also a friend of her son was also mentioned in this article.

[25] BB indicated to the appellant that there was now a problem with her continuing to act as her sponsor. She said she could no longer take any responsibility for her and that she would assist her if necessary to return to Burma. BB then took the appellant to a backpacker's hostel in Wellington from where she received advice about claiming refugee status.

[26] In the week after she was taken to the refugee hostel the appellant spent quite some time trying to contact her sister via Gtalk. Approximately a week later she managed to successfully contact her sister using this means of communication. In this conversation her sister told her that the appellant's business assistant, who was looking after the business in her absence on a day-to-day basis, had decided to close the business. The appellant had given her sister instructions to check on the business on a regular basis while she was away

and undertake such chores as collecting money. During one of these visits the assistant had informed the sister that the authorities had come to the appellant's business and told the assistant that they wished to see the appellant and the assistant was to inform the appellant immediately upon her return. The appellant's sister also begged the appellant not to return to Burma because the government had begun to arrest people who had assisted with the disaster relief effort in the wake of Cyclone Nargis.

Documents and submissions

[27] On 13 August 2009 the Authority wrote to Mr Petris enquiring as to whether or not he proposed to call BB as a witness. On 25 August 2009 the Authority received a letter from Mr Petris dated 24 August 2009 advising that it was not proposed to call BB as a witness on behalf of the appellant. On 9 September 2009 the Authority received a further letter from Mr Petris making various submissions in relation to the appeal. On the morning of 28 September 2009 Mr Petris submitted two pages, namely pages 1 and 16 of the Internet version of the United States Department of State *Country Reports on Human Rights Practices 2007: Burma* (11 March 2008). At the conclusion of the appeal Mr Petris made final submissions.

[28] The RSB file contains a number of photographs relating to both the appellant's and BB's activities in Burma, in particular pictures of :

- (a) the appellant and BB together in both 2006 and 2007;
- (b) the appellant and BB with MM in 2000;
- (c) BB in a meeting with a number of Burmese nationals including one associated with Burmese dissidents;
- (d) the appellant working in an orphanage in which the records of donations made by the ABC Party are visible;
- (e) the appellant distributing food aid in the wake of Cyclone Nargis. The food aid is clearly labelled with the ABC Party's name;
- (f) other aid sent to Burma in the wake of Cyclone Nargis also labelled with the ABC Party's name;

- (g) a group of children in an orphanage in the aftermath of Cyclone Nargis in which the ABC Party's name is identifiable;

[29] On 16 September 2009 the Authority received a letter from the ABC Party. In this letter the secretary confirmed that the appellant had been an active member of the party and a liaison person inside Burma. He then confirmed the appellant had participated in and coordinated the ABC Party's humanitarian work inside Burma following Cyclone Nargis. The letter also confirmed that the appellant had been involved in arranging and connecting prominent opposition leaders and writers with business scholars and activists from NGOs. The letter confirms that the appellant took an active role in collecting data and photography of a Canadian mining company's "un-ethical business activities" inside Burma.

THE ISSUES

[30] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[31] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, does the appellant have a well-founded fear of being persecuted?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[32] The appellant's oral evidence before the Authority was largely consistent with that which she gave in her written statement and in RSB interviews. While some discrepancies arose in the hearing, these were all satisfactorily explained by the appellant. Having observed the appellant over one and a half days of detailed

examination, the Authority finds that her demeanour and presentation is consistent with someone making a genuine claim and recalling genuine events. Her oral evidence is supported by credible documentary evidence in the form of the photographs and the ABC Party letter.

[33] While BB's absence as a witness is unusual given the centrality of her own activity to the appellant's claim, the Authority is satisfied no adverse finding can be made because of the failure of the appellant to call her. It is clear from the file that BB's concern about not appearing as a witness appears to relate to confidentiality issues. This is recorded in a file note made by the RSB which states that BB had agreed to give a statement to the RSB in support of the appellant's case and the appellant signed a privacy waiver to facilitate this. This willingness, at least initially, by BB points to the underlying truth of the appellant's claim.

[34] Weighing these things cumulatively, the Authority finds the appellant is a credible witness and her account is accepted in its entirety.

Objectively, on the facts as found, does the appellant have a well-founded fear of being persecuted?

Country information

[35] Country information establishes that, as the appellant has stated, there have been arrests and jailing for lengthy periods of persons involved in co-ordinating disaster-relief work in the wake of Cyclone Nargis (17 years' imprisonment), for reporting on the plight of victims or, in some cases, for simply burying the dead (2-4 years' imprisonment) – see J Zeitlyn "The cyclone's new victims" *The Guardian* (18 March 2009); Amnesty International press release *Cyclone Nargis: one year on, 21 people imprisoned for helping the victims* (4 May 2009). According to Amnesty International:

"In the aftermath of the cyclone, Burmese people from all walks of life have been working together to distribute aid from private donors in order to rebuild the devastated areas.

"This is an untold story behind the cyclone. At the same time as relief efforts have moved forward, the Myanmar government has penalized people for assisting," said Benjamin Zawacki, Amnesty International's Myanmar specialist. "The authorities should immediately release these 21 people, who are among the over 2,100 political prisoners in Myanmar."

So far 20 people have been sentenced in unfair trials. Six are serving sentences ranging from 10 to 35 years. All of them were arrested for delivering aid to the victims, for reporting on the cyclone, and even for burying the dead. "

[36] The Human Rights Watch Report *Burma's Forgotten Prisoners* (8 August 2009) www.hrw.org/en/node/84740/section/6 accessed 20 October 2009 ("the HRW report") states:

"In June 2008 alone, Human Rights Watch believes that 22 people were arrested for activities related to assisting victims of the cyclone, in many cases because they reached out to the international community or publicly criticized the SPDC's performance. The most prominent of these is renowned Burmese comedian and activist Zargana, but many others, including former political prisoners, used the brief opening of freedom to help their countrymen.

Police arrested journalists Eine Khaing Oo, a 24-year-old reporter for *Eco Vision Journal*, and Kyaw Kyaw Thein, a former editor of *Weekly Journal*, after bringing cyclone survivors to Rangoon and interpreting for them at meetings with the ICRC and the United Nations Development Program (UNDP). Eine Khaing Oo will spend two years in prison and Kyaw Kyaw Thein received a seven-year prison term for trying to bring the voices of cyclone victims to the international community.

[37] The arrest and detention of Zarganar, the activist comedian with whom the appellant was acquainted and to whom she introduced BB, is commented on in other reports which vary as to his length of imprisonment. According to the Amnesty International press release he has been sentenced to 35 years' imprisonment for criticising the regime's relief efforts to foreign media representatives. In contrast the United States Department of State *Country Report on Human Rights practices 2008: Burma* (25 February 2009) ("the 2009 DOS report") indicates he has been sentenced to 59 years' imprisonment. The HRW report states that while Zarganar was initially sentenced to 59 years' imprisonment on 21 November 2008, this was reduced to 35 years on appeal in February 2009. Whether it is 35 or 59 years is immaterial – the significant point for present purposes is that he has been jailed for a lengthy period for peacefully expressing his opinion.

[38] Country information continues to show Burma as being a country with an extremely poor human rights record – see the 2009 DOS report at s1a:

"Burma, with an estimated population of 54 million, is ruled by a highly authoritarian military regime dominated by the majority ethnic Burman group. The State Peace and Development Council (SPDC), led by Senior General Than Shwe, was the country's de facto government. Military officers wielded the ultimate authority at each level of government. In 1990 prodemocracy parties won more than 80 percent of the seats in a general parliamentary election, but the regime continued to ignore the results. The military government controlled the security forces without civilian oversight.

The regime continued to abridge the right of citizens to change their government and committed other severe human rights abuses. Government security forces allowed custodial deaths to occur and committed other extrajudicial killings, disappearances, rape, and torture. The government detained civic activists indefinitely and without charges. In addition regime-sponsored mass-member organizations engaged in harassment, abuse, and detention of human rights and prodemocracy activists. The government abused prisoners and detainees, held

persons in harsh and life-threatening conditions, routinely used incommunicado detention, and imprisoned citizens arbitrarily for political motives. The army continued its attacks on ethnic minority villagers. Aung San Suu Kyi, general secretary of the National League for Democracy (NLD), and NLD Vice-Chairman Tin Oo remained under house arrest. The government routinely infringed on citizens' privacy and restricted freedom of speech, press, assembly, association, religion, and movement. The government did not allow domestic human rights nongovernmental organizations (NGOs) to function independently, and international NGOs encountered a difficult environment. Violence and societal discrimination against women continued, as did recruitment of child soldiers, discrimination against ethnic minorities, and trafficking in persons, particularly of women and girls. Workers' rights remained restricted. Forced labor, including that of children, also persisted. The government took no significant actions to prosecute or punish those responsible for human rights abuses."

[39] Similarly, Human Rights Watch *World Report 2009: Burma* states:

"Burma's already dismal human rights record worsened following the devastation of cyclone Nargis in early May 2008. The ruling State Peace and Development Council (SPDC) blocked international assistance while pushing through a constitutional referendum in which basic freedoms were denied. The ruling junta systematically denies citizens basic freedoms, including freedom of expression, association, and assembly. It regularly imprisons political activists and human rights defenders; in 2008 the number of political prisoners nearly doubled to more than 2,150. "

Application to the appellant's case

[40] Having regard to the country information, the Authority finds the appellant's fear is well-founded. The regime has shown a recent interest in the appellant. She will be required to report to the authorities upon her return and, if she does not, there is a real chance she will be arrested. The appellant was the in-country co-ordinator for the ABC Party's disaster-relief efforts in the wake of Cyclone Nargis. From the photographic evidence on the file, it is clear that the appellant's involvement in this disaster-relief work was done openly. Her role would therefore be known to the local population and now very likely known to the regime. Given that the regime's sensitivity to at least some disaster-relief work is demonstrably established, it is extremely plausible that the interest in her is associated with this activity.

[41] The country information cited above indicates that the appellant faces a real chance of being sentenced to a substantial term of imprisonment as a result of an unfair trial process and that any imprisonment carries with it an attendant risk of physical mistreatment. By any yardstick, this amounts to a well-founded fear of being persecuted. There can be no doubt that should the Burmese authorities know, or learn by interrogation, of her involvement with the pro-democracy revolution by the monks, the risk she faces of being subjected to very serious harm will only increase. While it is true that the appellant was able to be released

from her period of previous detention after a week and without suffering physical harm through the fortuitous intervention of the officer who knew her father, it is unlikely that the appellant will be so fortunate again.

[42] For these reasons the Authority has no doubt whatsoever that this appellant does have a well-founded fear of being persecuted if returned to Burma. The first principal issue is answered in the affirmative.

Is there a nexus to a Convention ground?

[43] The appellant has told the Authority that she has been motivated in her activities facilitating meetings between BB and leading Burmese dissidents as well as her other activity by the fact she is against the regime.

[44] As for her disaster-relief work, although sparked by an entirely non-political naturally occurring event – a tropical cyclone – the disaster relief effort in response became highly politicised. As noted in the Human Rights Watch report (at p 14):

“In early May 2008 Cyclone Nargis struck lower Burma, leaving more than 150,000 people dead or missing. The overwhelming storm and the massive tidal surges devastated coastal regions, villages, towns, and the former capital Rangoon, directly affecting over 2.4 million people.

The military government’s initial response was to block and delay aid delivery to the affected Irrawaddy Delta during the crucial first weeks after the cyclone. An untold number of people died and suffered needlessly as the SPDC treated the cyclone as a national security problem instead of a natural disaster, demonstrating the shocking disregard they hold for the welfare of their own people. This was partly explained by the SPDC’s pushing ahead with its constitutional referendum, brutally prepared through intimidation and vote rigging for months, and held in most parts of the country only a week after the cyclone. The government claimed a 98 percent turnout and said that more than 92 percent had voted in favor of the new constitution.

In the crucial first weeks following the disaster, international assistance and technological expertise built up in Rangoon and neighboring Thailand, but were only slowly released following the visit of UN Secretary-General Ban Ki-moon in late May.

In the absence of government assistance and responsibility, Burmese civil society stepped in. In the thousands, individuals and communities raised money, collected supplies, and traveled to affected parts of the delta and the Rangoon area, helping shattered villages. Burmese community aid workers, private organizations, and citizens working for international organizations helped their people, often against roadblocks, obstructions, and impediments erected by the authorities.

Some observers suggested that the resurgence of civil society in the wake of the cyclone showed an opening of humanitarian space inside Burma. Yet for Burmese who attempted relief efforts independent of the authorities or spoke openly about their frustrations with the government, the threat of arrest or intimidation was all too real and has continued to the present.

...

In a bizarre public relations exercise, the SPDC tried to tell the world that Burmese people “are not beggars,” and therefore did not need handouts. In one infamous line, the state-run media claimed that the Burmese didn’t need “foreign chocolate bars” to survive and that “large edible frogs are abundant” for survivors to eat. Burma’s military ruler, General Than Shwe, toured makeshift camps of survivors handing out DVD players to those without electricity, even as the government bargained with the international community over the costs of flying rights for helicopters, and while British, US, and French military vessels loaded with supplies waited in vain off Burma’s coast.”

[45] That the regime treated the disaster first and foremost as a national security issue transformed the arena within which the appellant’s (and others) disaster-relief was carried out from an essentially humanitarian space into a highly-politicised space. This, combined with the international and domestic criticism of the lack of an effective response by the regime to the natural disaster, means the regime will in all probability impute a negative political opinion to the appellant for her independent facilitation of disaster-relief activity as it has done with others. This is sufficient to engage the protection of the Refugee Convention. The second principal issue is also answered in the affirmative.

CONCLUSION

[46] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. At this point the Authority notes that Mr Petris advises that legal aid has been denied for this appeal on the basis the appeal had no prospects of success. This is surprising given the credible documentary evidence on the file in the form of photographs showing the appellant with MM and BB, photographs showing the appellant engaging in disaster-relief work as she has claimed before the RSB, and the demonstrably poor human rights record in Burma. Nevertheless, the Authority has no doubt whatsoever that her claim to refugee status is genuine and the risk to her all too real. Refugee status is granted. The appeal is allowed.

“B L Burson”

B L Burson
Member