

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 76286**

**AT AUCKLAND**

**Before:** J Baddeley (Member)

**Counsel for the Appellant:** D Mansouri-Rad

**Appearing for the Department of Labour:** No Appearance

**Date of Hearing:** 15 & 16 December 2008

**Date of Decision:** 20 March 2009

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**DECISION**

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[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 Myanmar.

**THE APPELLANT'S CASE**

[2] The following is a summary of the evidence presented by the appellant in support of his appeal. It is assessed later.

[3] The appellant is a 32-year-old citizen of Myanmar. He has lived all his life in Myanmar with his parents. He has a relative, AA, who is studying in New Zealand. AA gave evidence in support of his appeal.

[4] The appellant first became aware of the reality of politics in Myanmar in 1988 when his elder brother and father were involved in the August "8888" uprising. As a consequence of their involvement, his father was forced to leave his government job and his brother disappeared, never to return to his family. In 1991, the appellant joined his high school student union. He and others

distributed pamphlets promoting the National League for Democracy (NLD) to other students and placed them on notice boards.

[5] He began studying at WW Technical Institute in 1995 and joined the ABC, a banned organisation which promoted democracy and supported the aims of the NLD.

[6] In December 1996, he joined a demonstration of several thousand students against the government. He was arrested and then released the next day. He returned to the demonstration and was again arrested and taken, with other students, to an unknown place of detention. After two weeks he was transferred to Insein Jail where he was mistreated and kept in overcrowded, insanitary conditions. He was continuously interrogated about the ABC and the NLD. After eight months he was released upon his parents paying a bribe and signing an undertaking that he would not become involved in politics again. The appellant did not take part in any further public political protests in Myanmar. None took place before his departure in 2007.

[7] The appellant returned to university in December 1999 when the authorities allowed it to re-open. He continued with his degree which he completed in 2002.

[8] His student colleagues who had been involved in the ABC had either left Myanmar for Thailand or did not return to university; effectively, the student protest movement was broken up. He did not attempt to join the NLD which was still functioning, because it was very dangerous to do so.

[9] In 2003, the appellant and some friends from university set up a private library in the home of his friend, XX. They invited students whom they knew at university to join the library. The library was established to broaden the general knowledge of students, particularly their knowledge of conditions outside Myanmar. They provided their own books and purchased others. Eventually there were about 1000 books in the library. The library was not an illegal operation but the authorities were suspicious of such an establishment. In the library they also kept some banned political books which were not on display. To increase the number of banned books, the appellant contacted his friend, YY, who had left Myanmar as a result of the 8888 uprising and was living in Thailand where he had claimed refugee status.

[10] The appellant obtained a Myanmar passport in April 2003. Because he had been imprisoned in 1996, he was unable to obtain legally the police clearance certificate required for a passport. Instead, he used the services of an agent to whom he paid US\$500 for a valid passport containing all his correct personal details. The appellant presumes that the agent used the money to bribe officials. The passport was extended in April 2004, again through the services of the agent. In June 2004, the appellant used this passport to travel to Thailand to meet his friend, YY, who was a member of the ABC which was headquartered in Thailand. He returned to Myanmar in July 2004.

[11] The appellant and YY arranged a system for bringing books banned in Myanmar from Thailand to the library. YY sent an email to the appellant each time books were to be brought to the library and the appellant took delivery of them. The appellant knew that the authorities monitored emails so he frequently changed his email address. He accessed emails only at an internet café because the private internet sites such as G-mail were available there but elsewhere only government-controlled sites were available. The appellant received about 300 books from YY.

[12] In 2005, the authorities began to arrest more political dissidents. The appellant became concerned that he might be arrested because of his work in the library. He had no Citizenship Scrutiny Card which was necessary for internal travel in Myanmar. The authorities had refused to replace his original Citizenship Scrutiny Card which he had lost in 2000. It was very difficult to obtain a Citizenship Scrutiny Card through the use of bribes as he had his passport. He decided that he would try to travel and remain overseas.

[13] Initially, he applied unsuccessfully for a visa to the United Kingdom and then, on the advice of an agent, applied for a visa to New Zealand in 2006 because AA was already in New Zealand studying. The agent assisted him in obtaining false supporting documentation; a police clearance certificate, employment record and references. The appellant travelled to Thailand on his own passport in October 2006 to submit his visa application to the New Zealand Embassy in Bangkok.

[14] On his return to Yangon several days later, the appellant discovered that one of his colleagues who worked at the library had been arrested by the military police. They decided to close the library, in the belief that their arrested colleague

might, under torture, disclose information about the library. They took the banned political books and threw them down a well. The other books remained in the library.

[15] The appellant left home and went to live with a friend who was not involved in any anti-government activity. His friend kept in touch with the appellant's parents and learned that, several weeks after the appellant had left home, his parents were twice visited by military police looking for him. His parents told the police that he had gone to visit relatives outside Yangon. His other colleagues from the library had also left their homes to hide from the authorities.

[16] In January 2007, his friend with whom he was staying and who had been accessing the appellant's email for him, told him that he had received an email from New Zealand granting his visa application. The appellant made contact with his agent who arranged for his departure from Yangon airport. He was instructed to present himself at a particular immigration booth to avoid any possible problems from immigration officials. He followed these instructions and departed without incident.

[17] He arrived in New Zealand in February 2007 intending to apply for refugee status. Two to three months after the appellant's arrival, he tried to find out how to do this by searching the Internet but did not get enough information. In the meantime, he enrolled at a technical institute. He was preoccupied with catching up with his course because he had not arrived until one week into the first semester. He did not ask AA (who was living in the same city) for help because AA's English was not as good as his. He did not think that there was any urgency to apply for refugee status because he had a visa enabling him to remain in New Zealand for a year. He completed his course and passed it in November 2007. He did not, however, make his application for refugee status until April 2008, after he had met a successful refugee claimant from Myanmar in January 2008 who told him how to instruct a lawyer.

[18] The appellant remained in email contact with XX, in whose home the library was located. XX was still in Myanmar and had not been arrested. He did not give any information to the appellant about their other colleagues. In September 2007, the appellant received another email from XX which contained photographs of the demonstrations in Yangon ('the Saffron Revolution'). He later learned from his

friend, YY, in Thailand that all their library friends had been arrested because they had participated in those demonstrations.

[19] The appellant informed YY that he had applied for refugee status in New Zealand. He asked YY to obtain a reference from the ABC in Thailand confirming the appellant's work for the library and his involvement in ABC. YY agreed to do this and the appellant received from YY by email a scanned copy of a reference letter from ZM, the president of the ABC.

[20] After his RSB interview in May 2008, the appellant gave his written consent to the refugee status officer making enquiries of ZM to verify the contents of the reference letter. A reply was received by the refugee status officer from ZM in which ZM denied having written the reference letter or knowing the appellant. The appellant has been unable to contact his friend, YY, for any explanation about the fraudulent reference letter. YY had told the appellant that he was intending to return to Myanmar to help with the cyclone relief there in May 2008. The appellant believes YY is uncontactable in Myanmar

[21] The appellant has not attempted to contact ZM because he thinks he may be a spy for the Myanmar government (although he had previously asked his friend to send him a reference from ZM). The appellant told the Authority that he would never have given his consent to the refugee status officer making enquiries of a Myanmar person (ZM) (rather than a foreigner) and revealing his real name and sending a photograph to him.

[22] Since coming to New Zealand, the appellant has participated in two demonstrations against the Myanmar authorities: one in September 2007 in Aotea Square which was a protest to coincide with the demonstrations in Myanmar and one in August 2008 which was the anniversary of the 8888 demonstrations. On the first occasion, the appellant held a placard saying "Free Aung San Suu Kyi!" and on the second, he took no active role beyond attending the ceremony. He believes that the Myanmar government had spies present on both occasions who would report his attendance. This would result in his arrest on return. However, he does not know anyone who has returned to Myanmar after participating in political protests in New Zealand. He believes that on return, the government will imprison him for a lengthy period. The sentences passed against political dissidents have increased markedly in the past year. He expects that he would die in prison from the harsh conditions.

[23] AA also gave evidence to the Authority. AA recalled the time the appellant was arrested and imprisoned in 1996 for participating in student protests. He was in a weak physical condition when he returned home. AA did not know that the appellant had continued with his political activities and was surprised and upset to hear about this when he applied for refugee status in New Zealand. AA knew that the appellant's parents had warned him against any further political involvement.

[24] AA and the appellant are not close. AA contacts the appellant's parents by email about once a month. AA believes that telephone calls, letters and emails from overseas are monitored by the authorities in Myanmar so AA and the appellant's parents are careful what they say to each other. His parents have not mentioned that they are experiencing any problems from the authorities but have said "Don't let [the appellant] come back; he will know what he has done". AA did not know what was meant by that but imagines that it is related to his political activities. AA did not ask for details because of the monitoring by the Myanmar authorities.

## **THE ISSUES**

[25] 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."

[26] 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**

[27] The Authority accepts that the appellant was arrested in 1996 for his participation in the student demonstration. His description is consistent with country information. However the Authority does not accept that he continued his resistance to the regime in the way he describes or that he fled Myanmar in 2007 to escape the adverse interest of the authorities. The reasons for these findings follow:

- (a) The appellant supplied to the refugee status officer a reference letter from ZM. The letter stated that the appellant had been a member of the ABC since 1995 and that the ABC had sent political books to the library which the appellant and his colleagues had established in Myanmar. The authenticity of this reference was checked by the refugee status officer who first obtained the written consent of the appellant to contact ZM to verify the appellant's membership and work for the ABC.

The reply received from ZM stated that he had not written the reference letter and that the appellant was not known to ZM or his colleagues. When asked to explain this, the appellant told the refugee status officer that he did not know ZM personally, that it was YY who had sent the letter at the appellant's request. The appellant was unable to explain "what is wrong with this letter". When questioned further by the Authority, the appellant said he had been unable to contact YY to obtain an explanation for the fraudulent letter. YY had indicated that he had intended returning to Myanmar to help in the flood relief, the appellant believed that this was the reason that he had lost contact with him. When asked if he had tried to contact ZM himself, the appellant replied that he was too scared to do so because he believed ZM might be a spy for the military regime in Myanmar. By contacting ZM the appellant would be putting himself at risk.

Furthermore he objected to the refugee status officer having sent his photograph and his name to ZM because that would expose him to danger. Had he realised that the refugee status officer was going to contact a Myanmar national (ZM) he would not have agreed to the enquiries being made. Furthermore, the appellant surmised that a reply received from ZM might not be reliable because ZM might not be from the ABC.

The Authority is not persuaded by these explanations. When he gave his consent to the refugee status officer making enquiries of ZM about his ABC

activities, he knew that no such enquiry could be made without his true name being revealed. The fact that the refugee status officer also sent his photograph (for which he had not given written consent) does not expose him to any additional danger. He gave written consent to these enquiries being made at a time when he also had counsel's advice available to him. It would have been known to him that ZM was a Myanmar national. He cannot now pretend that he would have withheld consent for this reason.

The Authority does not accept that the appellant decided not to make any further enquiries of ZM to establish why he had sent the letter denying any knowledge of him and his ABC activities because he now believes ZM may be a spy for the regime. Had he believed that, then he would never have wanted YY to contact ZM for a reference in the first place. The Authority concludes that this is an excuse invented by the appellant to nullify the damaging statements made in ZM's reply and to avoid the probable conclusion that the appellant had never obtained banned books for the students' library. This in turn calls into question the appellant's entire account of his involvement in the establishment of the library and the events which caused him to go into hiding and ultimately flee Myanmar.

- (b) Even assuming that the library existed, the Authority asked the appellant how he knew that the authorities had arrested his colleague in 2006 because of the library or that they had ever discovered the existence of the library given that XX (in whose home the library was located) was not arrested until a year later and then as a result of his participation in the Saffron Revolution demonstrations. The appellant replied that XX had not been arrested previously because he had been in hiding. He conceded that he did not know why their colleague had been earlier arrested in 2006 but speculated that under torture he would have disclosed the existence of the library.
- (c) Despite their having signed an undertaking in 1996 that the appellant would not become involved in politics again, his parents experienced no adverse consequences as a result of his subsequent activities. Their ability to remain free of harassment by the authorities despite their son's continued political involvement casts further doubt on his claimed anti-regime activities.



- (d) After his arrest and imprisonment in 1996 the appellant was unable to travel abroad because he could not get a police clearance. He used an agent to obtain a passport in his own name containing his correct personal details. With this passport he exited Myanmar three times from 2003 to 2007 and entered it twice. His last departure again on his own passport was successfully undertaken although the authorities were actively searching for him after his colleagues' arrests. The Authority acknowledges that corruption is widespread in Myanmar but it should be noted that the current regime strictly controls overseas travel. Refer United States Department of State *Country Reports on Human Rights Practices for 2007: Burma* (11 March 2008) at 2d Freedom of Movement:

"An ordinary citizen needed three documents to travel outside the country: a passport from the Ministry of Home Affairs, a revenue clearance from the Ministry of Finance and Revenue, and a departure form from the Ministry of Immigration and Population. To address the problem of trafficking in persons, the government continued to hinder or restrict international travel for women, particularly those under 25 years of age.

The government carefully scrutinised the prospect of travel abroad for all passport holders. Rigorous control of passport and exit visa issuance perpetuated rampant corruption, as applicants were forced to pay bribes of up to \$230 (300,000 kyat), approximately equivalent to the average annual salary of a skilled worker. The government regularly denied passports on political grounds. College graduates who obtained a passport (except for certain government employees) were required to reimburse the government for the cost of their education. It frequently took several months to receive a passport, particularly if the applicant was unwilling to offer a bribe as incentive for speedier service."

The appellant's ability to access the border openly in his own name casts doubt on his claim to have fled Myanmar while being pursued by the authorities.

- (e) The appellant took no part in any student demonstrations for the last ten years he was in Myanmar despite continuing to be involved in anti-regime activities. When asked why this was so, he replied to the Authority that there were no student demonstrations in Myanmar after 1996. The Authority put to the appellant country information describing political demonstrations by students which had taken place in Yangon in 1998. (Refer "Protest & Run" *Far Eastern Economic Review* (18 September 1998). When asked to comment on this report the appellant in a written statement dated 9 February 2009 advised that he knew about the demonstration of 2 September 1998 referred to in the article. He was on his way to university that day and the road was blocked by military police to

prevent people gaining access to the campus where the demonstration was taking place. He did not mention this at the hearing because he had not participated in it. His counsel in a letter dated 9 February 2009 advised that the appellant did not mention the protest demonstrations of August/September 1998 because “they were not public preannounced protest demonstrations”.

This response does not answer the Authority’s concerns; the appellant was asked why he had not attended any protests after 1996. His answer was that there were none. This was obviously not the case and he knew that to be so. His misleading answer, that there were none, was given to provide an excuse for his failure to attend any further demonstrations. The Authority concludes from this, along with its rejection of his account of the students library, that he chose to take no further part in anti-regime political activities after 1996 rather than being unaware of and therefore unable to participate in such demonstrations.

- (f) The appellant did not apply for refugee status until he had been in New Zealand for 14 months although he claims that he had left Myanmar fearing for his life and with the intention of applying for refugee status in New Zealand. When asked to explain this delay the appellant offered various reasons:
- (i) He did not apply at the airport on arrival because he had a one-year visa and so had plenty of time to make the refugee application therefore he did not bother making any enquiries at the airport about this.
  - (ii) He had been too busy because he arrived a month late and his tertiary course had already commenced. He had to work hard to catch up.
  - (iii) He did not apply *en route* in Thailand (as his friend had done successfully) because there was a military government in place there whereas in New Zealand human rights were respected.
  - (iv) Initially he made enquiries on the Internet about refugee status but did not get enough information. He did not seek help from AA who had been living in New Zealand for approximately two years by then.

He did not consider asking AA for help because AA's English was not as good as his own. AA when told of his decision to apply for refugee status took a neutral stance saying "It's up to you". AA had no idea of his political activities after his release from prison in 1996. His application for refugee status was eventually prompted by meeting a successful refugee claimant from Myanmar who also advised the appellant to retain a lawyer.

The Authority does not accept that this delay in applying for refugee status was due to ignorance of the procedure. AA gave evidence to the Authority in very competent English. On arrival the appellant also had sufficient knowledge of English to participate in and pass a tertiary-level qualification. He could easily have made enquiries through AA or others as to the procedure for obtaining refugee status had he been interested. It is by no means certain that he would be allowed to remain in New Zealand beyond the expiry of his visa. The relaxed attitude to commencing his application and informing himself of the procedure and the priority he accorded to his studies over the need to ensure his remaining safely in New Zealand, belie his claim to have fled Myanmar in fear and to have come here to seek asylum from the agents of persecution.

The Authority acknowledges that there may be good reasons for a refugee claim being lodged a considerable time after arrival. These reasons may be, *inter alia*: a change in circumstances in the home country, ignorance about the availability of refugee status, inability to inform oneself of the correct procedure. None of these apply in this case to explain the inordinate delay in the appellant lodging his claim.

In the absence of any other credible explanation the Authority concludes that the appellant did not apply for refugee status on arrival or shortly thereafter because there was no need to do so. He did not need to ensure that he could remain in New Zealand beyond the expiry of his visa because he held no fear of being persecuted on return to Myanmar.

### **Credibility findings**

[28] The Authority rejects the appellant's account of his participation in the student library. It also rejects his excuses for having failed to make further contact

with ZM in order to establish the *bona fides* of the reference letter and rejects his now claimed suspicion that ZM is a spy for the Myanmar regime.

[29] The Authority is also not persuaded by the reasons he gave for the delay in his application for refugee status. It finds that the delay was due to the fact that there was no urgency or need to avoid serious harm on return to Myanmar.

[30] The Authority accepts that the appellant took part in two demonstrations in New Zealand and had participated in the 1996 student protests in Myanmar. It is in regard to these aspects of his claim that it now turns to assess well-foundedness.

### **Well-foundedness**

[31] The appellant took part in demonstrations in New Zealand in 2007 and 2008. This despite his belief that government spies were in attendance and would report his participation to the authorities in Myanmar. At the time he knew that he had no legal right to permanently remain in New Zealand.

[32] He could provide no evidence of the presence of spies or of adverse consequences suffered by anyone who had attended the demonstrations. Moreover, his own attendance on these occasions (without taking any prominent part in the proceedings) is most unlikely to be reported by spies (if they were present) or provoke any adverse consequences for him on return. There is no evidence of any enquiries being made of his family or any other evidence that the authorities know of his attending these occasions or are interested in it. He was not a person of interest to the Myanmar regime before his departure and it is no more than speculation to suggest that his presence on these two occasions would place him at risk of real harm on return.

[33] His earlier participation in the 1996 protest has had no long-term adverse consequences (beyond his initial detention); he resumed his university studies, remained living at his parent's home and travelled abroad twice without problems.

[34] The Authority finds that any fear of being persecuted arising from the 1996 protest or his participation in the demonstrations in New Zealand is not well-founded.

**CONCLUSION**

[35] For the reasons mentioned above, the Authority finds the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

**PUBLICATION**

[36] The Authority has considered counsel's request that the publication of this decision be embargoed for five years. Counsel submits that there are unique features of the case: the appellant's detention in 1996, his father and brother's political activities, the student library, his travels in and out of Myanmar and AA's residence in New Zealand which could lead to the appellant's identification or endanger the safety of others. The Authority is aware of its obligations under s129T of the Act in this regard and in particular s129T3(e) and (f) of the Act. Having considered the matters raised by counsel, the Authority concludes that these obligations will be satisfied by the removal of identifying features from the published version of the decision in accordance with Schedule 3C of the Act.

"J Baddeley"

J Baddeley  
Member