

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

**REFUGEE APPEAL NO. 74671**

**AT AUCKLAND**

<b><u>Before:</u></b>	L Tremewan (Chairperson) S Joe (Member) S Murphy (Member)
<b><u>Counsel for Appellant:</u></b>	S Munif and L Foley
<b><u>Appearing for NZIS:</u></b>	No Appearance
<b><u>Date of Hearing:</u></b>	15 and 16 July 2003
<b><u>Date of Decision:</u></b>	5 August 2003

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**DECISION**

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[1] This is an appeal against the decision of the 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 Union of Myanmar (Burma), of Karen ethnicity.

**BACKGROUND MATTERS**

[2] The appellant arrived in New Zealand on 21 January 2003 and sought refugee status upon arrival (although his application seeking refugee status was date stamped 24 January 2003). The appellant was interviewed by a Refugee Status Officer (RSO) in respect to his application on 4 March 2003 and 23 April 2003. A decision, declining to grant refugee status was published on 27 May 2003. The appellant has appealed to this Authority from that decision.

[3] The appellant was denied a temporary permit on arrival and has been in custody since then.

[4] The appellant has been legally represented throughout the processing of his refugee claim.

### **Language Issues**

[5] The appellant has a mother tongue of Eastern Po Karen (also known as Eastern Karen, or Karen Pwo) however, a speaker of Western Karen (also known as Sgaw Karen or Karen Pa'o) interpreted at the Authority hearing. Country information establishes that these two languages are essentially distinct. However the interpreter was able to speak some Eastern Karen (but not to the degree that the hearing could be conducted in that language).

[6] At the hearing, the appellant and the interpreter communicated in Burmese (Eastern dialect). They confirmed that they understood one another. Their ability to understand each other in Burmese was apparently assisted by the interpreter's ability to also speak some Eastern Po and the fact that the interpreter was, to use his words, "from the Eastern side". The appellant stated that his Burmese was "not really good" but in the circumstances as outlined he could converse satisfactorily with the Authority's interpreter.

[7] It is noted that the Authority had been offered the services of another interpreter who, like the appellant, is a speaker of Eastern Po Karen, but it did not use his services as he had provided written evidence in support of the appellant's claim. Thus he was not a neutral person, and other adequate interpreting options were available.

[8] The Authority also notes that at the RSB interview, a different interpreter was used, but who, like the Authority's interpreter, was a native speaker of Western Karen (however unable to communicate in Eastern Po). It is apparent that there were some communication difficulties at the RSB interview (which the RSO attributed to the appellant not being a Burmese Karen at all, whereas we have concluded that he is, but that the wrong Karen language was being used).

### **THE APPELLANT'S CASE**

[9] What follows is a summary of the appellant's case, which is then followed by the Authority's credibility assessment.

[10] The appellant was born and raised in P village, near Pa'an city, the capital of the Karen State of Burma/Myanmar. He has never been into any of the other Burmese states. He is a single man with no dependants, now aged in his late twenties.

[11] The appellant's family are ethnic Karen. They were one of the Christian families in their village, the others of whom were Buddhist. His late father, a farmer, was also a Pastor in their local Church. He died when the appellant was young, of natural causes, after which the appellant's older brothers left home. His mother, a retired teacher, remains alone in the village. The family land has been sold off.

[12] The appellant was the youngest of eight children. One of his brothers was killed fighting for the Karen National Union (KNU) (the main opposition Karen group, fighting Burma's military junta), when their base was overrun by the Burmese military when the appellant was young.

[13] Another of the appellant's brothers has refugee status in Australia (papers in relation to this being on the appellant's file).

[14] The appellant's remaining two brothers work in a refugee camp on the Thai side of the Thai/Burmese border. The appellant's sisters are all married and living in their respective husband's villages within the Karen State.

[15] As noted earlier, the appellant's mother tongue is Eastern Po, however he also learnt Burmese at school. He attended local schools from the age of six until thirteen, without any real problems. There were, however, periods when the schools closed as a result of the significant political problems in the region.

### **Forced Labour**

[16] At the age of eleven, the appellant and a number of his schoolmates were forced by the military to be porters for a period of time. Their highest local mountain, S, had a pagoda on it, which the military leaders wanted to be able to visit by helicopter. In order to do so, a helicopter pad had to be built. The appellant personally made about seven trips up to the summit, carrying sand and bricks, for this purpose. Older villagers were forced to carry wood and were treated harshly. All of the porters were Karen. The appellant was unhappy having to do this work but "kept it in [his] heart" as there was nothing he could do about it.

### **Involvement in 1988 protest**

[17] The appellant recalled that life changed in 1988 when there was an uprising initiated by students against Burmese military rule. On 8 August 1988 ("the 4 eights"), there was a significant demonstration in Pa'an. Although only twelve years old, the appellant joined in. He did not understand everything that was happening, but was old enough to appreciate that they were protesting in support of the rights of Burmese citizens generally (not merely for the rights of the Karen people). People were unhappy with military rule, felt that they had no rights and were suffering from poverty.

[18] To place this evidence in context, the Authority observes that country information discloses that in 1988 the State Law and Order Restoration Council (SLORC) was formed, and thousands were killed in anti-government riots. In the following year, 1989, SLORC declared martial law and renamed Burma as Myanmar (and Rangoon renamed Yangon). Aung San Suu Kyi (the National League for Democracy leader, and daughter of Aung San) was placed under house arrest. (See, for example, BBC News Timeline: Burma [internet reference] [http://newsvote.bbc.co.uk/mpapps/pagetools/print/nes.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/1300082.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/print/nes.bbc.co.uk/2/hi/asia-pacific/country_profiles/1300082.stm)).

[19] The appellant was the only member of his family who protested - his sisters were too afraid to involve themselves and all of his brothers had already left home.

[20] The appellant's evidence was that the protest in Pa'an was peaceful (compared to what took place in Rangoon). However, afterwards, the military began arresting those who had taken part. Those who were arrested were said to have been tortured and, from what the appellant heard, they simply remained in detention.

### **Fleeing the village**

[21] When this news first emerged, the appellant, fearful of being apprehended, fled to the border area, in early 1989. Five others accompanied him, fleeing for the same reasons. The appellant has never returned to his home village.

[22] Some of his group joined the KNU and others went illegally into Thailand, but the appellant went to a refugee camp in the Burmese/Thai border area. Indeed, it is the same camp where two of his brothers are now, although they were not there then. In the interim, it was also subject to attack from the Burmese military and was burnt down. The appellant states that the camp is in fact on the Thai side of the border and is "illegal" although the Thai authorities have not so far interfered with it.

[23] The appellant remained at the refugee camp for the next three years, until 1992, when aged 16. At the camp he had some schooling.

[24] The appellant heard news from time to time of problems at his home village and in the neighbouring areas. For example, the military would interfere with church services, turning up in a drunken state, closing down services, burning Bibles and generally creating havoc.

#### **Joining the Karen National Union (KNU)**

[25] In 1993, the appellant joined the KNU. He remained with the movement for the next three years, fighting for a Karen Free State. The Burmese military had suppressed the citizens so he and other Karen (and even some Burmese) felt compelled to fight against them.

[26] As he was still only in his mid-teens when he joined the KNU, he chose not to join the brigades that actively fought the Burmese military. Rather, he volunteered (in the less dangerous role) as an ordinary member within a 'messenger's group', which went to the Karen villages to talk with villagers about the Karen struggle.

[27] The appellant's group was under the control of their General Commander, B, who was in charge of about 75 troops.

[28] The appellant was based at M and then W camp while serving the KNU, although he frequently went out on the covert missions to visit the villagers in the group's assigned areas. The appellant's task was essentially to accompany and assist his immediate superior (nicknamed LC) and usually, two other more senior soldiers, who would do the talking. The appellant also had some cooking duties.

[29] The appellant outlined in some detail to the Authority how his group specifically carried out their duties (which need not be recorded here).

[30] On very rare occasions, when additional fighting support was needed by the "front-line" KNU troops, some soldiers from the messenger's section were sent. The appellant was quite prepared to go but was never selected. He assumed that this was because he was younger than most of the others.

[31] The appellant carried a firearm (the details of which he also outlined) and he received some training. He did use his firearm on about four occasions when his group sought to provide cover for itself while escaping from the Burmese military out in the countryside. On these occasions they shot into the air. He never saw anyone shot by either himself or his colleagues in such exchanges, and nor did anyone from his group get injured by the Burmese military in these particular incidents.

### **Leaving the KNU**

[32] The appellant's reason for leaving the KNU was due to the split in the group, between the Buddhists and Christians in 1995, when the Buddhists surrendered to the Burmese military. The KNU base at Manerplaw had been lost following a battle, and the Buddhists "came back with the Burmese military, as the DKBA [Democratic Karen Buddhist Army]".

[33] Although the KNU continued without the Buddhist defectors, the whole situation upset the appellant to the extent that he gave up his involvement altogether. His association with the KNU meant, however, that he could never return to his village.

[34] To place this evidence in context it is helpful to refer to sources of country information which refer to such events:

"The KNU declared a unilateral cease-fire in March 1995, following the loss of its Manerplaw headquarters in January and its base at Kawmoora a month later. In early 1997, however talks between the KNU and the government broke down, with the army quickly renewing its campaign against remaining KNU bases...

Earlier, a splinter group calling itself the Democratic Karen Buddhist Organisation (DKBO) had broken away from the largely Christian KNU. With the support of government forces, the DKBO's military wing, the Democratic Karen Buddhist Army (DKBA), spearheaded several assaults in 1997-1998 on KNU refugee camps in Thailand. The KNU responded in March 1998 by attacking DKBA bases in Myanmar". (see: Banks A & Muller T (ed), *Political Handbook of the World* (1999), CSA Publications, New York 674, at 678).

[35] Following the split, the appellant went to Thailand, illegally, and obtained work. He has never returned to Burma/Myanmar since then, it being too dangerous to do so.

### **Perceived risks**

[36] The risks faced by the appellant in terms of returning home became more apparent when his previous General Commander, B, visited his mother's home, in 1996, asking about the appellant's whereabouts. B had been in the group that had defected and joined forces with the Burmese military. He instructed the appellant's mother that if the appellant returned that she should make this known. The appellant assumed that B would then have reported such news to the Burmese military. The appellant (who has no means of direct communication with his mother) learnt about this and subsequent visits by B to his mother when such news was passed on through some friends he met in Thailand.

[37] The appellant last heard news of his mother in 2002, when he was in Thailand. B had continued to show an interest (as to whether his mother had heard news of him) in the intervening period. Detail as to these matters was outlined in his evidence.

[38] The appellant knows that if he returned to his home area, it would only be a matter of time before the Burmese authorities caught up with him, as many of his former KNU colleagues are now in collaboration with the Burmese military. As noted, his former General Commander B, has specifically shown an active interest in his whereabouts. Living in the jungle areas away from the villages is no option as it is fraught with difficulty. For example, there is no living to be made, landmines exist throughout the territory and one is vulnerable to the Burmese military.

[39] The appellant has also heard of lists being kept by the Burmese military junta of persons perceived to be in opposition. He expects to be on such a list. It is likely that if he was returned to Burma/Myanmar he would be subject to close scrutiny, especially as a Karen, and his KNU involvement identified. He would face extremely grave consequences.

### **Additional Evidence**

[40] It is noted that at the hearing, counsel produced some important written evidence relating to the case. Firstly, there was a detailed, jointly written statement

dated 29 June 2003, from the New Zealand Karen Association Inc., signed by Matthew Dwe (President), Than Tapili (Secretary), and Hla Aung Tun (Tootoo) (a Member). These men all indicated their availability to give evidence at the hearing, although this was ultimately not necessary. The salient points made in this communication can be summarised as follows:

- That the appellant is who he claims to be, namely a Karen born in P village, in Pa'an district of the Karen State. He is personally known by one of the persons who wrote the letter, who was from the same village. That person also knew members of the appellant's family and confirmed those details (for example, that the appellant's brother A was killed in the Karen conflict (with the Burmese military) and another brother M (whose Karen names and "English" names were given) is known to be a recognised refugee living in Australia);
- That Karen people can have different Karen and Burmese names and that many Christian people also take Christian English names when baptised (the relevance of this being to explain why the appellant's brother in Australia has both Karen and English names);
- The interpreter used for the RSB interview speaks Sgaw Karen rather than Eastern Po, the appellant's language. The appellant would have had difficulty understanding the interpreter since, although there are some shared words between the two languages there are also many different words and the pronunciation is very different. The correspondents had all visited him in custody and confirm that Eastern Po is his native tongue;
- The appellant's inability to satisfy the refugee status officer (RSO) with his answers to questions about facts and figures about Burma/Myanmar was explicable. It was stated that:

"We are not surprised that, when questioned by the New Zealand Immigration Service [the appellant] did not know many basic facts about Burma, because most teenagers in our community also do not know much about Burma. They have tried to struggle for their survival in the jungle and in Thailand. If the New Zealand immigration officers interviewed some of the refugees already accepted in New Zealand through the United Nations, many of them would also not know facts such as the shape of the Burmese flag and the public holidays in Burma" ;

- That, in any event, the finding by the RSO (that the appellant's evidence was not credible in regard to these matters) was misconceived. Some of her assertions in regard to "facts" about Burma/Myanmar were wrong (for example,



concerning the date of the Karen New Year, in regard to which the appellant had been right). Other times, the appellant had simply failed to understand the point of a question, had been misunderstood by the RSO, or had plausible explanations for answers given. Thirteen detailed examples of such matters were set out in the letter (and some supporting evidence provided where relevant);

- That the appellant would be at risk of being persecuted on a return to his home country due to his past connection with the Karen National Union (KNU). As a Christian it would be especially dangerous for him to be in the Karen area because of the presence of the breakaway Democratic Karen Buddhist Army (DKBA), which is supported by the Burmese military.

[41] The second document produced at the hearing was a detailed statement from the Vice President (Federal) of the Australian Karen Association, Saw A. Ganemy Kunoo, JP, dated 30 June 2003. Like the letter from his New Zealand counterparts, Mr Kunoo also provided evidence confirming the appellant's identity.

[42] Mr Kunoo also expressed concern that the New Zealand immigration authorities had declined the appellant's claim due to his not being able to satisfy the authorities of the sufficiency of his knowledge about Burma. He referred to the remoteness of the location from where the appellant, he himself, and others come, and the difficulties of their living situations (having suffered regional attacks by the Burmese military and so on). He suggested that this had to be taken into account when assessing the degree of knowledge that the appellant should be expected to have in relation to 'Burma proper'. The letter then detailed matters relating to the situation of the Karen people, and the risks faced by a person in the appellant's situation, on return.

## **THE ISSUES**

[43] 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, is unable or, owing to such fear, is unwilling to return to it."

[44] 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**

[45] Before turning to the above issues, it is necessary to assess the appellant's credibility. We found him to be an unsophisticated, open witness. In answer to our questions, he gave appropriate answers with spontaneous detail as to aspects of his life in the Karen State, which was entirely consistent with country information. In this regard we reached an entirely different finding to the RSO, whose conclusions we comment upon later in this decision. We accept the appellant's account.

[46] In accepting the appellant's credibility we have not overlooked the fact that in his interview with immigration officials at the airport upon arrival, he failed to disclose the correct details of his family members. In particular, he did not disclose that he had a brother in Australia who had been granted refugee status.

[47] Having studied the appellant's evidence over a two day period and carefully considered it, we are satisfied with his explanation that he deliberately failed to give the correct details as to his family members upon arrival as he did not want to cause them any repercussions. It was not until he later received legal advice that reassured him in that regard that he felt able to set the record straight.

[48] We also accept that the brother in Australia has a "Christian name" as well as a Karen name (like a number of his other siblings) and that these different names refer to the same individual. Indeed, there is considerable independent

evidence from various individuals within the Karen community in both New Zealand and Australia attesting to this familial relationship.

### **Is there a real chance of persecution on a return to Burma/Myanmar?**

[49] It now falls to the Authority to address the first issue of whether the appellant would face a real chance of persecution if returned to Burma/Myanmar. It is necessary to first consider further country information (in addition to that already cited).

### **Country Information**

#### **Overview**

[50] Myanmar (a former British colony that gained independence in 1948) has been ruled by a repressive military regime since the elected civilian government was overtaken in 1962 by General Ne Win. The regime is dominated by the majority Burman ethnic group.

[51] In 1988, pro-democracy demonstrations were brutally suppressed by the armed forces. At this time the State Law and Order Restoration Council (SLORC), a junta composed of military officers, took control and ruled by decree. This group was superseded in 1997 by the State Peace and Development Council (SPDC). (see: Banks A & Muller T (eds), *Political Handbook of the World* (1999) New York, CSA Publications, pp674-5 and United States Department of State *Country Reports on Human Rights Practices for 2002: Burma* (31 March 2003), [internet] <http://www.state.gov/g/drl/rls/hrrpt/2002>, at 1 and 19)

[52] The latest United States Department of State *Country Reports on Human Rights Practices for 2002: Burma (ibid)* describes the general human rights situation in Burma/Myanmar as follows (*inter alia*):

**"The regime's human rights record remained extremely poor, and it continued to commit numerous serious abuses.** Citizens did not have the right to change their government. In ethnic minority areas, security forces continued to commit extrajudicial killings and rape, forcibly relocated persons, used forced labor, and conscripted child soldiers. Disappearances continued, and members of the security forces tortured, beat, and otherwise abused prisoners and detainees. Citizens were subjected to arbitrary arrest without appeal. Arrests and detention for expression of dissenting political views occurred on numerous occasions. The SPDC arrested approximately 45 persons, including some NLD members, for political activities during the year; most were released within days. The Government also released approximately 550 political prisoners since talks began with the NLD in 2000. **By year's end, an estimated 1,300 political prisoners (including members and**

**supporters of ethnic armed groups) remained in prison. Prison conditions remained harsh and life threatening**, although conditions improved in some prisons since the International Committee of the Red Cross (ICRC) was allowed access. The judiciary was not independent.

The SPDC continued to restrict severely freedom of speech, press, assembly, association, and travel. During the year, persons suspected of or charged with prodemocratic political activity were subjected to regular surveillance and occasional harassment. **The junta restricted freedom of religion, coercively promoted Buddhism over other religions, and imposed restrictions on religious minorities.** The regime's control over the country's Muslim minority continued, although acts of violence against Muslims decreased from last year. The regime regularly infringed on citizens' privacy; security forces continued to monitor citizens' movements and communications systematically, search homes without warrants, and relocate persons forcibly without just compensation or legal recourse. **The SPDC also continued to forcibly relocate large ethnic minority populations in order to deprive armed ethnic groups of civilian bases of support.** The regime continued to restrict freedom of movement and, in particular, foreign travel by female citizens ... The regime continued to restrict worker rights, ban unions, and used forced labor for public works and for the support of military garrisons. Other forced labor, including forced child labor remained a serious problem, despite recent ordinances outlawing the practice. The forced use of citizens as porters by SPDC troops--with attendant mistreatment, illness, and sometimes death--remained a common practice as did recruitment of child soldiers by the SPDC. Trafficking in persons, particularly in women and girls mostly for the purposes of prostitution, remained widespread, despite increased regime efforts to publicize dangers to potential victims." [emphasis added]

[53] The general human rights situation in Burma/Myanmar does not appear to be improving. For example, in a release issued by Amnesty International this week, (*Myanmar: Justice on trial*, (29 July 2003) AI INDEX: ASA 16/020/2003 [internet] <http://amnesty-news.c.tclik.net/maabiV8aaZvJnbdHOSpb/>) the country's Government was urged to bring to justice those found responsible for the violent 30 May attack on National League for Democracy (NLD) members. The report also calls for the immediate and unconditional release of Daw Aung San Suu Kyi, NLD General Secretary, U Tin Oo, NLD Vice-Chairman, and all other NLD members and supporters arrested for expressing "peaceful political views". It also stated:

"We are gravely concerned by the violent attack on the NLD and the subsequent crackdown on all political opposition activities. We urge the State Peace and Development Council (SPDC, the military government) to permit an independent, impartial and prompt investigation into the violent attack on NLD members."

### **The Karen people**

[54] The Karen (or Kayin) is the largest ethnic minority in Burma, comprising 7% of the population. (Banks A & Muller T (eds), *Political Handbook of the World* (1999) New York, CSA Publications, at 674). Prior to Burmese independence in 1948, many Karen people had pushed for a Karen independent state, fearing repression under a Burmese dominated government. As a result of the inclusion of Karen territory in the new Burma, the Karen National Union (KNU) commenced an

armed struggle for independence in 1949. In 1952 a Karen State was created within Burma along the border with Thailand. The KNU's fight for independence continues to this day. (ICG Asia Report No 52, *Myanmar Backgrounder: Ethnic Minority Politics* (7 May 2003), at 4).

[55] In the mid 1990s a Buddhist splinter group broke away from the mainly Christian led KNU, formed the Democratic Karen Buddhist Army, and signed a ceasefire with the government. This led to the fall of the KNU headquarters of Manaplau in January 1995. Other defections followed. (ICG Asia Report No 52, *Myanmar Backgrounder: Ethnic Minority Politics*. (7 May 2003), p5; Banks A & Muller T (eds), *Political Handbook of the World* (1999) New York, CSA Publications, at 678).

### **Abuses against the Karen People**

[56] Ethnic minorities including Karen are particular targets of the Burmese/Myanmar regime. For example, the United States Department of State *Country Reports on Human Rights Practices for 2002: Burma* (31 March 2003) [internet] <http://www.state.gov/g/drl/rls/hrrpt/2002> stated:

"For decades successive military regimes have applied a strategy of forced relocation against ethnic minority groups seeking autonomy in an effort to deny support to the armed ethnic groups; such forced relocations continued during the year, particularly along the Thai border. The forced relocations often were accompanied by alleged rapes, executions, and demands for forced labor to build infrastructure for villagers and SPDC units. To make way for commercial or public construction and, in some cases, for reasons of internal security and political control, the SPDC forcibly relocated citizens to "new towns." This practice has become somewhat less common in recent years. Persons relocated to new towns generally suffered from greatly reduced infrastructure support. Residents targeted for displacement generally were given no option but to move, usually on short notice (see Sections 1.c. and 2.d.).

A September report by a highly respected private citizen in Thailand estimated more than 2,500 villages have been destroyed or forcibly relocated by SPDC troops since 1996, displacing more than 600,000 citizens. The report estimated that more than 350,000 of these citizens were moved to SPDC-controlled "relocation centers," while the remainder lived in hiding. This practice was particularly widespread in the Shan, Kayah, and Karen States and in areas of Mon State, and Pegu Division. In these areas, thousands of civilian villagers were displaced from their traditional villages, which often were burned to the ground and moved into settlements tightly controlled by SPDC troops in strategic areas. In other cases, villagers who fled or were driven from their homes, found shelter in the forest, frequently in heavily mined areas without adequate food, security, or basic medical care.

The forced relocations often generated large refugee flows to neighboring countries or to parts of the country not controlled by the regime. In some areas, the junta replaced the original ethnic settlements with settlements of ethnic Burmans. In 2000 in Rakhine State, the regime forcibly relocated several largely Muslim villages and resettled the area with Buddhist Burmans, who were forced to move from Dagon

township in Rangoon division. In other areas, army units forced or attempted to force ethnic Karen to relocate to areas controlled by the proregime Democratic Karen Buddhist Army (DKBA). "

[57] Defectors from the KNU defectors, in particular the DKBO have, together with the Burmese military, been implicated in torchings and assaults on a number of Karen refugee camps on the Thai-Burmese border. (see: "Burma: It's Rangoon, Not Rebels" *Far Eastern Economic Review* (18 May 1995); Banks A & Muller T (eds), *Political Handbook of the World* (1999), New York, CSA Publications, at 678.)

[58] In 1999, the BBC reported that the term "ethnic cleansing" had been increasingly employed by human rights groups in relation to what it described as the government's "campaign against the Karens". It reported repeated burning of villages, theft of crops and livestock, forced labour, and rape. (see: "World: Asia Pacific, Inside Burma with the Karen" (23 January 1999) [internet] <http://news.bbc.co.uk/2/hi/asia-pacific/257514.stm>). Last year, a report by a UN Human Rights Commission Special Rapporteur on the Situation of Human Rights in Myanmar referred to allegations of serious human rights abuses by the SPDC in ethnic areas, including the execution of villagers in the Karen State. He concluded that there are "serious problems with the way the army treats civilians in ethnic counter-insurgency areas". (see: United Nations Economic and Social Council E/CN.4/2003/41, (27 December 2002), at 14-15)

[59] According to Karen sources, Karen villagers in the Toungoo District of Northern Karen state who have had prior contact with the KNU, even years ago, risk torture and execution by 'Guerilla Retaliation Unit' execution squads that have operated since 1998. (see: KHRG Information Update #2003-U1, *Expansion of Guerilla Retaliation Units and Food Shortages in Toungoo District of Northern Karen State*"; (June 16 2003), at 2. Similarly, in the Pa'an district [*which the Authority notes is the appellant's home district*] the Burmese military is said to frequently arrest, torture and sometimes kill suspected KNU sympathisers and destroy villages it believes to be supporting the KNU. (KHRG Information Update #2002-U4, *Consolidation of Control: The SPDC and the DKBA in Pa'an District* (7 September 2002) at 14).

[60] Having accepted the appellant's account of his identity we accept that, in light of relevant country information sources, he faces a real chance of persecution on a return to Burma/Myanmar. In this regard we note as relevant the following. The appellant:

- is an ethnic Karen (and a Christian) from within the Karen State, who has a belief in the establishment of a fully independent Karen State and has involved himself in activities in opposition to the Burmese military regime;
- has had an active role within the KNU. This role is known to the authorities who received information from former members of the KNU (the Buddhist defectors who aligned themselves with the Burmese military junta); and
- has been the subject of interest by the authorities through their agent B, previously a commander under whom the appellant served.

### **Why no Internal Protection Alternative (IPA)**

[61] We note that we consider the Internal Protection Alternative (IPA) has no bearing in this case. The appellant fears state agents, and furthermore, country information sources suggest that he would be scrutinised at the point of entry. The latest the United States Department of State *Country Reports on Human Rights Practices for 2002: Burma* (31 March 2003) [internet] <http://www.state.gov/g/drl/rls/hrrpt/2002> stated (at 7):

“Through its pervasive intelligence network and administrative procedures, the regime systematically monitored the travel of all citizens and closely monitored the activities of many citizens, particularly those known to be active politically.

The law requires that any person who spends the night at a place other than his registered domicile to inform the police in advance, and that any household that hosts a person not domiciled there to maintain and submit to the police a guest list. There were reports that this restriction, which appeared to be relaxed somewhat last year, was strictly enforced this year. At least 30 arrests reportedly occurred following house to house searches.”

### **Convention Ground**

[62] The persecution feared by the appellant is for a series of overlapping Convention reasons. It would primarily relate to his political opinion (as evidence through his association with the KNU). Underlying this, is his racial ethnicity as a Karen. Further, as a Christian he was in the section of the KNU which have continued to be targeted by the SPDC as they did not surrender to the Burmese military.

**Exclusion not a relevant issue**

[63] We note that we have also considered the potential relevance of the Convention's Exclusion provisions given the appellant's military associations but deem the provision not to have any application on the accepted facts.

[64] Before concluding the Authority intends to make some observations about the RSB decision.

**Refugee Status Branch decision**

[65] The Authority conducts hearings *de novo* and for that reason does not, as it were, review the RSB decision. Indeed, it rarely comments on an RSB decision. In this case, however it appropriate to make some observations as to the manner in which the appellant's RSB interview was conducted.

[66] The Authority accepts that refugee decision-makers must be vigilant in appropriately testing that appellants are who they claim to be. Making such determinations is by no means easy. However, decision-makers must fairly and impartially make the relevant enquiries, an elementary aspect of which is giving the claimant the opportunity to tell his or her full story. This is a fundamental requirement of natural justice.

[67] In the present case, rather than conducting an 'open' interview designed to illicit relevant past events, it appears that the RSO pursued a preconceived theory of the case, namely that the appellant was not a Burmese Karen as he had claimed. Even though the RSO interviewed the appellant on two different occasions, these were relatively short, somewhat 'closed' interviews, which failed to make the relevant general enquiries. This is unfortunate since an attempt to pursue the substance of the appellant's claim would have made it clear to the RSO, as it did to the Authority, that the appellant was indeed a Burmese Karen.

[68] The officer also effectively dismissed out of hand the evidence from members of the Karen community in New Zealand and in Australia who had vouched for the appellant, in terms of his being who he claimed to be. They offered to provide more detailed evidence however this appears not to have been pursued in any way. (The Authority also considers that this is an area where counsel could have been more active at an earlier point in the proceedings).



[69] One is regretfully left with the impression that the RSO placed undue weight on the evidence which she could use to support her case theory (that he was not a Karen) and little or no weight on evidence or explanations which in fact supported his account. Rather than presenting as an inquiry, the hearing appeared as an unequal contest. The appellant, born and raised in a remote jungle area, is an unsophisticated individual who is not overly well equipped to articulately 'argue his case'. However, at the Authority hearing, when allowed a proper opportunity to explain his relevant background, we found him amply well able to do so. Indeed, he spontaneously provided some very detailed information, which accorded with our comprehensive country information.

[70] We also record the officer's failure to establish the correct Karen language spoken by the appellant (noting her mistaken conclusion that his inability to understand the interpreter provided by the RSB, related to his not being the ethnicity claimed by him).

[71] It is not an appropriate use of the Authority's resources to traverse all aspects of the RSB decision. We simply reiterate our concerns as to the manner of the inquiry in respect of this refugee claimant who has remained imprisoned for many months whilst his claim has been finally determined.

## **CONCLUSION**

[72] For the reasons mentioned above, the Authority finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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L Tremewan  
Chairperson