0802146 [2008] RRTA 274 (23 July 2008)

DECISION RECORD

RRT CASE NUMBER:	0802146
DIAC REFERENCE(S):	CLF 2008/17254, CLF 2008/37603, CLF 2008/49093
COUNTRIES OF REFERENCE:	Burma (Myanmar), Japan
TRIBUNAL MEMBER:	Mila Foster
DATE DECISION SIGNED:	23 July 2008
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the following directions: (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants respectively of the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The first and second named applicants claim to be husband and wife. They claim that the third and fourth named applicants are their children.

3. The applicants claim to be stateless Rohingyas and that their countries of former habitual residence are Country 1 and Japan.

4. The applicants arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

5. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.

6. The applicants applied to the Tribunal for review of the delegate's decisions.

7. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

8. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

9. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

10. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

11. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

12. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

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

13. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

14. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

15. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

16. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

17. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

18. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

19. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or

insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

20. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

21. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Protection Obligations

22. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999. They provide as follows:

> *Protection obligations*
>
> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> > (a) a country will return the non-citizen to another country; and
> >
> > (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country.

23. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

24. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].

25. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

CLAIMS AND EVIDENCE

Protection visa application

26. The Tribunal has before it the Department's files relating to the applicants. The Tribunal has had regard to the material referred to in the delegate's decision.

27. Each of the applicants has applied for protection visas on the basis that they are a refugee in their own right having completed Part C of the protection visa application form. Their claims are contained in written statements made by the first and second named applicants submitted with the protection visa application and statutory declarations sworn by the first and second named applicants and subsequently provided to the Department.

28. In their application the applicants state that their ethnicity is Rohingya and their religion is Muslim. According to the application, the first, second and fourth named applicants were born in Burma while the third named applicant was born in Japan. In response to a question on the protection visa application form about their citizenship at birth the applicants responded that it was unclear as they were Burmese Rohingya. In response to a question on the form directed at stateless applicants about why they had become stateless, the applicants replied that Burma did not recognise Rohingyas as citizens. The applicants listed Japan and Country 1 as countries of former habitual residence or transit before their arrival in Australia.

29. According to information on the Department's file the applicants arrived in Australia by plane without any travel documentation or identification. Initially the first named applicant gave false information about the applicants' identities and claimed that they have fled Burma. He subsequently admitted their true identities and stated that they had travelled to Australia from Japan on Japanese travel documents which they had destroyed on the plane to avoid being sent back to Japan.

First named applicant's claims

30. According to the protection visa application the first named applicant is a middle aged man originally from State A in Burma.

31. He states that there is severe discrimination against Rohingyas in Burma and widespread denial of their human rights. They are not able to get a proper education, and as a result of travel restrictions, Rohingyas who live in a place without work opportunities cannot support themselves. They are also subject to restrictions on getting married. In State A, mosques are destroyed and the Rohingyas cannot build new ones. Land belonging to Rohingyas is confiscated. Rohingya girls and women were at risk of being raped or taken away as the wives of soldiers.

32. The first named applicant claims that he led demonstrations in Burma against the government for its treatments of the Rohingya people who are not viewed as citizens by the Burmese government. He was arrested and held for a number of months during which time he was beaten. A relative secured his temporary release to allow him to obtain medical treatment by paying bribes. Instead of returning to the police the first named applicant fled Burma and went to Country 2.

33. After securing a false passport in Country 2, the first named applicant went to Country 3. There were many Rohingya people there and they tried to let the world know about what was happening in Burma and to their people. He, along with others, joined a welfare association for Rohingyas and distributed information.

34. Country 3 was not a free country and the first named applicant felt he could not express his views there. He had heard there was an association in Japan and thought he could be more effective for his people there. He went to Japan on a temporary visa.

35. He overstayed his Japanese visa for many years. During that time he became a member of an association in Japan. The association organised demonstrations and lobbied Japanese ministries to recognise the rights of the Rohingya people and inform them of the oppression by the Burmese authorities.

36. After being detained by the Japanese authorities for overstaying his visa, the first named applicant applied for refugee status but was refused. His appeal against the refusal was rejected. He was however he was granted a temporary visa to remain in Japan. Since then he has been granted successive visas.

37. The first named applicant believes he would be killed if he returned to Burma because he is anti-government and due to his activities for the rights of Rohingyas.

38. The first named applicant did not wish to return to Japan either. He claims that he faced discrimination in employment there because he was a foreigner including being unable to obtain permanent employment. As a temporary employee he did not enjoy certain rights such as payment for health insurance. He had no money left after paying for living expenses. If he lost his job or got sick and was unable to work he would not have received any help from the Japanese authorities and could not continue to provide for his family and educate his children. He did not want to live the rest of his life in a country where there was such discrimination. Further, he had destroyed his Japanese travel documents and thus feared the authorities would take action against him and take away or cancel his Japanese visa.

Second named applicant's claims

39. The second named applicant claims to be a Rohingya woman originally from State B in Burma.

40. She claims that she experienced discrimination because she was Rohingya. She says she was not issued a national registration card and had to pay a bribe to obtain a Burmese passport because the Burmese authorities does not recognise the Rohingya as nationals.

41. She left Burma to marry the first named applicant in Country 1 and was given the same type of Japanese visa as her husband. She then went to live with him in Japan.

42. She returned to Burma when she was pregnant with her second child, the fourth named applicant. She returned to Burma because the third named applicant was very young, her husband was always working and there was no one to look after them.

43. The second named applicant claims that upon her return to Burma a family member was taken to the police station and questioned about her so she went to stay with a relative in a remote place. She claims that she and her child would have been put in gaol otherwise.

44. The second named applicant states that she fears that if she returns to Burma she would be killed because of her husband's political activities and she would face the severe discrimination and harassment Rohingyas are subjected to.

45. She fears that if she returned to Japan her visa would be revoked because her documents were destroyed and she would thus be returned to Burma. She also claims that she was discriminated against in Japan because she was a foreigner. When she collected her child from school the others parents would turn away from her, the school meetings were conducted in Japanese which she could not understand, and parents would comment on her headscarf and when she wore black which was considered funereal in Japan.

Claims made on behalf of the third and fourth named applicants

46. According to the protection visa application the third named applicant was born in Japan. They attended school in Japan. The fourth named applicant was born in Burma.

47. It is claimed on behalf of the third and fourth named applicants that if they were returned to Burma they would be killed because of their father's political activities and would face severe discrimination and denial of human rights because they were Rohingya.

48. It is claimed that the third named applicant suffered discrimination in Japan at school. The teachers did not care whether they learnt or not. They only eat halal food and sometimes they would be hungry because the teachers told them what they could or could not bring to eat. Children threw food at them because they ate with a spoon rather than chopsticks. They were the only foreigner in the school and the children would ask why they were there, they pulled their hair, threw things and they were hit with a cup. The school children would not give them a turn on the swing and took away toys they were playing with.

49. It is claimed on behalf of the third and fourth named applicants that if they were returned to Japan their visas could be revoked because their travel documents were destroyed and thus they would be sent to Burma. They would face discrimination in Japan because they are foreigners and their parents could not afford to give them the education they needed as it is very expensive.

Documents submitted in support of application

50. A number of documents were submitted in support of the applicants' protection visa application including:

    a. A letter from a member of another organisation. The letter indicates that he once was a member of the same association as the first named applicant and states that the first named applicant was a Rohingya who had fled Burma to escape persecution

b. A document from the association indicating that the applicant was a member.

c. Various reports about the discriminatory treatment of foreigners in Japan.

Japanese visas

51. The Department's file contains the temporary visa applications the applicants made to travel to Australia. Each application contains a photocopy of two pages of what appears to be a Japanese travel document. The documents indicate that each applicant has some kind of current resident status in Japan and are holders of an Alien Registration Certificate.

52. The adult applicants had given the Department written permission to make inquiries about their status in Japan however it appears that the Department did not make inquires specifically about the applicants but obtained the following general information from the Australian Department of Foreign Affairs and Trade (DFAT):

> SUMMARY
>
> … Information previously received from Japan's Ministry of Justice (in relation to a separate case) suggests that the applicant would be likely to have rights of re-entry and return, despite intentionally destroying residency documents, but we cannot be definitive about this without approaching the Japanese authorities.
>
> As requested in reftel, post sought information on topics raised by the case manager in relation to CISQUEST JPN 9263 (a claim by a Burmese Rohingya). As instructed, post did not raise any details of the applicant's case in discussions with Japanese authorities. We phrased our queries in general terms and confined these inquiries to questions 3 and 4 on social welfare and entitlements of residents of Japan. We have not approached the Immigration Bureau of the Ministry of Justice. … We also consulted previous advice received from Japan's Ministry of Justice in relation to re-entry and residence rights of third country nationals in Japan.
>
> R.1. We cannot provide a definitive response on whether the applicant and his family have the right of return to Japan without approaching the Japanese authorities with the particular details of this case. Our assessment is however, that the applicant and his family would be likely to have the right to return to Japan, provided they satisfy certain conditions. We note that the right of return of a permanent resident is evidenced by a re-entry permit in the permanent resident's passport, about which no information is provided in reftel. The applicant and his family would be likely to have the right to return to Japan, provided they satisfy certain conditions.
>
> We consulted information from the Ministry of Justice, dated 25 April 2006, in relation to a separate case which outlined the entry rights of third country nationals who had residency in Japan The Ministry of Justice stated that possession of a re-entry permit would normally give the foreign national the right to enter Japan, subject to having a valid passport in their possession. A foreign national entering Japan must undergo a landing examination conducted by an immigration inspector at the port of departure or entry. At such time, the foreign national must satisfy conditions for landing pursuant to Article 7 of the Immigration Control and Refugee Recognition Act (See CISNET: CX194717). The Ministry of Justice also stated that an Australian Certificate of Identity, generally speaking, is treated as a valid travel document; however, its validity would need to be verified during a landing examination.
>
> R.2. We consider it unlikely that the applicant would be denied entry because his residency documents were intentionally destroyed. The Ministry of Justice noted in

> their advice of 25 April 2006 on a separate case, which involved expired rather than destroyed documents, that the Immigration and Refugee Recognition Act (See CISNET: CX194767) prohibits the entry of certain classes of persons. In particular, paragraph 12 of Article 5 states that members of political parties that encourage acts of violence or destruction of public installations or facilities shall be denied entry to Japan. We consider it would be unlikely that the applicant's acts of violence (destroying his residency documents) would be considered serious enough to prohibit re-entry under this provision. (CX194793: JAPAN: Japan Rohingyas, Australia: Department of Foreign Affairs and Trade (DFAT), 5 March, 2008 Accessed Via: DFAT, CIR No. 08/20)

53. [information about the investigation deleted under s. 431 as it may identify the applicants]

Invitation to provide additional information

54. The Tribunal invited the applicants to provide additional about their statelessness, status in Japan and refugee claims in writing. In response the first named applicant provided a statutory declaration and the applicants' registered migration agent provided a copy of Burma's Citizenship Law as well as independent information from various sources which indicates that most Rohingyas are excluded from Burmese citizenship.

Tribunal hearing

55. The applicants appeared before the Tribunal to give evidence and present arguments. The first and second named applicants gave oral evidence on behalf of the third and fourth named applicants. The migration agent also attended the hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.

56. The Tribunal focussed on obtaining evidence about the applicants' status in Japan and their reasons for not wanting to return there. The Tribunal provided the applicants with particulars of adverse information which could have lead the Tribunal to affirm the delegate's decision. They requested two weeks after the hearing to provide their comments in writing. The Tribunal agreed and adjourned the hearing. The first named applicant provided as written response and the applicants' agent made submissions. The information and responses are referred to as relevant in the Findings and Reasons below. Upon resumption, the hearing focussed upon what the applicants feared if they returned to Burma.

57. The Tribunal found some aspects of the oral evidence credible and other aspects overstated. The Tribunal's assessment of the oral evidence is discussed in the Findings and Reasons section below.

58. The following is a summary of the evidence given at hearing.

Circumstances in Japan

59. The first named applicant stated that he had never returned to Burma after leaving. He said he had only left Japan to get married and then later to take his wife and oldest child to the border when his wife wanted to return to Burma to give birth to their second child. He said his wife was always weeping about wanting to see family for the last time so he let her go.

60. He said he had lived in Japan for a long time and was the holder of a temporary visa. He told the Tribunal he destroyed his Japanese documentation because he did not want to return

there. He said foreigners were hated in Japan and did not enjoy equal rights with its citizens. He said that instead of granting a person refugee status they only gave them a temporary visa. He stated that even if he lived his whole life there he would not be granted citizenship and he did not want his children to spend their whole life in a country where they could not acquire citizenship. He felt his life there has been wasted and he did not want his children to face the same life so that is why they came here. The second named applicant confirmed that they wanted to find a country where they could acquire citizenship.

61. The second named applicant told the Tribunal that she had a short term visa to remain in Japan but did not know when it might be revoked. She said her husband had lived there for many years and had no right to anything and "they" did not employ foreigners. She wanted to leave Japan because her child had been discriminated against and bullied at school every day and in Burma they were not recognised as citizens.

62. The second named applicant stated that she feared she would be detained if she returned to Japan because they had destroyed their documents.

Political activities in Japan

63. The first named applicant testified that when he first arrived in Japan there was no Rohingya organisation so he became a member of an association. He took part in demonstrations, made speeches, distributed leaflets urging people to take action against the military government in Burma, and obtained permission from the Japanese government to demonstrate. *[Information about the association deleted under s.431 as it may identify the applicants]*

64. The second named applicant testified that all she knew about her husband's activities was that he was involved with an association and was a patron, went to meetings and attended demonstrations.

65. The second named applicant stated that she believed that all of the applicants would be killed if they returned to Burma because of her husband's activities in Japan. She said that when she returned to Burma to give birth to her youngest child a family member would not let her go into his house because all the neighbours had learnt about her husband's activities. She claimed that she was thus sent to stay with a relative and the family member was interrogated by the police about her return so she stayed in hiding for many months.

Treatment of Rohingya

66. At the hearing the Tribunal asked the second named applicant about the discrimination she had experienced in the past because she was a Rohingya. She said she did not face many difficulties because there were not many Rohingyas in the village in State B and people thought her family were a mixed breed. She said her family was not issued national registration cards which made travelling difficult but then stated that she was able to obtain one because a family member pleaded with the authorities. This made things easier but the card indicated she was obviously from a different country, so sometimes when she was required to produce it she was questioned about how she had obtained the card and turned back. The Tribunal put to the second named applicant that what she had described did not appear to be serious harm amounting to persecution and asked about the severe discrimination and harassment she had referred to in her written claims. The second named applicant stated that the whole world knew that the Rohingya were suppressed. She said there was no place where Rohingyas were not harassed or harmed.

67. Asked what discrimination he had experienced as a Rohingya the first named applicant told the Tribunal he was taken as porter, he would not be fed and would only be let go after two or three days. He said that if he wanted to travel to another village he had to pay to obtain a letter from the local council to travel. He recounted that he was detained because of his political activity and beaten so badly he could not get up from bed He stated that if there was a fight between two ethnic groups the police would take in the Rohingya and there were cases of the abduction and rape of women in the villages but they did not have the strength to take action and go to court. The first named applicant stated that as his family lived in the town this had not happened to any of his female relatives but it was known to happen in the villages.

Additional documents and materials submitted to the Tribunal

68. The applicants submitted various documents and materials to the Tribunal in support of their review application including the following:

    a. An article about bullying in Japanese schools.

    b. A letter from a Rohingya organisation in Australia certifying that the applicants were Rohingyas from State A and stating that Rohingyas are persecuted in Burma for reasons of race and religion.

    c. A letter from a current member of the association in Japan stating that the first named applicant was a member and had been involved with the organisation

    d. Photographs of the first named applicant at the association's gatherings.

    e. The US Department of State (USDOS) *Country Report on Human Rights Practices 2007 Burma,* released on 11 March 2008, and other reports about the poor human rights situation in Burma and the difficulties faced by foreigners in Japan.

Independent evidence

Human rights in Burma

69. Burma has been ruled by a succession of highly authoritarian military regimes dominated by the Burman ethnic group since 1962. The government's human rights record is poor. The law does not provide for freedom of speech and the government restricts the right severely and systematically. The government arrests, detains, convicts and imprisons citizens for expressing political opinions critical of the government. Security services monitor and harass persons believed to hold anti-government opinions. Members of security forces and other pro-government forces reportedly torture, beat and otherwise abuse prisoners and other citizens with the authorities taking little or no action to investigate such incidents or punish perpetrators. The law does not prohibit arbitrary detention and the government routinely used it. Military Security Affairs and Special Branch police officers were responsible for detaining persons suspected of "political crimes" perceived to threaten the government. (USDOS, *Country Report on Human Rights Practices 2007 Burma,* released 11 March 2008, sections 1.d, 2a)

70. The authorities routinely infringed upon citizens privacy, closely monitoring the travel and activities of its citizens especially those known to be politically active through its intelligence

network and administrative procedures. (USDOS, *Country Report on Human Rights Practices 2007 Burma,* released 11 March 2008, section 1.f)

Monitoring of Burmese overseas and risk upon returning to Burma

71. DFAT provided the following assessment to the Tribunal on the risk of harm faced by persons returning to Burma who had been political active overseas:

> There is a high risk the Burmese regime would treat harshly Burmese nationals who have engaged in high profile political activity abroad. There is no clear definition of "low-level" political activity. Burmese engaged in high profile anti-regime activities overseas are closely monitored by Burmese authorities. Burma residents assessed as active opponents of the regime can expect to receive particularly close attention from security forces. Severe penalties, including life imprisonment, are routinely imposed for dissent in Burma. Defence lawyers are typically neither permitted access to the defendants nor allowed to participate in court proceedings.
>
> …3. Overseas Burmese (including in Australia) classified as strong critics of the regime are monitored closely by Burmese authorities. There is no clear, reliable definition of "low-level" political activity. For example, the Burmese regime considers distribution of pro-democracy materials in Burma as a very serious offence. …
>
> 4. There is a pervasive security apparatus in Burma All Burmese residents are monitored by the regime. Anyone assessed as being a potential active opponent of the regime can expect to receive particularly close attention from security forces. Any Burmese returning to Burma after a lengthy period overseas would come at least to the attention of their local township authorities and their movements may be monitored for an initial period. Some Burmese returning after engaging in anti-regime activities overseas appear to escape close attention or retribution. They may well only receive an interview on return to Burma with a warning against continuing any political activities in Burma.
>
> 5. But there is a high risk the Burmese regime would treat harshly returning Burmese nationals who, the regime considers, have engaged in high profile political activity abroad. Strong offshore critics of the regime have been treated summarily by the regime on return to Burma. We would expect the regime would classify as "strong critics" any active or high profile members of organisations such as the National Coalition Government of the Union of Burma (NCGUB), the Federation of Trade Unions of Burma (FTUB), the All Burma Students Democratic Front (ABSDF), the Shan State Army-South (SSA-S), the Network for Democracy and Development (NDD) or the Vigorous Burmese Student Warriors (VBSW). (Department of Foreign Affairs and Trade, *DFAT Report 564 – RRT Information Request: MMR30908,* 24 November 2006)

Treatment of Rohingyas in Burma

72. Amnesty International has produced a comprehensive report about the Rohingyas, the Muslim ethnic minority who live primarily in the northern Rakhine State in Burma. The report details the restrictions and human rights violations that they experience. Their freedom of movement is severely restricted and the vast majority are effectively denied Burmese citizenship. They are subjected to various forms of extortion and arbitrary taxation; land confiscation, forced eviction and house destruction; and financial restrictions on marriage. They are used as labourers on roads and military camps although this has reduced in recent

years. These practices appear discriminatory in that they do not appear to be imposed in the same manner and at the same level on other ethnic groups in the State or the country as a whole. The restrictions and abuses and general discrimination is such that they amount to violations of the right to an adequate standard of living for many Rohingyas and thus tens of thousands have fled to neighbouring Bangladesh and other countries. (*The Rohingya Minority: Fundamental Rights Denied*, Amnesty international, May 2004, ASA 16/005/2004).

73. The US Department of State similarly reported upon the treatment of Rohingyas:

> There is wide ranging governmental and societal discrimination against ethnic minorities with serious abuses occurring including killings, beatings, torture, forced labour, forced relocations and rapes of ethnic groups by government soldiers. Rohingya Muslims who returned to the Rakhine state were discriminated against because of their ethnicity and faced severe restrictions on their ability travel, engage in economic activity, obtain education, registers births, deaths and marriages. (USDOS, *Country Report on Human Rights Practices 2007 Burma*, released 11 March 2008, section 5)

FINDINGS AND REASONS

Countries of reference

74. The applicants claim that they are stateless Rohingyas.

75. The Tribunal accepts that the applicants are Rohingyas because the adult applicants were generally credible witnesses and demonstrated knowledge of the circumstances of Rohingyas in Burma. There is nothing before the Tribunal to bring this claim into question.

76. The applicants' agent provided the Tribunal with a copy of the 1982 Burma Citizenship Law. The law creates three classes of citizens: full, associate and naturalised. The Amnesty International report referred to in the independent evidence above explains why the vast majority of Rohingyas fail to qualify for any of these three categories of citizenship and instead are regarded as permanent residents of Burma (p.9). Thus, the Tribunal accepts that the applicants are not nationals of Burma.

77. The Japanese documentation submitted by the applicants with their Australian temporary visa applications indicates that they were registered as "aliens" in Japan and had some form of residence status rather than citizenship.

78. There is no evidence before the Tribunal to suggest that the applicants are nationals of any other country.

79. Hence, the Tribunal accepts that the applicants are stateless.

80. The Tribunal accepts that the adult applicants were born and raised in Burma. Thus, the Tribunal finds that Burma is a country of former habitual residence of the first and second named applicants. Although the fourth named applicant was born in Burma and the third named applicants stayed in Burma with the second named applicant for a period before and after the sibling's birth, the adult applicants testified at the hearing that the second named applicant went to Burma on that occasion so that she could see family so that she could have support at the time of her second child's birth. The Tribunal thus finds that whilst the third and fourth applicants stayed in Burma for period of time there was no intention to reside

there. Hence, the Tribunal finds that Burma is not the third and fourth named applicants' country of former habitual residence.

81. The adult applicants testified that they met and married in Country 1 because the first named applicant could not return to Burma. Further, when the second named applicant returned to Burma to give birth to the fourth named applicant she entered Burma via Country 1. This evidence indicates that the first and second named applicants had no intention of residing in Country 1 and it was merely a transit point. Thus, the Tribunal finds that none of the applicants has resided in Country 1 and Country 1 is not a country of former habitual residence of any of the applicants.

Claims made by first named applicant

82. The first named applicant's oral evidence at the hearing about his involvement with the association and political activities in Japan was convincing.

83. The first named applicant's evidence was supported by the testimony of his wife as well as photographic and documentary evidence submitted to the Tribunal. Thus, the Tribunal accepts that the first named applicant engaged in political activities in Japan as he claims.

84. Based on the independent evidence the Tribunal finds that due to the Burmese government's close monitoring of the population the first named applicant would come to the attention of the authorities if he returned to Burma particularly given his long absence. Given the active and public nature of the first named applicant's political activities with the association and the information provided by DFAT, the Tribunal finds that it is highly probably that the Burmese authorities would be aware of his activities. In light of the evidence from DFAT and the USDOS about the government's treatment of critics of the Burmese government combined with the discrimination against Rohingyas the Tribunal finds that there is a real chance that the first named applicant would be subjected to persecution in the form of arrest, detention or imprisonment as well as serious physical abuse by the government authorities for reasons of his political opinion and ethnicity. The Tribunal therefore finds that the first named applicant has a well-founded fear of persecution in Burma.

85. The question however arises whether the first named applicant has effective protection in Japan. The Tribunal believes that he had a right to reside in Japan temporarily on the basis of his own evidence about the recurring visas he has been issued as well as the fact that he returned to Japan after travelling to Country 1 to marry. Further, the fact he destroyed his Japanese travel documents because he did not want to be sent back to Japan indicates that he had a right to enter and reside in Japan albeit temporarily. However, the Tribunal must be satisfied that the first named applicant has not taken all possible steps to avail himself of a legally enforceable right that exists now to enter and reside in Japan temporarily or permanently. The Tribunal notes the opinion of DFAT that the applicants would have a right to re-enter Japan provided they satisfied certain conditions including that they had a re-entry permit. However, the first named applicant destroyed the documentation he had regarding his status in Japan. The Tribunal attempted to obtain general information about any right to re-enter and reside in Japan particularly in light of the destruction of the Japanese documentation. However, the Japanese authorities advised that without the original documentation they could not provide any information about anyone's status in Japan, right to re-enter and reside in Japan or the possible consequences on any such right arising from the destruction of the documentation. Obviously the Tribunal could not provide the original documentation given it had been destroyed. Thus, the Tribunal is not in a position to be

satisfied and affirmatively find that the first named applicant has not taken all possible steps to avail himself of a legally enforceable right to enter and reside in Japan. Hence, the Tribunal finds that s.36(3) of the Act does not apply to the first named applicant.

Claims of the second, third and fourth named applicants

86. The second named applicant claims that she fears that if she returns to Burma she will be killed because of her husband's political activities. The Tribunal rejects this claim. The Tribunal put to the first and second named applicants at the hearing that if her claim were true she would not have returned to Burma with the third named applicant to give birth to the fourth named applicant. The first named applicant responded to this in writing after the hearing stating that the second named applicant went clandestinely and had to hide. He said the second named applicant's family member was very ill and she wanted to see the person once more before they passed away. The Tribunal does not consider it plausible that if the second named applicant had a subjective fear that not only she but her children would be killed in Burma due to her husband's political activities that she would have returned to Burma and exposed not only herself but her small child and unborn child to such danger. Further, the Tribunal does not consider it plausible that if the second named applicant believed she and her children faced such danger she would have remained in Burma for so many months after the fourth named applicant was born. The Tribunal thus finds that the second named applicant does not have a well-founded fear of persecution in Burma for reasons of her husband's political activities.

87. It follows from the findings in the previous paragraph that even if Burma was the third and fourth named applicants' country of former habitual residence the Tribunal would find that they did not have a well-founded fear of persecution in Burma because of their father's political activities.

88. It was also claimed that the second named applicant would face persecution if she returned to Burma because she was a Rohingya however her oral evidence indicated that she was did not experience any serious harm due to her ethnicity in the past because she lived in an area with few Rohingyas who were viewed as mixed race. The first named applicant claimed that he had heard that Rohingya women in the villages outside his town had been raped and girls forced to marry soldiers but this had not happened to any members of his family as they lived in the town rather than the outlying villages. Thus, the Tribunal finds that whilst the independent evidence indicates that there is a chance that the second named applicant might be persecuted in the future due to her ethnicity, taking into account her past experience and the situation in her home area and her husband's town the Tribunal finds that the chance of persecution in the reasonably foreseeable future is not real. Hence, she does not have a well-founded fear of persecution in Burma for reasons of her ethnicity.

89. It follows from the findings in the previous paragraph that even if Burma was the third and fourth named applicants' country of former habitual residence the Tribunal would find that they did not have a well-founded fear of persecution in Burma for reasons of their ethnicity.

90. The second named applicant claims that she fears being punished if she returns to Japan for destroying her Japanese documentation. There is no evidence before the Tribunal to indicate that she would be punished or even if she was that the punishment would be serious enough to amount to persecution. Thus, the Tribunal finds that the second named applicant would not be persecuted for destroying her Japanese decimation.

91. The first named applicant claimed that the applicants were not entitled to the health services that Japanese nationals were entitled to. The Tribunal put to the first and second named applicants on the first day of the hearing that the independent evidence the delegate had referred to in her decision indicated that long term residents in Japan such the applicants were entitled to the same educational, medical and social welfare safety net arrangements as Japanese citizens. The first named applicant responded to this in writing stating that he did not believe he would have been able to obtain welfare assistance if he had been out of work, and he had never seen anyone like him being given monetary assistance. He said he had suffered discrimination in employment, many employers did not employ foreigners, as a foreigner he could not get a permanent job, health insurance was not paid for and he could not get bonus payments and overtime loading. He stated that the discrimination was serious and affected the wellbeing of his family. The Tribunal accepts that the first named applicant suffered some discrimination in his employment. It appears that this and the fact he was not accepted by the Japanese authorities as a refugee thereby denying him access to the entitlements of a refugee have been a source of considerable resentment for him. The Tribunal believes he has thus exaggerated the discrimination faced by the applicants in Japan. Thus, the Tribunal prefers the independent evidence referred to in the delegate's decision and finds that the second named applicant was not subjected to discrimination in relation to medical, welfare or education services in Japan because she was a foreigner nor would she, the third or fourth named applicants be subjected to discrimination in those areas in the future.

92. The Tribunal accepts that the second and third named applicants were subjected to discriminatory comments and treatment at the third named applicant's school in Japan. The Tribunal accepts that the conduct was unkind, upsetting and cruel and not well handled by the school. Section 91R(2) of the Act illustrates the kinds of serious harm that may constitute persecution. It includes significant physical harassment or ill-treatment. The Tribunal finds that the treatment the second and third named applicants were subjected to was not significant or serious enough to amount to persecution. Further, the third named applicant was not denied an education and the independent evidence referred to by the delegate in her decision indicates that third and fourth named applicants would have the same access to education as a Japanese national. Thus, the Tribunal finds that the second and third named applicants were not persecuted in relation to the incidents at the school and that the third and fourth named applicant would not be subjected to serious harm amounting to persecution in relation to their education in the future if they returned to Japan.

93. Further, the Tribunal put to the adult applicants at the hearing that if the severity of the discrimination they claimed was true then they would not have remained in Japan for as many years as they did. In their written response to this the first named applicant stated that it was only after he had a child that he became more aware of discrimination in Japan and felt downhearted. He said that as a stateless person he had little choice about where to go and he saved hard to have the money to come to Australia. The applicants' agent emphasised their limited choices and the uncertainty in coming to Australia. She submitted that it was the intolerable situation faced by their children at school that led them to seek protection in Australia. The Tribunal does not accept these explanations. The first named applicant presented at the hearing as clever and astute man whose actions are well thought out and calculated. The Tribunal does not believe it would have taken him many years to become conscious of the discriminatory situation he and his family faced and to organise to leave Japan if the discrimination was as serious as claimed.

94. Thus, the Tribunal finds that the second, third and fourth named applicants have not suffered persecution in Japan in the past because they are foreigners nor is there a real chance that they will face persecution in Japan in the reasonably foreseeable future. Hence, they do not have a well-founded fear of persecution in Japan.

Consideration of application on the basis of family membership

95. The applicants made a combined protection visa application in which they clearly indicated that the first and second named applicants were married spouses and the third and fourth named applicants were their children. Thus, the Tribunal infers that in addition to making their application on the basis of their own individual refugee claims the applicants also applied for protection visas on the basis of their family membership. As such they are entitled to be considered with respect to the criteria in s.36(2)(b) of the Act.

96. There is no evidence before the Tribunal to contradict the claim that first and second named applicants are spouses or that the third and fourth named applicants are their children. The children's young age and the evidence before the Tribunal indicates that they are dependants of the first named applicant. Thus, the Tribunal finds that the second named applicant is the spouse of the first named applicant and the third and fourth named applicant are dependants of the first named applicant.

CONCLUSIONS

97. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided he satisfies the remaining criteria.

98. The Tribunal is not satisfied that the other applicants are persons to whom Australia has protection obligations under the Refugees Convention. However, as the Tribunal is satisfied that the second named applicant is the spouse of the first named applicant for the purposes of s.36(2)(b)(i) she will be entitled to protection visas provided she satisfies the criterion set out in s.36(2)(b)(ii) and the remaining criteria for the visa. Further, as the Tribunal is satisfied that the third and fourth named applicants are dependants of the first named applicant for the purposes of s.36(2)(b)(i) they will be entitled to protection visas provided they satisfy the criterion set out in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

99. The Tribunal remits the matter for reconsideration with the following directions:

(i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and

(ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants of the first named applicant.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.
Sealing Officer's I.D. PMRTKS