

0900751 [2009] RRTA 456 (26 May 2009)

DECISION RECORD

RRT CASE NUMBER: 0900751

DIAC REFERENCE(S): CLF2006/139124

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Mary Urquhart

DATE: 26 May 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Burma (Myanmar) arrived in Australia [in] November 2006 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] December 2006. The delegate decided to refuse to grant the visa [in] March 2007 and notified the applicant of the decision and his review rights.
3. The applicant sought review of the delegate's decision and the Tribunal, differently constituted, affirmed the delegate's decision [in] July 2007. The applicant sought review of the Tribunal's decision by the Federal Magistrates Court and [in] January 2009 the Court set aside the decision and remitted the matter to the Tribunal to be determined according to law
4. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
5. The matter is now before the Tribunal pursuant to the order of the Federal Magistrates Court.

RELEVANT LAW

6. 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.
7. 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The application is now before the Tribunal pursuant to the order of the Federal Magistrates Court.
21. The applicant appeared before the Tribunal [in] April 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
22. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
23. In Part C of his application to the Department for a Protection Visa, in response to the question what do you fear may happen to you go back to your country, the applicant states inter alia as follows:

"Today, in Burma there is no National Constitution that guarantees the rights of all citizens. All "laws" promulgated by the military regime exist as "pseudo-law" valid only within the term of office of the Minister concerned or as long as it suits the needs of the military. Policies brought out by various ministerial departments exist only to suit the needs of people within the hierarchical network designed to support the Military Government administrative and political infrastructure. Two common practices are regularly carried out by Government staff. They are to create (i) constant suppression throughout the entire country (ii) to maintain constant fear in people where no one really knows what awaits them the next day. These two practices have become more important than the actual day to day efficient running of the departmental work and activities.

Photocopying (activity) for NLD is a "crime", and close association with NLD [deleted s.431(2)] members is a "serious crime" both of which can cause a person to be arrested, and tortured before charges are laid. There are many incidences where charges do not fit the alleged crime yet given long term prison sentences.

The pattern of (i) constant suppression on all people in order to instill (ii) constant fear is supported by (iii) long term prison sentences, with torture, threats as well as actual - physical, emotional, psychological and sexual abuse accompany along the three stages.

The statements I make are based on, hundreds of cases some of which occurred to my friends and relatives, above all my mother. There is imminent danger and real threat to our lives and future

in Burma. Varying degrees of threat and fear have begun in the lives of my father and the rest of my family in Burma”.

Evidence at the hearing

24. The applicant stated his name and gave his date of birth as [date deleted: s.431(2)] He told the Tribunal that he had finished high school and was not married. He presented his passport, [number deleted s.431(2)], issued in Burma [in] May 2004. It was his evidence that he left Burma and first came to Australia with his mother [in] November 2006 to visit an uncle in Australia who was ill. He said he is currently working in a [business deleted: s431(2) in Perth.
25. The applicant lodged a Protection Visa application [in] December 2006 on the convention grounds of particular social group (family), political opinion and imputed political opinion and ethnicity. It was his evidence that his mother obtained his visa, passport and departure form, and paid money to obtain these documents. It was his evidence that it is the usual thing to pay money in order to obtain such documents. He said his mother had paid 150,000 Burmese Kyat in bribes. It was his evidence that he had had some five or six trips out of Burma in the past. He had gone with his mother to training sessions when she worked for the airlines and he had also investigated the idea of opening up a stationery shop, which he ultimately did. He said it was necessary for him to pay a bond in order to get the passport, in addition to the bribes paid by his mother
26. The applicant gave evidence of his own involvement in political activities and those of his family. The applicant said in 1988 when he was a year 5 student, aged about 11, he was on his way home from school when the military arrived at the school front gate and proceeded to grab students and to hit and beat them. He was very frightened, but he was also young and he said he ran very fast, down many lanes, not in a direct route to get away and reach his home.
27. The applicant described living under a military government since 1988 when he was about 11 years old. He said he had grown up in fear and that from the age of 11, or when he was in year 5, he had been frightened. He had witnessed beatings and he had lived with unfairness. He said the government’s practice, whether it was in the suburbs or all other districts, was that on important dates they would go around checking on people. He said when he came to know of his mother’s involvement in political activities he felt very frightened and lived in fear. He felt his family were being watched by the government. He said he felt watched by officials who wore ordinary clothes and were interested in people on “the list”. He said that it was people on the list who would be checked on, “particularly around national days, Christmas, and so on”.
28. The Tribunal asked the applicant if he thought that his family was on the list. He replied that that is what he understood. He said people who had been to prison, or who had taken part in demonstrations, were on the list and the military government wanted to make sure that they were all at home on important dates.
29. The applicant told the Tribunal of his father’s involvement in political activities, stating that his father had demonstrated as a government worker in 1988 and that, as a consequence of that, he had lost his job. He told the Tribunal that his father did not lose his job straight away. He said the government had lists to check through as to who

was what and who was where, but eventually they caught up with his father and he lost his job. The applicant told of the demise of his father's working career, after being sacked in 1991 and then having to work as a taxi driver and a tutor of children. He said his mother had worked part-time and together what they earned was just enough for the family to survive on.

30. It was the applicant's evidence he first was aware that his mother was helping the NLD when she was arrested because she was helping with the 1990 elections. He also told the Tribunal that he had assisted his mother when she was involved with collecting and delivering donations of food and other goods whilst he was still at school. The applicant told the Tribunal that he had known [Person A] since he was a young child because [Person A] was a long term friend of his [relative] He referred to [Person A] as his "big uncle". He knew [Person A] was involved with the NLD.
31. The Tribunal asked the applicant about the photocopying he claimed in his application for a Protection Visa to have executed for the NLD including how many times he helped out with photocopying. He said, in reply, that he really only did it the one time for the NLD and he did it because [Person A] had asked for him to do it. His evidence was that he had also printed material of a general nature for [Person A]
32. The applicant described his stationery shop to the Tribunal. He said it occupied the bottom floor of his home. He said the shop was near to a school, which was one street away. Apart from stationery and pens, he sold unusual items such as some cosmetics, including nail polish, cold drinks and things of that kind. The applicant's evidence was that he managed the shop. He printed about 100 copies of scheduled trips of the NLD to upper Burma for distribution.
33. The applicant told the Tribunal that he had friends who had also been involved in photocopying for the NLD. He described their machine as being better than his and capable of photocopying books. It was his evidence that in June 2005, sometime before Christmas, he went to visit these friends and was told by their parents that they had been arrested. They were two brothers and one other. He was told they had been taken away because they made copies of documents for the NLD. The applicant said he became very frightened and no longer kept in touch with these boys. It was his evidence that he was scared that they would be beaten "nice and proper" until they told their interrogators all that they knew, which may have included telling them about him, so he had to be very careful and he was very afraid.
34. The applicant told the Tribunal that he first learnt that his father had gone to prison in 2006 after he had arrived in Australia. His evidence was that he learnt this from a brief telephone call from his aunt to his and from his mother then telling him that there were disturbing circumstances back home. He said that people from the military visited his home and questioned his father about himself and his mother, and where they had gone and what their political activities were. He said they asked his father about the printing of some documents for the NLD. He said that his father was not aware of these activities. It was his understanding that his father had been taken to prison because the authorities could not get any answers from him.
35. The applicant told the Tribunal that this event made him particularly worried and frightened for his father. His demeanour in giving this evidence was convincing He said after all he knew of living in fear over the years, of seeing his parents never speak

openly about things political, about the whispers between his mother and father; and because he knew of the torture and the things that happened to people in prison, he was very worried and frightened for his father.

36. The applicant said it was only recently, through his aunt, that he came to know of his father's release. He said there had been no contact between his mother, himself and his father because to contact him may have caused him to be put back in prison again for being contacted. He told the Tribunal that his sister had been expelled from study after all the incidents and he again stated that that was all they knew and that he had no contact with her. He had no information about his family in Burma at the moment.
37. The Tribunal asked the applicant what he feared would happen if he went back to Burma. His evidence was that he believed the military intelligence knew of his family association with [Person A] and about his photocopying activities. He stated they had made enquires about him and his mother. It was his evidence that he "would be arrested for sure". He said this is what happens to others. He was very frightened about what he would face if he returned to Burma. He said because his mother had been arrested before, and because of her involvement, and because his father had recently been taken to jail, he remained very fearful of what would happen to him should he return to Burma.
38. The applicant gave evidence of the effect that all his worries had on his health. He said he had also endured a major car accident and been treated in Royal Perth Hospital. It was his evidence that, whilst in hospital, he had seen the demonstrations on television where the Burmese monks were being persecuted and he had sought leave from his doctors to attend the demonstration. He presented photographic evidence of his attendance indicating that he was wearing bandages on his face where oxygen tubes had been connected.
39. It was the applicant's evidence that the military government had been unfair for a long time to people and particularly to his parents who had gone through all of that. He said the monks didn't deserve the treatment and the torture "that happened" to them, and that other people didn't deserve it either. He said that it was important to let the outside world know what was happening in Burma. He said the military government would continue as it is and that he would continue to take part to oppose it.
40. It was the applicant's evidence that not being "one hundred percent Burmese" also played a part in the persecution he suffered, and would expect to suffer should he return to Burma.

Independent Country of origin information

41. The US State Reports of 2008 on Human Rights Practices in Burma states in part as follows:

"Burma, with an estimated population of 54 million, is ruled by a highly authoritarian military regime dominated by the majority ethnic Burman group. The State Peace and Development Council (SPDC), led by Senior General Than Shwe, was the country's de facto government. Military officers wielded the ultimate authority at each level of government. In 1990 prodemocracy parties won more than 80 percent of the seats in a general parliamentary

election, but the regime continued to ignore the results. The military government controlled the security forces without civilian oversight.

The regime continued to abridge the right of citizens to change their government and committed other severe human rights abuses. Government security forces allowed custodial deaths to occur and committed other extrajudicial killings, disappearances, rape, and torture. The government detained civic activists indefinitely and without charges. In addition regime-sponsored mass-member organizations engaged in harassment, abuse, and detention of human rights and prodemocracy activists. The government abused prisoners and detainees, held persons in harsh and life-threatening conditions, routinely used incommunicado detention, and imprisoned citizens arbitrarily for political motives. The army continued its attacks on ethnic minority villagers. [Country information regarding Person A deleted: s.431(2)] The government routinely infringed on citizens' privacy and restricted freedom of speech, press, assembly, association, religion, and movement. The government did not allow domestic human rights nongovernmental organizations (NGOs) to function independently, and international NGOs encountered a difficult environment. Violence and societal discrimination against women continued, as did recruitment of child soldiers, discrimination against ethnic minorities, and trafficking in persons, particularly of women and girls. Workers' rights remained restricted. Forced labor, including that of children, also persisted. The government took no significant actions to prosecute or punish those responsible for human rights abuses.

The government persisted in its refusal to investigate or take responsibility for the 2003 attack by government-affiliated forces on an NLD convoy led by party leader Aung San Suu Kyi near the village of Depeyin, in which as many as 70 persons were killed.

Private citizens and political activists continued to "disappear" for periods ranging from several hours to several weeks or more, and many persons never reappeared. Such disappearances generally were attributed to authorities detaining individuals for questioning without informing family members and to the army's practice of seizing private citizens for portering or related duties, often without notifying family members. Requests for information directed to the military forces were routinely ignored. In some cases individuals who were detained for questioning were released soon afterward and returned to their families.

The government took no action to investigate reports that security forces took large numbers of residents and monks from their homes and monasteries during numerous nighttime raids following the peaceful prodemocracy protests in September 2007.

The whereabouts of persons seized by military units to serve as porters, as well as of prisoners transferred for labor or portering duties, often remained unknown. Family members generally learned of their relatives' fates only if fellow prisoners survived and later reported information to the families.

There are laws that prohibit torture; however, members of the security forces and other progovernment forces reportedly tortured, beat, and otherwise abused prisoners, detainees, and other citizens. They routinely subjected detainees to harsh interrogation techniques designed to intimidate and disorient. As in previous years, authorities took little or no action to investigate the incidents or punish the perpetrators.

In 2005 the Thailand-based Assistance Association for Political Prisoners released a report on the "brutal and systematic" torture that the government inflicted on political prisoners. Based on the testimony of 35 former political prisoners, the report gave details of the physical, psychological, and sexual abuse the government employed on dissidents, and it identified by name many of the perpetrators. The report detailed the kinds of torture the government used, including severe beatings, often resulting in loss of consciousness and sometimes death; repeated electric shocks to all parts of the body, including genitals; rubbing iron rods on shins until the flesh comes off; burning with cigarettes and lighters; prolonged restriction of movement for up to several months using rope and shackles around the neck and ankles; repeatedly striking the same area of a person's body for several hours; forcing prisoners to walk or crawl on an aggregate of sharp stones, metal, and glass; using dogs to rape male prisoners; and threatening female prisoners with rape. Authorities used prolonged solitary confinement to punish prisoners.

There were credible reports that prostitutes taken into police custody were sometimes raped or robbed by the police. Occasionally, authorities would arrest and prosecute women who reported being raped by police or soldiers. Security officials frequently placed a hood on those accused or suspected of political crimes upon arrest.

The government denied prisoners adequate medical care, although medical services in prisons partially reflected the poor health care services available to the general population.

Despite the government's insistence that it did not hold any political prisoners, reports by prisoners indicated that authorities frequently placed politically active prisoners in communal cells, where they were subjected to beatings and severe mistreatment by common criminals.

The law does not prohibit arbitrary arrest or detention, and the government routinely used them. The law allows authorities to extend sentences after prisoners have completed their original sentence, and the government regularly used this provision.

The Myanmar Police Force is under direct military command but falls administratively under the Ministry of Home Affairs. Police primarily deal with common crimes and do not handle political crimes. Corruption and impunity were serious problems, due to a government-imposed system whereby police were required to collect funds for their operations. Police typically required victims to pay substantial sums for crime investigations and routinely extorted money from the civilian population. There are no effective legal mechanisms available to investigate security force abuses. The government took no significant measures to reform the security forces.

Military Security Affairs (MSA) officers and Special Branch (SB) police officers are responsible for detaining persons suspected of "political crimes" perceived to threaten the government. Once a person is detained, MSA or SB officers interrogate the individual for a period ranging from hours to months and can charge the person with a crime at any time during the interrogation.

During the year the regime detained numerous prodemocracy and human rights activists and several top opposition leaders and MPs-elect. Other activists wanted by the regime remained in hiding or self-imposed exile at year's end.

In April and May, the regime detained more than 130 persons suspected of campaigning against the government's draft constitution in the period preceding the May constitutional referendum. Many of these individuals were released shortly after their arrest. Several others remained in detention at year's end.

On June 25, police in Rangoon arrested a protester in front of city hall. According to the press, the woman shouted slogans calling for the release of Aung San Suu Kyi and other political prisoners before the authorities took her away. Officials did not acknowledge her arrest or release her identity.

The judiciary is not independent of the government. The SPDC appoints justices to the Supreme Court, which in turn appoints lower court judges with SPDC approval. These courts adjudicate cases under decrees promulgated by the SPDC that effectively have the force of law. The court system includes courts at the township, district, state, and national levels. While separate military courts for civilians do not exist, the military regime frequently directs verdicts in politically sensitive trials of civilians.

The government continued to rule by decree and was not bound by any constitutional provisions providing for fair public trials or any other rights. Although remnants of the British-era legal system remain formally in place, the court system and its operation were seriously flawed, particularly in the handling of political cases. The misuse of blanket laws including the Emergency Provisions Act, Unlawful Associations Act, Habitual Offenders Act, Electronic Transactions Law, Video Act, and Law on Safeguarding the State from the Danger of Subversive Elements--as well as the manipulation of the courts for political ends continued to deprive citizens of the right to a fair trial and to stifle peaceful dissent. Executive Order 5/96, which provides for the arrest of any person deemed a threat to the National Convention and the "roadmap to democracy," effectively stifled open debate among citizens. Pervasive corruption further served to undermine the impartiality of the justice system.

The new constitution provides for the right to a fair trial, but it also grants broad exceptions that in effect allow the regime to violate these rights at will.

Numerous prodemocracy and human rights activists arrested in 2007 were formally sentenced to prison terms during the year. ...

In November officials sentenced several NLD members who were arrested in 2007 to prison terms...

NLD general secretary Aung San Suu Kyi remained under house arrest without charge and without trial. In May the regime again extended her detention, which began in 2003....[Country information regarding Person A deleted: s.431(2)]

Civil judicial procedures and remedies existed in principle, but in practice there was no assurance that a complainant would receive a fair hearing.

f. Arbitrary Interference with Privacy, Family, Home, or Correspondence

The law does not prohibit such actions, and authorities routinely infringed citizens' privacy. Through its intelligence network and administrative procedures, the government

systematically monitored the travel of all citizens and closely monitored the activities of many citizens, particularly those known to be active politically.

Forced entry without a court order is legal. The law requires that any person who intends to spend the night at a place other than his registered domicile inform local peace and development council authorities in advance. Any household that hosts a person not domiciled there must maintain a guest list and submit it to authorities. Ward-level officials continued unannounced nighttime checks of residences for unregistered visitors. Authorities in Rangoon Division continued sporadically to require households to have "family photographs" taken for government agents to use when conducting nighttime checks of residences. Households subjected to this requirement were required to pay for the cost of their photographs, usually at significantly higher than market rates, and permanently display in their homes the photographs of authorized residents.

Security personnel regularly screened private correspondence, telephone calls, and e-mail.

The government continued to control and monitor closely the licensing and procurement of all two-way electronic communication devices. Possession of an unregistered telephone, facsimile machine, or computer modem is punishable by imprisonment.

The government continued its practice of conscripting members of ethnic minorities for service as military porters in Bago Division and Karen, Kachin, Kayah, and northern Rakhine states.

Government employees generally were prohibited from joining or supporting political parties; however, this proscription was applied selectively. The government used coercion and intimidation to induce persons, including nearly all public-sector employees and many students, to join the government's mass mobilization organizations the USDA, Myanmar Women's Affairs Federation (MWAFF), and Myanmar Maternal and Child Welfare Association and attend meetings in support of the regime. The government also used coercion to entice or force members of the NLD and other opposition parties to resign, and it publicized the coerced resignations in government media.

Weak private property rights and poor land ownership records facilitated involuntary relocations of persons by the government. The law does not permit private ownership of land, recognizing only different categories of land-use rights, many of which are not freely transferable. Postcolonial land laws also revived the precolonial tradition that private rights to land are contingent upon the land being put to productive use.

Forced relocations in rural areas continued during the year. The relocations reportedly were often accompanied by executions, rapes, and demands for forced labor to build infrastructure for military units.

While less frequent than in rural areas, reports persisted of forced relocation in urban areas. The government reportedly continued to relocate forcibly some urban households for "security" reasons. In Rangoon persons were compelled to leave homes or dwellings located on property that could be used for commercial gain. In some cases those forced to move were poorly compensated, if at all.

At year's end most civil servants in the administrative capital Nay Pyi Taw continued to live separately from their families in Rangoon.

There were numerous reports that government troops looted and confiscated property and possessions from forcibly relocated persons or persons who were away from their homes. The materials often were used for military construction. Commandeering privately owned vehicles for military or VIP transport without compensating the vehicle owners was commonplace throughout the country. The practice was particularly widespread in Shan, Kayah, and Karen states and in areas of Mon State and Bago Division.

The government routinely confiscated property, cash, and food from civilians. Additionally, USDA members, acting under the cover of governmental authority, confiscated property for their own use.

Military personnel also routinely confiscated livestock, fuel, food supplies, fishponds, alcoholic drinks, vehicles, and money. Such abuses were widespread. Regional commanders forced contributions of money, food, labor, and building materials from civilians throughout the country.

The government punished family members for alleged violations by individuals.

g. Use of Excessive Force and Other Abuses in Internal Conflicts

Ethnic insurgent groups continued to battle the government for autonomy or independence, including the Shan State Army–South, the Karenni National Progressive Party, and the Karen National Union (KNU), through its armed wing, the Karen National Liberation Army. In ethnic minority regions, military personnel reportedly killed and raped civilians, shelled villages and burned homes, destroyed food and seized possessions, confiscated land, forced villagers to work on infrastructure projects, and demanded that villagers provide food and construction materials for military camps.

There were no reports that the government investigated or otherwise attempted to identify and punish those responsible for numerous acts of killing, injury, and destruction committed against Karen communities during the year.

According to the Office of the UN High Commissioner for Refugees (UNHCR), approximately 150,000 Burmese refugees lived in camps in Thailand. The regime did not allow the UNHCR to monitor fully the potential areas of return to assess conditions for the voluntary return of the refugees and IDPs, leading the UNHCR to determine that conditions remained unsuitable for their return.

The new constitution provides for freedom of speech and of the press, but the government continued to restrict these rights severely and systematically.

The government arrested, detained, convicted, and imprisoned citizens for expressing political opinions critical of the government and for distributing or possessing publications in which opposition opinions were expressed. Security services also monitored and harassed persons believed to hold antigovernment opinions.

The government continued to use force to prohibit all public speech critical of the regime by all persons, including by individuals elected to parliament in 1990 and leaders of political parties. The government pursued this policy consistently with few exceptions.

The law prohibits the publication or distribution of any printed material without obtaining prior approval from the government. The government controlled content in all print publications and owned and controlled all domestic radio and television broadcasting facilities. The official media remained propaganda organs of the government and did not report opposing views except to criticize them.

The law makes it a criminal offense to publish, distribute, or possess a videotape not approved by a state censorship board. The government continued to crack down on uncensored foreign videotapes and digital video discs, although pirated copies remained widely available on the street.

No laws or regulations exist regarding monitoring Internet communications or establishing penalties for the exercise of freedom of expression via the Internet. However, the government monitored Internet communications and blocked Web sites so that individuals could not freely engage in such activities.

The law limits freedom of assembly, and the government severely restricted it in practice. An ordinance officially prohibits unauthorized outdoor assemblies of more than five persons, although it was not enforced consistently and authorities sometimes prohibited smaller gatherings. While still a legal political party, all NLD offices except its Rangoon headquarters remained closed by government order, and the NLD could not lawfully conduct party activities outside its headquarters building. The nine other legally registered political parties were required to request permission from the government to hold meetings of their members. Informal meetings involving NLD members occurred outside the NLD office; however, security officials closely monitored these activities. Authorities occasionally demanded that NLD leaders provide them with lists of attendees in advance in an attempt to discourage participation.

The regime and its supporters routinely used intimidation, violence, and the power of arrest to disrupt peaceful demonstrations and meetings.

The new constitution provides for the freedom of religion; however, it also grants broad exceptions that allow the regime to restrict these rights at will.

There is no official state religion, but the government continued to show preference for Theravada Buddhism, the majority religion. Most adherents of registered religious groups generally were free to worship as they chose; however, the government imposed restrictions on certain religious activities and promoted Buddhism over other religions. The Ministry of Religious Affairs has a separate department for the "promotion and propagation of Sasana" (Buddhism). The government promoted education at Buddhist monastic schools in rural areas and subsidized Buddhist universities in Rangoon and Mandalay.

Virtually all organizations, religious or otherwise, must register with the government. Although an official directive exempts "genuine" religious organizations from registration, in practice only registered organizations were allowed to buy or sell property or open bank accounts. Consequently, most religious organizations registered with the government.

The law provides for criminal penalties for official corruption; however, the government rarely and inconsistently enforced the anticorruption statute, and officials frequently engaged in corrupt practices with impunity. A complex and capricious regulatory environment fostered corruption.

The government did not allow domestic human rights organizations to function independently, and it remained hostile to outside scrutiny of its human rights record.

Rape is illegal, but the government did not enforce the law effectively. If the victim is under 14 years of age, the act is considered rape with or without consent. In such cases the maximum sentence is two years' imprisonment when the victim is between ages 12 and 14, and 10 years' to life imprisonment when the victim is under 12. Spousal rape is not a crime unless the wife is under 14.

There are no laws against sexual harassment, which continued to be a problem.

Shan and other ethnic minority women and girls were trafficked across the border from the north; Karen and Mon women and girls were trafficked from the south. There was evidence that internal trafficking generally occurred from poor agricultural and urban centers to areas where prostitution flourished (trucking routes, mining areas, military bases, and industrial areas) as well as along the borders with Thailand and China. Men and boys also reportedly were trafficked to other countries for sexual exploitation and labor.

The Ministry of Home Affairs continued to maintain that there was no complicity of government officials in trafficking; however, corruption among local government officials was widespread. NGOs reported that government officials were complicit in trafficking, although it appeared limited to local and regional officials turning a blind eye to trafficking activities. Authorities took no law enforcement action against trafficking by government or military officials. Although corruption was pervasive along the borders, there were no reports of action taken against officials complicit in profiting from or involved in trafficking.

There were ethnic tensions between Burmans and nonindigenous ethnic populations, including South Asians, many of whom were Muslims, and a rapidly growing population of Chinese, most of whom emigrated from Yunnan Province. Chinese immigrants increasingly dominated the economy of the northern part of the country.

Other Societal Abuses and Discrimination

Many citizens viewed homosexuals with scorn. Penal code provisions against "sexually abnormal" behavior were applied to charge gays and lesbians who drew unfavorable attention to themselves. Nonetheless, homosexuals had a certain degree of protection through societal traditions.

HIV-positive patients were discriminated against, although HIV activists reported that awareness campaigns helped to reduce discrimination and stigma. However, some persons reportedly were reluctant to visit clinics that treat HIV/AIDS patients for fear of being suspected of having the disease.

FINDINGS AND REASONS

42. In both his Protection Visa application and his review application, the applicant described himself as a national of Burma (Myanmar). He arrived in Australia on a Burmese passport issued [in] May 2004 in Yangon, Burma. There being no evidence to the contrary the Tribunal finds the applicant to be a national of Burma and has assessed his claims against Burma as his country of nationality. The Tribunal is satisfied that he is outside the country of his nationality. There is no evidence before the Tribunal that the applicant has a legal right to enter and to avail himself of the protection of a third country, and the Tribunal finds that the applicant does not have effective protection in a safe third country.
43. In reaching its determination in this application the Tribunal must consider whether or not the applicant has a well-founded fear of persecution for a Convention related reason.
44. The Tribunal observes that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts.
45. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
46. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
47. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant’s country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). However, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

48. In order to be a refugee under the Convention, it is necessary for the applicant to be outside his/her country of nationality and to hold a well-founded fear of persecution for reasons of at least one of the five grounds enumerated in the Convention namely religion, race, nationality, membership of a particular social group, and political opinion.
49. The applicant claims he fears imprisonment and torture if he returns due to his political opinion and imputed political opinion arising from some photocopying work he did at the family owned photocopying and stationery shop at the direct request of [Person A], a [member] of the NLD (National League for Democracy) [information deleted: s.431(2)], and because of his current support of the opposition NLD party. He also fears future harm because of his membership of a particular social group (family) due to his family's long standing and close friendship with [Person A] and his parent's involvement in political activities and their arrest. The applicant says he is not "fully Burmese" and for this reason claims he has been "discriminated against" on grounds of his ethnicity.
50. For the reasons that follow the Tribunal finds that the harm feared by the applicant, as set out in his application for a Protection Visa, involves serious harm and systematic and discriminatory conduct, and that the essential and significant reason for the harm feared is his imputed or actual political opinion, his membership of a particular social group (family) and his ethnicity, any or all of which are Convention reasons.
51. The Tribunal accepts that independent country of origin information contained in the US State Reports of 2008 on Human Rights Practices in Burma supports the applicant's claims that the Burmese authorities commonly engage in the abuse and persecution of those suspected of expressing anti-government or pro-democracy beliefs. The Tribunal finds that independent country of origin information contained in the US State Reports of 2008 on Human Rights practices in Burma in particular "the government arrested, detained, convicted, and imprisoned citizens for expressing political opinions critical of the government ... Security services also monitored and harassed persons believed to hold antigovernment opinions" supports the applicant's claims that there is persecution of those advocating political reform in Burma, or supporting dissident groups, such as the NLD.
52. The Tribunal accepts on the basis of independent country of origin information contained in the US State Reports that in 1988 Burma was wracked by mass demonstrations, protests and other forms of insurrection against the military junta, that they were suppressed ruthlessly and systematically, and that their leaders and others were hunted down and imprisoned, in particular the report states that "[country information regarding Person A deleted: s.431(2)] The government routinely infringed on citizens' privacy and restricted freedom of speech, press, assembly, association, religion, and movement. The government did not allow domestic human rights nongovernmental organizations (NGOs) to function independently, and international NGOs encountered a difficult environment".
53. The Tribunal accepts the evidence of the applicant that he first experienced harassment and discrimination as a school boy when indiscriminate attacks were made on school children outside his school from which he was forced to flee. For the reasons that follow the Tribunal finds that the applicant has suffered a lifetime of suppression from the government since that time and that the applicant has a well founded fear of serious

harm should he return to Burma now or in the foreseeable future because of his political opinion and imputed political opinion and membership of a particular social group (family) and ethnicity.

54. The Tribunal finds the applicant to be an honest person and a credible witness. The Tribunal accepts the applicant's evidence that in 1988 his father had taken part in anti-government demonstrations criticising the military government. The Tribunal accepts that as a consequence his father lost his job in 1991. The Tribunal finds the applicant's account of the delay between the demonstrations and sacking of his father plausible in light of country information.
55. In reaching this finding the Tribunal relies upon the applicant's evidence together with independent country of origin information set out above and in particular the US State Report's reference to government employees who generally were prohibited from joining or supporting political parties. The Tribunal notes that the "government used coercion to entice or force members of the NLD and other opposition parties to resign, and it publicized the coerced resignations in government media".
56. The applicant described living under a military government since the age of 11. He said he had grown up in fear and that from the age of 11, or when he was in year 5, he had been frightened. He had witnessed beatings and he had lived with unfairness. He said the government's practice, whether it was in the suburbs or all other districts, was that on important dates they would go around checking on people. He said, knowing of his mother's involvement he felt very frightened and lived in fear. He felt they were being watched by the government. He said he felt watched by officials who wore ordinary clothes and were interested in people on "the list" He said that it was people on the list who would be checked on, "particularly around national days, Christmas, and so on".
57. The Tribunal accepts the applicant's evidence of the environment in which he grew up and that his mother and father both had difficulties with the authorities because of their political activities in particular those of his mother when she participated in the elections in 1990 counting votes and working at a polling station for which she was arrested, imprisoned and suffered harm.
58. In reaching these conclusions the Tribunal has taken into account independent country information set out in the US State Reports of 2008 on Human Rights Practices in Burma above, in particular that "the government arrested, detained and imprisoned citizens for expressing political opinions critical of the government" ...and that "the security services also monitored and harassed persons believed to hold anti-government opinions". The Tribunal notes the information that the "regime continued to abridge the right of citizens to change their government and committed other severe human rights abuses".
59. The Tribunal accepts the applicant's evidence that he first learnt that his father had gone to prison after he had arrived in Australia and that his father had been taken to prison because the authorities could not get any answers from him as to the whereabouts of himself and his mother and because of their political activities in photocopying for the NLD. The applicant's demeanour when giving this evidence was convincing. The Tribunal accepts as plausible the applicant's evidence as to his fears

having over the years observed his parents not being able to speak openly about things political, being reduced to whispering and because of his own observations of abuse and knowing of the torture and the things that happened to people in prison. The Tribunal finds this to be evidence of serious psychological harm suffered by the applicant in the past.

60. The Tribunal accepts that there has been no contact between the applicant or his mother with his father or other family in Burma because to make contact may have caused his father to be returned to prison. The Tribunal accepts that the applicant's sister has been expelled from study after all the incidents and that he had no contact with her.
61. The Tribunal accepts that the applicant's family owned a stationery shop. The Tribunal accepts that the applicant managed that shop. The Tribunal accepts the applicant's evidence that his family has a longstanding association with the NLD [member][Person A] and that [Person A] had been a friend of his [relative] since childhood. The Tribunal accepts as plausible that the applicant owning a stationery shop would be called upon to print material for the NLD. The Tribunal accepts the applicant's evidence that in 2003 he photocopied materials for the NLD and donated materials to the NLD. The Tribunal accepts that he did this because [Person A] had requested the help. The Tribunal accepts the applicant's evidence that when asked to do this he did it because he wanted to help [Person A] and the NLD. The Tribunal finds that if the applicant were to return to Burma now or in the reasonably foreseeable future there is a real chance that he would suffer serious harm that can be regarded as persecution as envisaged by s.91R(1) and (2) of the Act for his political opinion and imputed political opinion.
62. The applicant gave evidence that he also holds fears that because he demonstrated against the Burmese government in Australia since being here. The applicant said that whilst in hospital, he had seen demonstrations on television where the Burmese monks were being persecuted and he had sought leave from his doctors to attend the demonstration. It was his evidence that his motivation for this was his need to let the world know what was happening to people in Burma. He said the monks are treated very badly and unfairly by the government. He said a lot of unfair things are done by the government and he wants the world to know. The Tribunal accepts the applicant's evidence in this regard and relies upon information set out above that "the law does not prohibit arbitrary arrest or detention, and the government routinely used them". The Tribunal finds the applicant's involvement in the demonstrations was not conduct for the purpose of strengthening his claim and so may be disregarded under s.91R (3) of the Act. The Tribunal finds that if the applicant were to return to Burma now or in the reasonably foreseeable future there is a real chance that he would suffer serious harm that can be regarded as persecution as envisaged by s.91R(1) and (2) of the Act for his political opinion and imputed political opinion.
63. The Tribunal accepts the applicant's evidence that he and other members of his family were friends of one of the [members] of the NLD, [Person A]. The Tribunal accepts that the applicant's family may have a 'political profile' with the Burmese authorities resulting from the longstanding friendship with [Person A] and that as a consequence of this he has a well founded fear that should he return to Burma in the reasonably foreseeable future he would suffer serious harm because of his family. In reaching this determination the Tribunal takes into account independent country of origin information contained in the US State Reports on Human Rights Practices in Burma as set out above, in particular that "the government punished family members for alleged

violations by individuals” and that “[country information regarding Person A deleted: s.431(2)]” Further the Tribunal has considered information, set out above that the government “detained civic activists indefinitely and without charges”.

64. The Tribunal accepts as plausible the applicant’s evidence of his father’s imprisonment and of learning of this from his mother following a brief phone call from his aunt and a letter from her after he arrived in Australia. For the purposes of s. 91R(3) of the Act the Tribunal finds that the applicant’s conduct in relation to this not to be conduct for the purposes of strengthening his application In reaching this finding the Tribunal takes into account country information contained in the US State Reports on Human Rights Practices in Burma, set out above which states that “the government punished family members for alleged violations by individuals” and that “Private citizens and political activists continued to "disappear" for periods ranging from several hours to several weeks or more, and many persons never reappeared” The Tribunal also relies upon release documentation obtained by the applicant’s aunt as corroborative of the applicant’s father’s arrest and detention. For this reason and for reasons set out above the Tribunal finds that if the applicant were to return to Burma now or in the reasonably foreseeable future there is a real chance that he would suffer serious harm that can be regarded as persecution as envisaged by s.91R (1) and (2) of the *Act* because of his membership of a political social group namely his family.
65. The Tribunal accepts the applicant’s evidence that he had suffered discrimination because of his ethnicity in that he is a person of mixed race. Country information contained in the US State Department Reports of 2008 on Human Rights Practices in Burma supports the claim of discrimination against ethnic minorities in particular the report states that “the army continued its attacks on ethnic minority villagers”. The Tribunal finds that if the applicant were to return to Burma now or in the reasonably foreseeable future there is a real chance that he would suffer serious harm as envisaged by s.91R(1)and (2) of the Act because of his ethnicity.
66. The Tribunal finds that it is the State that is the perpetrator of the harm feared by the applicant. In making this finding the Tribunal relies upon information contained in the US State Department Reports of 2008 on the Human Rights Practices in Burma which points out that “the government continued to rule by decree and was not bound by any constitutional provisions providing for fair public trials or any other rights” and “the Myanmar Police Force is under direct military command but falls administratively under the Ministry of Home Affairs. Police primarily deal with common crimes and do not handle political crimes. Corruption and impunity were serious problems, due to a government-imposed system whereby police were required to collect funds for their operations. Police typically required victims to pay substantial sums for crime investigations and routinely extorted money from the civilian population. There are no effective legal mechanisms available to investigate security force abuses. The government took no significant measures to reform the security forces”. For this reason the Tribunal finds that the State cannot protect him and that it is unreasonable for the applicant to relocate within the country of Burma.
67. The Tribunal finds that if the applicant were to return to Burma now or in the reasonably foreseeable future there is a real chance that he would suffer serious harm as envisaged by s.91R(1) and (2) of the Act for his political opinions, imputed political opinions, membership of a particular social group (family) and his ethnicity all of

which are Convention related reasons. The Tribunal finds the applicant has a well-founded fear for Convention reasons.

CONCLUSIONS

68. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

69. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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. prrt44