

071674634 [2007] RRTA 275 (26 October 2007)

DECISION RECORD

RRT CASE NUMBER: 071674634

DIAC REFERENCE(S): CLF2000/14406

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: R Mathlin

DATE DECISION SIGNED: 26 October 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2) 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

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).

The applicant, who claims to be a citizen of Burma (Myanmar), arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights.

The matter is now before the Tribunal.

RELEVANT LAW

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.

Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom 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).

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'

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:

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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.

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

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.

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.

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.

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.

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.

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

The Tribunal has before it the Department’s file (CLF2000/14406) relating to the applicant, and the Tribunal files relating to the application.

Evidence submitted with protection visa application

In her protection visa application the applicant provided the following information. She left Burma on a passport issued shortly before her departure. She did not claim to have had any difficulties obtaining the passport or leaving the country. The applicant traveled to Country X with her husband when she left Burma. She provided one residential address in Burma for the period of over six years. She attended university attaining a degree. She then worked in a managerial capacity for three different employers.

The applicant provided little detail of her claims to refugee status, but appeared to indicate that she had distributed leaflets critical of the military regime to “all riot students” as well as “secretly developments around Burmese communities within country and overseas”. She claimed that she would be persecuted for these activities, and also pointed out that she had no family or husband, and she therefore had no one who could protect her.

The application was refused by the delegate, who took into account the fact that the applicant had delayed lodging her protection visa application for a significant period after her arrival in Australia. The delegate noted that she had provided few details of her claims, and relied on country information indicating that it was extremely difficult to obtain a Burmese passport or to leave the country, to conclude that the applicant could not have any political profile of adverse interest to the authorities. In reaching this conclusion the delegate also noted that the applicant had renewed her passport in Australia.

Evidence on Tribunal file

The applicant provided a detailed statement of her claims to refugee status with her application for review.

She stated that, as a first year university student, she participated in demonstrations. She was at a university, and her relative (relative A), who was attending another institution, was an anti-government activist. She stated that at her relative’s institution students demonstrated, one was shot and killed other students became involved.

She stated that she participated in a demonstration at her university campus; when the riot police arrived and started to beat students a lecturer hid many, including the applicant. She observed the whole event, including the arrests of many students. She remained in hiding for several days then returned home.

From that month onwards, there was ongoing political unrest and the applicant was involved in the underground movement.

A number of months later, the applicant and Relative A were demonstrating with when troops ordered the crowd to disperse and when they did not, opened fire. The applicant’s relative was killed.

The applicant’s activities in these demonstrations included taking part in strikes, raising funds to buy food and medicine for the students, and distributing leaflets.

The applicant joined the National League for Democracy, where her duties involved raising funds. She stated that after the death of her parents she supported herself by selling goods, so she was good at business and used these skills in her political fund-raising.

She stated that Aung San Suu Kyi was put under house arrest and about thirty students and party members who were present at her home were also arrested. The applicant was questioned because her name appeared on the receipts she issued for donations,

but she avoided arrest by providing a “tactical explanation”. However, she feared that her name was noted.

When the universities were reopened she completed her degree. During this time she continued to support the NLD and exiled students by collecting and remitting funds. She also supported the aged, needy parents of students who had taken up arms in the jungle.

In the mid 1990s the applicant was employed by a private company. She continued to raise money to pay for the production and distribution of material that she used to deliver in front of her house once she was released from house arrest. The applicant gave the money to Person B. She also gave materials to the people who donated money.

The applicant was questioned at work by two men “who looked like soldiers”. They showed her a receipt which she had given to a donor who was apparently an informer. She said that the receipt was for company business. Although they did not really believe her, the receipt alone was insufficient evidence to charge her with anti-government activities. Also she was beautiful and used attractive facial expressions to appeal to them. However, military intelligence investigated her workplace and even though her boss supported the NLD he was afraid and asked the applicant to leave the company.

She found another job at only half the salary but continued to raise funds.

Several years later the applicant was again questioned by military intelligence who showed her photographs of herself taken with Person B, receipts that she had issued and materials that she had given to financial donors. The applicant denied everything. Eventually a military officer told her that he would not charge her if she had sex with him. She was detained for several days during which time she was forced to have sex with him a number of times. She was released and told that the evidence against her would be kept secret as long as she did not talk about what had happened to her.

Afraid of becoming pregnant, the applicant married. She encouraged her husband to apply for work overseas because she wanted to leave Burma: she was having psychological difficulties because of the rape, she was afraid that her file could be reopened, and she wanted to get involved with helping the democracy activists overseas. Because her passport application was dealt with as the dependent of her husband, who had no political record, she was able to obtain it without difficulty.

The applicant and her husband lived in Country X for one year. During this time she donated a lot of money to democracy groups and the refugees. She made a number of business trips back to Burma, on which she smuggled money and information into the country, and materials out. They copied the material in Country X and sent them to other countries. She was usually accompanied by her husband on her trips to Burma.

On her last trip her bag containing the material was seized, although the materials were disguised and the content was not discovered. The applicant was able to board the plane after paying a bribe. However, when the contents were discovered this caused problems for her husband and he was investigated. The applicant was charged

in her absence and sentenced to a number of years gaol. However, no extradition was requested because it was not an internationally recognised crime. However the applicant was afraid that her activities would be reported to the Burmese Embassy in Country X, so she decided to come to Australia.

She did not apply for protection immediately because she had lodged another visa application which she thought would be successful. She applied for a protection visa only after that application was rejected.

At the first hearing the applicant provided oral evidence which, in many respects, was inconsistent with that in the written statement, or with objective information about events in Burma; or that was deficient, in that she was unable to provide explanations for apparent contradictions or problems in her claims.

Evidence submitted in support of request for Ministerial intervention

There is information on the Department's file submitted in support of another application. Much of this material relates to a de facto relationship between the applicant and an Australian citizen. The documents provided include a divorce certificate indicating that the applicant and her first husband were divorced in Burma by mutual consent; documents indicating that the applicant married for the second time to an Australian citizen, from whom she was divorced; letters of support from an association in Australia stating that the applicant was actively involved in the Burmese pro-democracy movement and that she would be arrested and tortured if she returned to Burma; and a letter of support from her second husband in which he mentions that she had discussed with him the "hardships and persecutions" she had suffered in Burma.

In addition, there is a statutory declaration made by the applicant in which she stated as follows:

- At the suggestion of the friend who helped with her application for review, she exaggerated and provided information that was untrue
- She now wants to provide her real story
- She is adopted and has [two relatives], one of whom was killed during the [year] democracy rallies
- At that time she was involved in helping the students and supported the NLD
- After graduating she became less involved in politics
- When she was working with her husband in [Country X], on two or three occasions she took [material] from Burma to [Country X] to give to Burmese friends. These showed [description of material]
- On the last trip the [material] were seized at the airport because they had not been censored. The officials did not view them, and let the applicant board the plane after paying a bribe
- After this the applicant was afraid to return to Burma because she thought that if the officials had viewed the videos she would be in big trouble
- She and her husband already had visas to Australia, but at this stage her husband was still in Burma. After the applicant returned to [Country X] her husband called her and told her that there had been trouble with the

[material]. Officials had come to his office and questioned him. He was summoned to military intelligence, but persuaded them that he knew nothing. He was released and allowed to leave the country.

- They both came to Australia and decided to apply for [other visas]. However, the marriage was in difficulty and eventually the applicant's husband returned to [Country X]. Her business visa application was then refused.
- She now fears that if she returns to Burma she will be arrested in relation to the [material]; also her passport contains a bridging visa that would alert the Burmese authorities to the fact that she had applied for refugee status in Australia.

Also on file is a report prepared by a consultant psychologist. The psychologist diagnosed the applicant as suffering from depression and post traumatic stress disorder. The psychologist referred to "experiences of violence that were inflicted upon her and her family" and "traumatic experiences, especially the death of her [relative]", but it is not clear what these traumatic experiences were, for none are referred to in any further detail, apart from the death of the applicant's relative. The report is primarily concerned with the impact on the applicant of returning to Burma and being permanently separated from her current partner.

Further Evidence in proceedings

The applicant appeared before the Tribunal again to give evidence and present arguments. Evidence was also given by the applicant's second husband. The applicant was accompanied at the hearing by a community volunteer. That person is not a registered migration agent. The hearing was conducted with the assistance of an interpreter in the Burmese and English languages.

Evidence of Second Husband

Her second husband (Person Z) told the Tribunal that he had met the applicant around a specific time. They were married, and although they subsequently divorced, they remain on good terms.

Person Z said that the applicant had told him some things about her life in Burma. She had said that she was a supporter of Aung San Suu Kyi; that her relative had been killed; perhaps shot in a riot; and the applicant had been arrested in connection with some material. He said that over the time he had known her she had expressed concern about the prospect of returning to Burma.

Evidence of the applicant

The applicant told the Tribunal that she had lied in relation to her protection visa application and the earlier proceedings. She said that the contents of the statutory declaration were correct, although it was not prepared with an interpreter.

She said that her adopted father had been in the military "a long time ago", and that he had subsequently been a civil servant. He and his wife had died while the applicant

was still quite young. She had put herself through university by working part time. All her relatives in Burma are dead, except for one.

While a student she had participated in the late 1980s demonstrations. She was detained at a demonstration; everyone was arrested, and the women were released after being raped. This is the only time she was ever detained or arrested. Her relative was shot and killed in a demonstration.

She married her first husband in the mid 1990s. The Tribunal asked whether he had connections with the military. She said that he used to pay money and most of the time “everything seemed to pass”. He had a business in Burma. They have had no contact for a number of years – the applicant said that he wants nothing to do with her because of the “problems” he had because of her.

The Tribunal asked the applicant to tell her about these problems. She said that she used to smuggle material out of Burma to Country X when traveling for business purposes. She had done this two or three times, and on the last occasion the materials were discovered at the airport and seized. She paid a bribe and was allowed to leave. Her account of subsequent events then diverged from that given in the statutory declaration. She said that further material had been found in her husband’s luggage. He had denied any knowledge of them, and told the authorities that they must have been put there by her.

The applicant appeared confused when the Tribunal pointed out that the two accounts appeared to differ; she said that perhaps there was a misunderstanding when the statutory declaration was prepared, because no interpreter was used.

Her account of subsequent events, surrounding her husband’s next movements and how his problems had been communicated to her was also confused, although her evidence on the whole was consistent with the statutory declaration – that he had telephoned her from Burma to tell her what had happened, and then returned to Country X after a number of days.

She said that she had subsequently heard that his business had declined because of problems with the government resulting from the smuggling of the material. She had not spoken to him for a number of years, but had heard some information from mutual friends.

The Tribunal asked the applicant about the renewal of her passport. She said that it was only if she returned to Burma that any action could be taken against her.

The Tribunal asked whether she had been involved in any political activities in Australia. She said that she had been to some demonstrations and contributed some money to democracy groups. She had been to a demonstration to protest and had also attended a prayer session for those killed.

Independent country information

The United States State Department’s 2006 Country Report on Human Rights Practices – Burma, states, in part:

1962 Burma, with an estimated population of 54 million, has been ruled by a succession of highly authoritarian military regimes dominated by the majority Burman ethnic group. The State Peace and Development Council (SPDC), led by Senior General Than Shwe, was the country's de facto government, with subordinate peace and development councils ruling by decree at the division, state, city, township, ward, and village levels. 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 totally controlled the country's armed forces, excluding a few active insurgent groups.

...government's human rights record worsened during the year. The regime continued to abridge the right of citizens to change their government. The government detained five leaders of the 88 Generation Students prodemocracy activists. The government refused to allow the International Committee of the Red Cross (ICRC) to visit prisoners privately. The army increased attacks on ethnic minority villagers in Bago Division and Karen State designed to drive them from their traditional land. In addition, the government continued to commit other serious abuses, including extrajudicial killings, custodial deaths, disappearances, rape, and torture. 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. National League for Democracy (NLD) General Secretary Aung San Suu Kyi and NLD Vice Chairman Tin Oo remained under house arrest. Governmental authorities routinely infringed on citizens' privacy and resorted more frequently to forced relocations. The government 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 hostile environment. Violence and societal discrimination against women continued, as did forced recruitment of child soldiers, discrimination against ethnic minorities, and trafficking in persons, particularly of women and girls. Workers rights remained restricted, and forced labor, including that of children, also persisted.

...

Disappearance

...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 (see section 6.c.). Little improvement was reported regarding requests for information directed to the military services. In many cases, individuals who were detained for questioning were released soon afterward and returned to their families.

...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.

...its May report "Eight Seconds of Silence: The Death of Democracy Activists Behind Bars," the Assistance Association for Political Prisoners - Burma (AAPP) meticulously documented 127 death cases of political prisoners since 1988. Fifteen of these cases were persons who disappeared while in custody. AAPP estimated there were other death and disappearance cases about which it had no information.

Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment are laws that prohibit torture; however, members of the security 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.

December 2005 the AAPP 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 graphic 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 electrocution 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. to the AAPP report, the ministers of home affairs, defense, and foreign affairs form a three person committee that oversees the detention of political prisoners charged under the State Protection Act. The report also indicated that during initial interrogations torture is conducted mainly by MSA. Interrogations were also conducted by the Bureau of Special Investigations and the Special Branch (SB) of the police, which is under the Ministry of Home Affairs.

...the year at least six political prisoners died while in custody (see sections 1.a. and 1.c.).

The Report also notes that corruption is rampant.

A July 2002 report compiled by the Department states, in part:

...to Amnesty International, Myanmar authorities pay considerable interest to overseas dissident activities. Amnesty International is aware of cases of returnees who have engaged in peaceful political activity abroad, who have been tortured, detained or even executed. Even low profile dissidents who do not hold office within a political organisation and who have engaged in minor activity such as partaking in protests or distributing leaflets, can be severely punished. The kinds of dissident activities that are likely to be punished range from political demonstrations outside the Myanmar diplomatic mission, to the distribution or writing of dissident literature, and involvement in the Myanmar community radio station

...about returnees who have been politically active abroad was not available from published and internet sources. Moreover it is difficult for foreigners to collect such

information in Myanmar without the likelihood of endangering sources. Some general information appears in CISNET document CX65492, although this mainly refers to violent political opposition to the regime.

...in Australia:

International's mandate only allows it to assist in the cases of dissidents who carry out their political activities by peaceful means. Amnesty International stated that Myanmarers known to have conducted political activities in Australia are liable to be punished. It is difficult to know what level of punishment is likely to be applied to particular cases because of the arbitrary way in which the regime applies the law. Such returnees would be intensively interrogated at the very least. They may be detained, tortured, sentenced to imprisonment or even executed.

(CX77468, July 2002)

In August 2007 DFAT provided further information about the situation of Burmese nationals returning to Burma from 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.

...penalties, including life imprisonment, are routinely imposed for demonstration of dissent in Burma. Those accused are usually denied access to legal counsel. For example, on 13 June 2005 life sentences were given to Aung Myo San, Ba Myint, Ba Thint and Khin Kyaw from the National League for Democracy Youth and to That Oo from the Democratic Party for a New Society. They had been arrested in December 2004 for distributing pamphlets and charged under Law 5/96 Section 3 under which it is an offence to demonstrate, protest, campaign, give a public speech, or take any action intended to or having the effect of disturbing the peace and tranquillity of the nation or national reconciliation or the National Convention. Defence lawyers were not permitted any access to the defendants and were not permitted to participate in court proceedings. The regime press regularly threatens named alleged dissidents as liable for action under draconian national security laws such as Law5/96.

...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.

...household registration system requires a person to hold formal registration documentation on their residential location in Burma. If the individual comes to the attention of the relevant authorities (including through commercial legal proceedings), any breach of this requirement would be noticed. In addition, at the neighbourhood-level at which the household registration system is managed, the local authorities often have access to local gossip and personal knowledge to inform them of people's movements.

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.

...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). The NCGUB, FTUB, ABSDF and SSA-S were all declared by the Burmese regime on 28 August 2005 as "unlawful associations" under Section 15 (2) of the Unlawful Associations Act for endangering "the law enforcement of the Union of Myanmar, stability of the State and peace and tranquillity of the entire people." For example, the Australian Coalition for Democracy in Burma has publicly registered its strong support for the "outlawed" NCGUB.

(CX183945: BURMA: BUR9081 Return Issues, Australia: Department of Foreign Affairs and Trade (DFAT), 28 August, 2007)

A recent letter to the Department from UNHCR outlines concerns over the return to Burma of failed asylum seekers:

...is well documented that the prevailing human rights situation in Myanmar is extremely poor. In the context of return to Myanmar, it must be assumed that individuals will be subject to government scrutiny upon arrival. Persons with a political profile are reasonably likely to be subject to disproportionate punishment, and so the question of whether or not an individual has such a profile must be carefully evaluated as part of the refugee status determination process.

UNHCR recommends consideration of even wilfully-constructed *sur place* claims which raise an individual's profile to such an extent that it could draw the attentions of the Myanmarese authorities. UNHCR accepts States' prerogative to discourage fraudulent claims, but it considers that Myanmar presents a special case.

...if an individual does not in fact have a political profile, it is reasonable to believe that any person whom the Myanmar Government suspects to have applied for refugee status abroad, and who has the profile of someone who *may* harbour a political opinion, risks being charged under the 1950 Emergency Provisions Act upon his or her return to Myanmar, and subjected to disproportionate punishment. For example, while a rejected asylum seeker (such as a manual labourer) who has been found to be a economic migrant and is unlikely to have been politically active would probably be questioned by the government upon return to Myanmar and later released, someone who has not been politically active but has the profile of an individual who could have been active (such as an intellectual or a student) risks being charged and disproportionately punished under the Act.

...to monitor returnees to Myanmar is extremely limited. Nonetheless, UNHCR is aware that detention of returnees does occur. A case of particular note is that of a person returned by the Swiss Government accompanied by officials from that country, who was reportedly sentenced to 19 years imprisonment for 'crimes' including leaving Myanmar illegally, 'bringing his country into disrepute' by applying for asylum in Switzerland, and re-entering Myanmar illegally.

...the decision of the Australian Government be to return individuals to Myanmar, UNHCR would urge that the safety upon return of the individuals concerned be ascertained prior to a removal arrangement. The utmost care should be taken to avoid raising their individual profiles in the eyes of the Myanmar authorities, as this may have the effect of exposing them to a risk of the disproportionate punishment discussed above. In particular, Australian Government involvement with the issuing of travel documents, and accompaniment by Australian officials on return to Myanmar, may draw attention to an individual.

(CX 161042, 17 November 2005)

FINDINGS AND REASONS

Having sighted her passport at the hearing the Tribunal is satisfied that the applicant is a national of Burma. There is no evidence before the Tribunal from any source to indicate that the applicant has rights to enter or reside in any other country. Accordingly her claims to refugee status will be assessed as against Burma, as her country of nationality.

The applicant essentially claims that she will be persecuted if she returns to Burma for reason of her political opinion. The independent information set out above indicates, and the Tribunal finds, that the Burmese government routinely disregards the fundamental human rights of its political opponents, or indeed, anyone who is suspected of or perceived to be engaged in active opposition to the government. The first step in determining whether the applicant has a well founded fear of persecution is therefore to decide whether her claims should be accepted. As noted above, the Department rejected the applicant's claims on the basis that they were not credible. The applicant admitted that she had provided false information in connection with the protection visa application, and she put forward claims which she now maintains are the true reasons for which she is afraid to return to Burma. These claims in fact form the kernel of her earlier ones, which she admits were added to and exaggerated on the advice of a friend. There were some minor inconsistencies in the presentation of these claims as between the statutory declaration and her oral evidence given at the hearing, however, the Tribunal is satisfied, in all the circumstances, that the claims now put forward by the applicant are true. In so finding, the Tribunal has taken into account the fact that the statutory declaration, while comprehensive, was not prepared with the assistance of an interpreter; and all the relevant events took place many years ago. Furthermore, the Tribunal accepts that the applicant has experienced certain traumatic events in Burma, and therefore accepts the diagnosis of the psychologist that the applicant is suffering from a psychological condition. The Tribunal accepts that this could affect her ability to recall and recount events. In these circumstances, the Tribunal is prepared to accept that the version of events now put forward by the applicant is the truth.

The Tribunal accepts that the applicant witnessed her relative being killed in a demonstration in which the applicant was also a participant, and notes that this claim has been presented consistently throughout the history of this application and her dealings with the Department.

The Tribunal accepts that the applicant was involved in democracy movement, as she has consistently claimed, but finds that her involvement was limited to distributing leaflets and collecting donations. The Tribunal also accepts that the applicant was detained and raped at this time. While her account of the circumstances of this incident has varied, the Tribunal notes that this is an extremely sensitive matter about which she might well be reluctant to speak freely. It considers that her account at the hearing, that she, along with all other females arrested at a demonstration were raped in detention and then released, is consistent with independent information about events at the time.

While the Tribunal accepts that these two traumatic events, the death of her relative and her own rape, would have affected the applicant's subsequent actions and psychological condition, it does not consider that these events, of themselves, would give rise to a well founded fear of persecution at the present time. Indeed, the applicant agreed at the first Tribunal hearing with independent information that there was no ongoing persecution of participants in those particular demonstrations for that reason alone.

The Tribunal accepts, however, that there are subsequent events which could lead to a real chance that the applicant would be persecuted if she now returned to Burma. First, the Tribunal accepts that the applicant, on several occasions, smuggled material out of the country. While the applicant has now presented two different versions of how this activity came to be discovered by the authorities, she has claimed consistently that, through her husband, the authorities have linked this material with her - whether he blamed her for material found in his possession, or whether the authorities became aware after her departure of the contents of the material they had confiscated from her, and questioned him about this, is not clear. Despite the lack of clarity concerning the circumstances in which the applicant claims the authorities became aware of her role in smuggling the material, the Tribunal is unable to dismiss the possibility that Burmese authorities are in fact aware that the applicant was involved in this activity. The Tribunal notes that this claim has been presented consistently, albeit with different details, at all stages of her application, including in her extremely brief protection visa application. The Tribunal finds, based on the independent country information referred to above, that such activity would be viewed very seriously.

The Tribunal also accepts that the applicant has been involved in some anti-government political activities in Australia. While this information was only provided by the applicant for the first time at the second hearing, the fact that the applicant has not sought to "play up" these claims adds to their credibility, in the view of the Tribunal. Her account of her activities appeared to the Tribunal to be matter of fact and credible. Her involvement in such activities was also briefly referred to in the supporting documentation lodged more recently: see letter from a named association on the Department's file.

There is independent information, which is set out above, indicating that the Burmese authorities scrutinise carefully any Burmese national returning to Burma after a long absence: UNHCR letter; DFAT advices. The Tribunal therefore finds that if the applicant were to return to Burma after many years overseas, she would certainly be subjected to careful scrutiny on arrival. Given that the Tribunal accepts that the applicant and her relative were involved in the democracy movement; accepts that the applicant has attended demonstrations in Australia; and cannot dismiss the possibility that the Burmese authorities have information that the applicant smuggled dissident material out of Burma in the late 1990's, the Tribunal cannot dismiss as remote or insubstantial the possibility that the "scrutiny" which the applicant would undergo on return to Burma would result in intensive interrogation and additional adverse consequences amounting to persecution. The Tribunal is satisfied, based on the information set out in the *Country Reports* and the UNHCR advice, that such consequences could include "disproportionate punishment", arbitrary detention and physical mistreatment. The Tribunal also accepts that torture of political prisoners in Burma is routine (see *Country Reports*) and considers that there is at least a real chance that anyone who comes to the adverse attention of the authorities for political reasons will be tortured.

While the Tribunal does have concerns about the credibility of the applicant, given the history of this matter and her admitted prior untruthfulness in her dealings with the Department and the first Tribunal, it does not consider that her entire account, as it now stands, can be dismissed as completely false or fabricated. The Tribunal considers it significant that several essential claims have been presented at each stage, and accepts that these form the kernel of truth at the heart of this application. These are the death of the applicant's relative, the sexual assault of the applicant, and the smuggling of the material. The Tribunal also accepts the evidence of the second husband that the applicant had mentioned these elements to him. The Tribunal cannot dismiss the possibility, based on these elements, that the applicant has some political profile. In view of the independent evidence referred to above, and in the light of recent events in Burma, namely the renewed wave of anti-government demonstrations which again have been brutally suppressed, the full consequences of which for political activists, including those overseas, are not yet known, the Tribunal is satisfied that there is at least a real, as opposed to a remote or insubstantial, possibility that the applicant would be subjected to serious harm amounting to persecution for reason of her political opinion, should she return to Burma.

CONCLUSION

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) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36 (2) 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*. PRRRNM