

071564682 [2007] RRTA 205 (18 September 2007)

DECISION RECORD

RRT CASE NUMBER: 071564682

DIAC REFERENCE(S): CLF2007/76519

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Antoinette Younes

DATE DECISION SIGNED: 18 September 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

**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 his review rights by letter.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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

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)(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 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.

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 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.

In support of the application for a protection visa, the applicant provided a Statutory Declaration in which he claimed that:

1. He is from Burma. He fears that he would be detained or suffer serious physical harm or discrimination if he returned to Burma because he was a member of the Wa Peace Party and was closely associated with his relative who had a leading position in the Party.
2. In the forms that comprise his protection visa application, where he does not know the precise day or month of a particular event, he had used 01/01. Some of the years provided in the application are also approximations.

3. His relative married a man of Wa ethnicity who was a member of the Wa Peace Party. The Wa people have been in conflict with the government of Burma off and on for many years. This person had been involved in this struggle. He does not know all the details, but he knows that he was “[working for] a Wa [official] called [Name deleted]”.

4. In 1994 there was a cease-fire between the Wa people and the Burmese Government and the Government allowed the Wa people to engage in trade in local resources.

5. There were not many Wa people who were experienced in business. His relative asked him to join the Party and work with them in the commercial area. The official had established a business. His relative knew that he had commercial experience and he trusted the applicant to do a good job. The applicant had to learn the trade. He went into the country to learn the trade.

6. Then he began to work with the Wa people. If a profit was made, he was paid for this work. He continued to do this work until he came to Australia without facing any problems because of the agreement between the Wa people and the Burmese Government.

7. He came to Australia for a visit. While he was in Australia, he learned that the agreement between the Burmese Government and the Wa people had broken down. People such as his relative who belonged to the Wa Peace Party are viewed as opponents of the government and it is no longer safe for them to remain in Burma. His relatives have fled to another country. They have returned to Burma briefly from time to time when they believed it would be safe, but if they returned openly they would be arrested or perhaps face other serious harm.

8. Other members of his family began to feel pressure because of their association with his relative. People in the area began to accuse them of belonging to the Wa Party and they feared that their names were recorded by the authorities as members or supporters of the Wa Peace Party and the official. Fearing that they could be arrested or face serious problems if they remained in Burma, they left the country.

[Details of activities in Australia deleted under s431 of the Migration Act.]

Material received

The Tribunal received written submissions from the advisor in which the advisor stated that the applicant’s “*claims are set out in detail in the statement which accompanied his initial application. He continues to rely on these claims*”. The advisor noted that the applicant maintains that he worked for the Wa group and that he fears harm on the basis of being imputed with anti-government political opinion and for reasons of his “*race (his Wa ethnicity)*”. The advisor noted that the Burmese authorities are suspicious of citizens who spent time outside the country, especially those perceived as having a profile of someone who is likely to oppose them. The applicant would be suspected of applying for protection, which in itself is sign of opposition and involvement in anti-government activities.

HEARING

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages. The applicant was represented in relation to the review by his registered migration agent, who did not attend the hearing.

The Tribunal showed the applicant the Statutory Declaration that was provided in support of his application for a protection visa, and the applicant recognised the document. The Tribunal asked the applicant if he wanted to make any changes to that document and the applicant said he did not wish to make any changes.

[Details of activities in Australia deleted.]

The Tribunal asked the applicant if he had ever been involved in the Wa Peace Party. The applicant stated that he had for a number of years. He explained that his relative got married and that his in-law was a trusted person of a Wa official. The Tribunal asked him what he meant by being trusted. He said that he was most faithful to the official. He said they had fought together against the Burmese regime. The Tribunal asked when his relative and the official fought. The applicant said his relative and the official had been members of the Wa Party for several years. He said that his relative explained to him the history.

The Tribunal asked the applicant about his own activities in the Wa Party. The applicant said after the marriage, there were peace talks between the government and the Wa Party. He said subsequently the Wa Party was allowed to do business in local resources. He said his relative and the official began to be involved in that business. He said his relative needed a person who was bilingual which the applicant was. He said that he began to do research and study. He said his relative wanted him to be able to make business decisions as well. The Tribunal asked him how those business and training activities related to his activities in the Wa Peace Party. The applicant stated that because of the peace talks he was able to do business. He said he was also in charge of several aspects of the running of the group. He said that he began to study. The Tribunal asked him when he carried out these duties. He said since he became a member. The Tribunal asked him how he became a member. He said he became a member as a result of his involvement in activities of the business. The Tribunal indicated to the applicant that in his Statutory Declaration he does not say anything about becoming a member then although he claims to have been a member. The Tribunal explained to the applicant that although in the Statutory Declaration he says that he was a member of the Wa Party he does not say that he became a member then. The applicant stated that it was possible that the date had been left out by his lawyer. The Tribunal indicated that it would consider the explanations further.

The Tribunal indicated to the applicant that in the Statutory Declaration he does not claim that he had conducted certain duties which the Tribunal considered to be a serious claim. The Tribunal asked him why he has not mentioned that claim previously. The applicant stated that when he became responsible for these duties it was incidental that he also took on the other role. He said perhaps he left out that claim. The Tribunal indicated that it would consider the explanations further. The Tribunal advised the applicant that whilst the hearing is an opportunity to explore and provide further explanations about claims, making substantial new claims could also be a concern as it could suggest fabrication. The applicant stated that he was telling

the truth. He said he did not know what to say however. The Tribunal indicated that it would further consider his explanations.

The Tribunal asked the applicant about his exact activities in relation to the Wa Peace Party. The Tribunal asked the applicant how working in and expanding the business, relevant to political activities in the Wa Party. The applicant said that the Wa Party is a political party and that anyone working with the Party was considered to be in opposition to the regime. He said whenever he travelled he was stopped. When asked when that occurred, he said it was during all of their travels. He said he had to report to the intelligence about certain aspects of the group and names. The Tribunal indicated to the applicant that the claim that he had to report to the intelligence was not a claim that he had made in the Statutory Declaration provided in support of the application for a protection visa. He said he did not mention it and he missed that. He said there are facts that he did not mention as he missed them. The Tribunal suggested to the applicant that reporting to the intelligence is a very significant matter and it is odd that he had not mentioned previously. He said it was part of the peace agreement to allow the Wa Party people to conduct business but conditional on them reporting to the intelligence. The Tribunal re-iterated to the applicant that reporting to the intelligence was a very significant claim and it is odd that he did not make that claim at a primary level. The applicant said that he missed that point and some facts. The Tribunal indicated that it would further consider the explanations. The applicant said that one of the duties he carried out for the Party was part of the agreement with the government.

The Tribunal asked the applicant about any other activities in which he may have been involved with the Wa Peace Party. He said he had carried out certain duties. The applicant said that this aspect of the work he completed was connected with the official.

The Tribunal asked the applicant if he had suffered any harm as a result of his involvement in the Wa Party. He said since becoming a member they were noticed by the government including their families. He said there have been threats and they have been considered as enemies of the regime. The Tribunal asked him if he has ever been threatened by the authorities, he said he had after returning. The Tribunal asked him who threatened him. He said it was the intelligence. He said there was a warning about him opposing the regime. He said he would not be free. The Tribunal indicated to the applicant that being threatened by the intelligence is a significant claim which again he had not mentioned in the Statutory Declaration. He said he had missed those points but there are not many points that he missed. The Tribunal indicated to the applicant that on the contrary it appears that he had missed quite a few substantial claims. The Tribunal indicated to the applicant again that making significant new claims which had not been made previously would concern the Tribunal but that the Tribunal would further consider his explanations.

The Tribunal asked the applicant about his relative's activities in the Wa Peace Party. He said that his relative was trusted by the official. He said his relative took goods to another country to market them. The Tribunal asked him about any other activities in which his relative may have been involved. He said his relative was involved in the business on the border where there were business activities. He said that his relative is still there now.

The Tribunal asked the applicant what he feared in case of his return to Burma. The applicant said that since his arrival in Australia, he has had contact with his relative who has told him of the constant harassment by the government. The Tribunal asked him what kind of harassment he was referring to. He said that those involved in the Wa Peace Party have been listed and some of them have been taken and interrogated by the intelligence. He said some of them have been detained. The Tribunal asked him if his relative had been taken by the intelligence and he said that because of those incidents his relative had left the other country in order to avoid being harmed. The Tribunal asked when his relative went there. He said a number of years ago. The Tribunal indicated to the applicant if it were indeed true that his relative went to another country to avoid being harmed as a result of incidents of harm to other members of the Wa Party, it is difficult to understand why the applicant himself did not lodge his application for a protection visa earlier. The applicant did not comment

The Tribunal asked the applicant about what ethnic group he belongs to. The applicant stated that he does not belong to the Wa Ethnic group. He said his relationship to the Wa Group is through his relative. The Tribunal asked him what ethnic group he belongs to. The applicant stated that he is of the Shan Burmese ethnic group. The Tribunal asked him if any members of the Shan Burmese ethnic group had ever been persecuted. The applicant stated that no member had.

The Tribunal noted that in the written submissions provided to the Tribunal, the advisor stated that the applicant would be persecuted on the basis of his "*race (his Wa ethnicity)*". The applicant said that he belongs to the Wa ethnic group. The Tribunal indicated to him that he had given evidence earlier that he does not belong to the Wa ethnic group but the Shan Burmese.

The Tribunal summarised the applicant's claims namely that he fears harm on two grounds. Firstly, on the ground of his and his relative's involvement in the Wa Party as well as his relative's ethnicity, namely the Wa Group. The applicant confirmed that this was correct. He said he fears that he would be arrested because he is a member of the Wa Peace Party as well as his relative's involvement with the party. He said that members of the Wa Peace Party had been called and interrogated by the authorities who have also locked them up and detained them. He said that the main reason why he does not want to return to Burma is because of his association with the Wa Peace Party.

The Tribunal talked to the applicant about the difficulty in finding information about the Wa Peace party exactly. The Tribunal indicated to the applicant that it might appear that there had been a mistranslation of the Burmese phrase "*wa-nein-chan-ye apwe*" where the English translation for which is normally *Wa Cease Fire Group* (i.e. a generic description of the group involved in the cease fire negotiations in 1989, the Myanmar National Solidarity Party or United Wa State Party).

The Tribunal discussed with the applicant information about returnees to Burma. The Tribunal indicated that the country information suggests that a person returning to Burma who had been suspected of seeking asylum abroad may be questioned by the Burmese authorities, however unless the person has a political profile, they are not likely to be harmed by the Burmese authorities. The Tribunal indicated that it would need to further consider whether there is a real chance that he would be harmed on the

basis of returning to Burma. The Tribunal indicated to the applicant that in its view it would be implausible that the Burmese authorities would find out from the Australian authorities that he had applied for asylum. The applicant had nothing to say.

FINDINGS AND REASONS

On the basis of the available information, the Tribunal is satisfied that the applicant is national and that he is outside that country.

As noted earlier, in written submissions, the advisor stated that the applicant's "*claims are set out in detail in the statement which accompanied his initial application. He continues to rely on these claims*". For the purpose of Section 424A of the Act, the Tribunal is satisfied that the applicant has relied on the written claims as set out in his statement (Statutory Declaration) provided in support of the application for a protection visa.

In consideration of the evidence as a whole and for reasons outlined below, the Tribunal finds that the applicant does not have a well-founded fear of persecution.

In reaching its conclusions and findings, the Tribunal has relied on the following matters:

[Details of activities in Australia deleted]

- The applicant gave evidence that as part of his activities in the Wa group, he was in charge of certain activities for the Party and as such he supplied the Party accordingly because the government had agreed to this. The Tribunal asked him when he carried out these activities. He said since he became a member. The Tribunal asked him how he became a member. He said he became a member as a result of his involvement in the Party. As indicated to the applicant, in his Statutory Declaration he does not in fact say that he became a member then although he claims to have been a member; in the Statutory Declaration, the applicant said that he was a member of the Wa Party but he does not say that he became a member then. The applicant explained that it was possible that the date had been left out by his lawyer. The Tribunal is not persuaded by that explanation. Furthermore, in the Statutory Declaration, the applicant does not claim that he had carried out certain activities which the Tribunal considers to be a serious claim. The Tribunal asked him why he has not mentioned that claim previously. The applicant stated that when he became responsible these activities it was incidental that he also supplied items. He said perhaps he left out that claim. The applicant stated that he was telling the truth. He said he did not know what to say however. The Tribunal is not convinced. The Tribunal appreciates that whilst the hearing is an opportunity to explore claims and provide explanations, making substantial new claims could suggest fabrication. The Tribunal considers that carrying out certain activities is a serious matter which the applicant had not mentioned in a reasonably comprehensive Statutory Declaration. The fact that he made the claim in the course of the hearing indicates to the Tribunal that he was fabricating significant claims to bolster his protection claims. As far as the date of his alleged membership is

concerned and whilst in isolation, this may not be problematic, when considered cumulatively, it also suggests fabrication. The fabrication raises doubts about the veracity of the applicant's claims and his general credibility.

- In the course of the hearing, the applicant claimed that whenever he travelled he was stopped. When asked when that occurred, he said it was during all of their travels. He said he had to report to the intelligence about certain details and names. As indicated by the Tribunal, the claim that he had to report to the intelligence was not a claim that he had made in the Statutory Declaration provided in support of the application for a protection visa. The applicant explained that he did not mention it, that he missed that that point and some facts. He said it was part of the peace agreement to allow the Wa Party people to conduct business but conditional on them reporting to the intelligence. The Tribunal is not persuaded by his explanations; reporting to the intelligence is a very significant matter and the fact that he had not mentioned it in the Statutory Declaration, suggests fabrication, raising doubts about the veracity of the applicant's claims and his general credibility.

- In the course of the hearing, the applicant claimed that he had been threatened by the authorities (intelligence) after returning. The Tribunal considers that being threatened by the intelligence is a significant claim which the applicant had not mentioned in the Statutory Declaration. He said he had missed those points but there are not many points that he missed. As indicated to the applicant, on the contrary it appears that he had 'missed' quite a few substantial claims. The Tribunal is not convinced by his explanations; being threatened by the intelligence is a very significant matter and the fact that he had not mentioned it in the Statutory Declaration, suggests fabrication, raising doubts about the veracity of the applicant's claims and his general credibility.

- The Tribunal asked the applicant about what ethnic group he belongs to. The applicant stated that he does not belong to the Wa ethnic group. He said his relationship to the Wa Group is through his relative. The Tribunal asked him what ethnic group he belongs to. The applicant stated that he is of the Shan Burmese ethnic group. The Tribunal asked him if any members of the Shan Burmese ethnic group had ever been persecuted. The applicant stated that no member had. The Tribunal noted that in the written submissions provided to the Tribunal, the advisor stated that the applicant would be persecuted on the basis of his "*race (his Wa ethnicity)*". The applicant said that he belongs to the Wa ethnic group. The Tribunal indicated to him that he had given evidence earlier that he does not belong to the Wa ethnic group but the Shan Burmese. The Tribunal is satisfied that the applicant's evidence was inconsistent about a significant claim. He clearly told the Tribunal that he was not personally of Wa ethnicity, contradicting the written claims in the submissions and his own earlier evidence that he was of the Shan Burmese ethnic group. The Tribunal considers that the inconsistency related to a significant matter, suggesting fabrication, raising doubts about the veracity of the applicant's claims and his general credibility.

In light of those comments, the above-noted concerns and in consideration of the whole, the Tribunal is satisfied that the evidentiary concerns are legitimate matters to be taken into account in reaching an adverse credibility finding. For those reasons, the Tribunal finds that the applicant is not credible.

Findings on the applicant's claims

Independent country information in relation to the existence or otherwise of the Wa Peace Party notes

After decades of armed conflict with the Burmese Armed Forces (Tatmadaw) and an estimated 12,000 Wa killed, the Wa (Myanmar National Solidarity Party, later renamed the United Wa State Party) signed on 9 May 1989 a cease-fire agreement with the Burmese regime. The Burmese regime has very limited presence or influence in the Wa: the regime's North-Eastern (Golden Triangle) Commander and any other visitors to the Wa require the permission of the United Wa State Army (UWSA) to travel within the Wa.

Periodic international press references to clashes between UWSA and Tatmadaw are typically exaggerated or grossly mistaken. Under the terms of the cease-fire, the Wa militia (UWSA) was permitted to maintain its arms. The UWSA maintains a very well armed and trained force of 20,000. The UWSA has regularly conducted armed activities on behalf of and, at times, jointly with the Tatmadaw against Shan militias. For example, international media reported on 18 April 2006 clashes between the UWSA and Tatmadaw. In fact, the UWSA deployed with the Tatmadaw on 21 April 2006 to attack the Shan State Army-South.

Similarly, international media pointed in April 2006 to the regime's cancellation of a Wa Opium Free Zone ceremony as a sign of a deterioration of relationships between the Burmese regime and the UWSA. In fact, the cancellation occurred in June 2005. Wa authorities issued invitations on 7 June 2005 to Burmese and international representatives under the provocative title of the "People's Government of the Wa State". The 8 June 2005 cancellation of that ceremony (later held without international representatives) reflected the regime's agitation Wa authorities had issued invitations without approval using terminology evoking autonomy (Wa is not a State) and the discarded socialist model.

We would not suggest the relationship between the Wa and the regime is without friction. All ethnic groups in Burma, including the Wa, are concerned at efforts by the regime through the National Convention process to continue to deny constructive dialogue and genuine reconciliation with all political and ethnic groups. Wa representatives will attend the final session of the National Convention in Rangoon starting 18 July 2007. In addition, Tatmadaw forces have periodically strayed without permission into the Wa to undertake "land survey" activities and been escorted out of the Wa by the UWSA. Further, anti-narcotics activity in Shan State by Burmese law enforcement authorities on 10 September 2005 involved interception of 496kg of heroin being transported under escort of a middle-ranking UWSA officer and militia. The Wa administration disowned the UWSA members involved as "rogue elements".

Neither we nor a wide range of contacts, including senior Wa contacts have any knowledge of a "Wa Peace Party". Wa Peace Party may be a mistranslation of the Burmese phrase "wa-nein-chan-ye apwe" the English translation for which is normally Wa Cease Fire Group (i.e. a generic description of the group involved in the cease fire negotiations in 1989, the Myanmar National Solidarity Party or United Wa

State Party. (CX180347:CISQUEST BUR 9031: Burma Wa Peace Party, DFAT, CIR N0.07/57, July, 2007).

The Tribunal will give the applicant the benefit of the doubt and will assess the claims on the basis that there had been a mistranslation of the *Wa Cease Fire Group*.

Given the adverse credibility finding and in consideration of the evidence as a whole, the Tribunal does not accept that the applicant or his relative had ever been a member of the Wa group, or that either one has ever been involved in any of the group's activities, including but not limited to any involvement in precious stones which was perceived to be a political activity, or that the applicant or his relative has been harmed in any way by the Burmese authorities for any actual or imputed political activities (or ethnicity, or any Convention related ground), or that any member of his family has fled to China to avoid being harmed, or that any member of his family has been harassed by the Burmese authorities or that anyone has been accused of supporting the Wa group or the official, or that he or his relative is of Wa ethnicity. In essence and for those reasons, the Tribunal is not satisfied that the applicant has suffered or that he would suffer any of the claimed harmed.

Returnees to Burma

In the course of the hearing, the Tribunal discussed with the applicant country information about returnees to Burma.

.....It 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.

*Even if an individual does not 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 harbor 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 laborer) who has been found to be an 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 punished under the Act. Accordingly, **UNHCR continues to oppose forced removal of failed asylum-seekers to Myanmar.** (CX156435: BURMA: Return of asylum seekers to Myanmar, 15 June, 2006, Letter UNHCR Australia/ DIMA Canberra AULCA/MISC/501, UNHCR, 15 June 2006*

In, CX134043: *BURMA: Treatment of politically active returnees to Burma*, DFAT, CIR No.05/51, 30 August 2005, it was noted that:

...There is a high risk the Burmese regime would treat harshly Burmese nationals who have engaged in high profile political activity abroad. There is no clear definition of "low-level" political activity. Burmese engaged in high profile anti-regime activities overseas are closely monitored by the Burmese regime. Burma residents assessed as active opponents of the regime can expect to receive particularly close attention from security forces. Severe penalties, including life imprisonment, are routinely imposed for dissent in Burma. Defence lawyers are typically neither permitted access to the defendants nor allowed to participate in court proceedings.

There is no clear, reliable definition of "low-level" political activity. For example, the regime considers distribution of anti-regime materials in Burma as a very serious offence. Severe penalties, including life imprisonment, are routinely imposed for demonstration of dissent in Burma. Those accused are usually denied access to legal counsel. For example, in June 2005, life sentences were given to four members of the National League for Democracy Youth and one member 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.

There is a pervasive security apparatus in Burma. All Burmese residents are monitored by the regime. Anyone assessed as being a potential active opponent of the regime can expect to receive particularly close attention from security forces. Any Burmese returning to Burma after a lengthy period overseas would come at least to the attention of their local township authorities and their movements may be monitored for an initial period. But 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.

But there is a high risk the Burmese regime would treat harshly returning Burmese nationals who 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." Similarly, we would expect any Burmese involved in the attack on the Burmese Embassy in Canberra in September 1999 would be classified as a "strong critic".

Overseas Burmese (including in Australia) classified as strong critics of the regime are monitored by the Burmese regime. For example, a mid-ranking official of the

Ministry of Foreign Affairs demonstrated to us recently a detailed knowledge of a Burmese expatriate long-term resident in Australia. Since the downfall of Prime Minister Khin Nyunt in October 2004, the regime has withdrawn senior career Ambassadors from many key overseas posts and replaced them (and mid-ranking diplomatic representatives) by military appointees. We would expect a consequential increase in the level of offshore monitoring of anti-regime activities.

It 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.

The Tribunal has not been satisfied that the applicant or any member of his family has been involved in activities relating to the Wa group. The applicant has not claimed and there is no suggestion that he has been involved in any political activities in Australia. In consideration of the evidence as a whole, the Tribunal is not satisfied that the applicant or any other member of his family had or has a political profile which could be perceived as being anti-regime. It is indeed a fact that he has sought asylum in Australia which theoretically could mean that he could be suspected of harbouring an adverse political opinion. However, seeking asylum in Australia is confidential and pursuant to s.431 of the Act, publication of any identifying details about the applicant would be prohibited and as such the Tribunal is satisfied that there is not a real chance that the Burmese authorities would find out that the applicant had indeed sought asylum. Even if the Burmese authorities were to suspect his application, given his and other members of his family lack of actual and or imputed political profile, the Tribunal is satisfied that whilst there is a real chance that the applicant on his return would be questioned by the Burmese authorities, the Tribunal is not satisfied the applicant would be subjected to disproportionate punishment amounting to persecution. The advice from UNHCR noted above suggests that “*while a rejected asylum-seeker (such as a manual laborer) who has been found to be an 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 punished*”. There is nothing before the Tribunal to suggest that the applicant could be perceived as being ‘active’ in Australia. The Tribunal has carefully considered the applicant’s profile as well as that of his relative, including the claimed ethnicity and political activities, and in consideration of the evidence as a whole, the Tribunal is not satisfied that there is a real chance that the applicant would be subjected to ill-treatment amounting to persecution if he were to return to Burma, on the basis of any actual or imputed political activities/opinions or ethnic group (or any other Convention ground); for reasons outlined above, the Tribunal is not satisfied that the applicant or his relative is of Wa ethnicity.

On the basis of the available information and in consideration of the evidence as a whole, the Tribunal is satisfied that there is not a real chance that the applicant would suffer serious harm as contemplated by the Act, or persecution as contemplated by the Convention in the reasonably foreseeable future if he were to return to Burma.

In sum, in consideration of the evidence as a whole and for the stated reasons, the Tribunal does not accept that the applicant has a well-founded fear of persecution.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.