

**0900265 [2009] RRTA 994 (10 November 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0900265

**DIAC REFERENCE(S):** CLF2008/136156

**COUNTRY OF REFERENCE:** Burma (Myanmar)

**TRIBUNAL MEMBER:** Peter Tyler

**DATE:** 10 November 2009

**PLACE OF DECISION:** Melbourne

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

## 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] September 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] October 2008. The delegate decided to refuse to grant the visa [in] December 2008 and notified the applicant of the decision and her review rights by letter [on the same date].
3. 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.
4. The applicant applied to the Tribunal [in] January 2009 for review of the delegate's decision.
5. 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

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 following personal details of the applicant and her written claims are contained in the protection visa application lodged [in] October 2008.

#### *Application for Protection Visa*

21. The applicant claims to be a citizen of Burma (Myanmar). The applicant was born and educated in Burma. She is 47 years of age having been born on [date deleted: s431(2)] and speaks Burmese. She is a Buddhist and described her occupation as "office manager".
22. The applicant is widowed and has three children, two daughters and a son. Only her youngest daughter currently lives in Burma.
23. The applicant arrived in Australia [in] September 2008 travelling on a Burmese passport and entered Australia on a Visitor visa granted [in] August 2008.
24. The application for a protection visa was accompanied by a Statutory Declaration by the applicant dated [in] September 2008 claiming that;

"I, [applicant] recruitment consultant of [address] in the state of Victoria make the following declaration under the Statutory Declarations Act 1959

That:

- I was born in Yangon, Myanmar on [date]
- I am a Myanmar citizen
- I was born and brought up as a Buddhist
- I attended secondary school to level year 9 in 1977
- I was married in 1977 and have three children. My husband had a transport business
- My husband passed away in 1998. After his death I sold the business and started working at [Company A] as an employment consultant.
- As a Buddhist I used to go to monastery very often. I saw monks being treated in a way that I had never seen before: they were shooting and killing everyone. I saw military officers hitting and abusing monks and making lots of noise and arresting them and shutting thousands of monks inside their monasteries under armed guards and barricading the streets of Yangon They took away the money given to the monks as donations. The monastery was destroyed. When I saw that I felt very angry, sad and sympathetic with the monks.
- When I saw the treatment of the thousands of monks I became involved in antigovernment activities. I began distributing brochures for the monks to arrange a protest in Yangon Part of the monk's protest included refusing to take alms from anyone connected to the military government. I decided to help them by providing food and water and I also participated in marches. [Person 1], the assistant Abbot, came to me disguised in plain clothes asking me to make copies of a letter that he gave me for [Person 2] of [location] monastery The letter urged the monk not to surrender under the heel of the military. I did what he asked me.

- Since the authorities found out that [Person 1] was involved in the distribution of brochures they arrested him. I fear that when they interrogate him, he will reveal my involvement and that he received brochures from me. When [Person 1] was arrested I was informed by other monks from [location] monastery that I should hide, as the authorities knew about my activities and my intentions.
- From February- August 2008 I went into hiding by moving to Mandalay and Pagan. I kept moving from place to place with no fixed address.
- My boss, [name] also a religious person knew that I was helping the monks and she supported me financially so I could hide from the military officers.
- My boss, [name] had a friend in Australia who is an Australian citizen and who gave me an invitation letter to come to visit Australia.
- I came to Australia on [date]/08/2008 as a visitor I am extremely concerned and worried that I would be thrown into prison if I go back to Myanmar. As a political activists. I was involved in anti-government activities by supporting monks. I would be arrested by the Authorities and would be abused and tortured, and there are incidents in which political activists have not only been beaten while in detention but have been under extreme physical, psychological and mental torture.
- As a female prisoner, I am really concerned about my health and safety and that of my children. I fear being killed, raped, imprisoned and tortured.
- In view of all the above circumstances, I now feel I have no choice but to apply for protection from the Australian government, I fear persecution from the Myanmar government on account of my support for the monks in their antigovernment protest.”

25. [In] October 2008 the applicant provided the Department, through her advisor, the following Statutory Declaration dated [in] October 2008 with a request that it be taken to contain the applicant’s claims in place of the Statutory Declaration which accompanied the application:

“STATUTORY DECLARATION ACT 1959

I [applicant], recruitment consultant of [address], Mobile:[number], in the state of Victoria make the following declaration under the Statutory Declaration Act 1959.

That. . . .

- I was born in Yangon Myanmar on [date]
- I am a Myanmar citizen.
- I was born and brought up as a Buddhist
- My father’s name is [name] and my mother is [name] (Deceased)
- I was married in 1977 and have three children
- 1. [Child 1 and date of birth]
- 2. [Child 2 and date of birth]
- 3. [Child 3 and date of birth]
- My husband died on [date]10-1998 and I had to struggle my life as a widow with three children.

To tell you sincerely and truthfully, I had never involved in the politics because I was very afraid of this cruel military Dictators. As I had to look after the three siblings I stayed away from them as far as possible.

In my heart, I disgusted them because they do not care the suffering of people and care only for themselves. The generals are tremendously rich and some people can eat only one meal a day and some are so poor that they can not eat rice and they have to buy a bottle of gruel for Kyats 200 and drink to survive.

They are using three four expensive cars but some people have no money to pay the bus fare and they have to walk to jobs.

The latest crackdown is that the Junta had increased the registration fee of Satalite from 5000/Kyats to one million Kyats so that people could not watch or listen the T.V or listen BBC news If a person is listening V.O.A or BBC, he could be arrested and sent to jail without a trial.

As you all know the Junta had killed thousands of students in 88 pro-democracy insurrections. Arrested Daw Aung San Suu Kyi for nearly 20 years. Now on 25 of September 2007 they had killed hundreds of vulnerable monks and students and also arrested over 6000 peaceful demonstrators.

I am a devoted Buddhist and I had never heard in my entire life that they killed, kicked, and dragged away peacefully enchanting Buddhist prayers monks on the street of Yangon Much to my disgust the military Regime is perfidious and unscrupulous.

On one unfortunate evening in October 2007, my youngest daughter [Child 3] and I were preparing to have our dinner at our house, two people dressed as farmers came to our door and knocked. I went to the door and saw my Reverent Sayadow [Person 1] dressed in mufti clothes. I was so surprised to see him in ordinary clothes. I opened the door and let them in. This monk is the Assistant Sayadow from [location] Monastery where we used to go on Buddhist Sabbath days to keep the Sabbath and to observe the sermons.

I respectful Kow-tow him offered them to sit and asked- What had happended Sayadow? He said as you might have heard, those dogs (referring to the soldiers) came and raided our monastery, ransacked and all donation money were confiscated and the head Abbot was taken away. He was fortunate enough that he was at another monastery holding a secret meeting with other monks from other townships.

When he came back, he was stopped by other monks not to go back and explained him how the monastery was destroyed and the special branch police were looking for him. So he had to disrobe and travel incognito. His eyes moistened with tears while explaining his story.

Later he took out a piece of paper from his underpant and said now Special Branch Police are looking for him. It is very difficult to move around so he implored me to copy this agitating leaflets as much as I can and go and give these to Sayadaw [Person 2] from [location] monastery at [location] Township. ([Location] is about 50 miles from Rangoon)

Tell him that I send it to him, mentioning my name he continued. His face bore and deep imprint of suffering.

When I read the letter it states:

"LET'S STRUGGLE TO FREE OURSELVES FROM THE SHACKLES OF DICTATORSHIP"

Dear fellow monks and democratic people of Burma, Today 45 years have elapsed since the military Dictator look over power. They did nothing good for the people but only themselves and their henchmen. They have ruthlessly killed thousands of monks and students who were peacefully expressing their views.

Human rights situation had deteriorated sharply and people are deprived of human rights lacking the necessities of life

Prices of everything is soaring sky-high. 80% of the population are leading a life of privation and people are suffering hell on earth.

Now they dare to arrest the Reverend Sayadows (monks) kicked with boots, tortured and disrobed them

So on the 4th of January 2008 (the Burma's Independence day) at 8 am morning, let us show our courage and solitary strength of all people led by the monks.

Reverend Sayadow [Person 1]

After I had read the letter, it made my fresh creep but I thought of myself... if these respectful reverend monks could take the risk for the suffering of people... why I should not help them?

So I went in my bedroom and gave 30000/Kyats (which is equivalent to A\$30) to the monk and told him to use this money as Nawa Khama (To use what is necessary for the monks) and also I promised him that I will fulfill his wish

He was very happy and gave me the blessing and left after drinking the sweet drinks my daughter had offered.

He also reminded me to deliver these pamphlets only when I met with Reverend [Person 2].

When they left, I lost my appetite to eat my dinner. It was the most exciting experience that I have ever had. The thrill runs up and down my spine. I went in my room to change my dress. I told my daughter to stay home with my father who is 81 years of age.

I took a taxi and left to see my friend [name] who has a copier. She is working as a general secretary at a foreign company. She is like a sister to me.

I copied about 200 copies of the letters and came back home. The time was about 10pm already and I decided to go to [location] the next morning.

The next day about 7 am I took my daughter [Child 3] and went to [location] by a taxi- I fold the papers with a towel and put it under my seat. The trip took about half an hour and I was all the time reciting Than-Boad-Day the blessing of Buddha to be safe and well.

When we arrived [location] I asked one of the tri-shaw man where the [location] monastery was? He showed us and we arrived there. It was a double-story building and I saw one young monk and I asked him where the Reverend [Person 2] would be and he said Sayadow is upstairs and my daughter and I went up asking the taxi driver to wait in the car.

Upstairs we saw an elderly monk sitting on his bed. We paid our respect by Kowtowed him. I asked are you Rev. [Person 2] just to make sure.

He nodded his head and said "yes I am, what you want? He asked. Then I explained him the situation and gave him the pamphlets.

He read the top one and smiled and asked me "How is Rev. [Person 1]" He is alright Sayadow" I replied.

He then said don't worry tell him I will do the rest.

I took out 20000 Kyats(A\$ 20) and offered him and said this is for your Nawa kaama Sayadow please allow us to go. He blessed us and we came back.

What a relief ! I have done my duty for the people of Burma.... But if the Junta found out what I did. It is a very serious offense. I would be arrested for subversive activities and even sentenced to years of imprisonment or even death.

I lost all sense of balance and consciousness when I think of it. I could hardly sleep at nights.

I was always exciting what might happen on the Independence day. I hardly slept at my house during those days. I visited Mandalay for few days moved to Pagan the next week and visiting my relatives house few days in each house.

One afternoon in November my daughter rang me to come home because she wanted to tell something urgent. I was so worried that something might have happened. So I took leave from my work and I went back home. When I saw my daughter she told me that the younger monk who came to our house last month came and told her that Sayadow [Person 1] was arrested by the Special Branch police yesterday and advised us to hide somewhere or to be very careful.

I was totally shocked my mind was in a complete haze what to do? My daughter's voice was also shivering with excitement and fear.

We do not know how our Sayadow will be tortured when he might disclose the secrets. When the Special Police will come to arrest me!

We even thought of going to Thailand Refugee camp, but we are only two females it would be very difficult to bear the hardships of the Refugee camps. What will happen if we were caught on the way to Thailand? So we dare not go there- I leave my faith in the lap of Buddha.

Fortunately, in December [date], an Australian citizen [Person 3] came to Burma to visit his relatives. We became friends at a party. He is a kind-hearted man. He was separated from his wife and staying alone. He gave me an invitation letter to visit Australia.

I came to Australia on [date]/08/2008 as a visitor. I am extremely concerned and worried that, number one person who wrote the anti-Junta monk Sayadaw [Person 1] was arrested and if he was tortured and put under duress I am going to be in big trouble.

In light of the above circumstances I face a real chance of persecution if forced to return to Burma- I therefore respectfully request that I be granted protection by the Australian Government.”

26. In the letter from the applicant’s advisor dated [in] October 2008 was also a letter from [Person 3] stating that the applicant had been placed under pressure by her uncle [Person 4] to sign the original Statutory Declaration which did not contain all she wanted to say.
27. [In] January 2009 the Department received a letter from the Managing Director of [Company A] stating as follows:

[Company A]

Dear Sir

[Applicant] was appointed on a probationary basis at [Company A] from ([date].5.2008). As she wished to go to Australia, and requested a letter from our company, we gave a letter of recommendation upon her assurance and undertaking that she was free from all involvement in politics.

She left for Melbourne on [date]-09-08. But soon after she arrived in Melbourne, she requested a letter from us to say that she had been employed by our company for the last two years; which was an untruth. Therefore we refused her request.

But it has recently come to our knowledge, through the local offices of some of our friends in Melbourne, that she has forged our company letterhead as well as the seal and signature of our company's Managing Director on a document falsely asserting her employment by our company as stated above.

Therefore, we respectfully take this opportunity to inform the Australian Embassy that we totally denounce the act of the said [applicant] and declare that we, Myanmar [agency] are not involved in any political activities, locally or abroad, that would be detrimental to the good relations between our two countries.

Yours sincerely  
[name]  
Managing Director  
[Company A]”

### *Application for Review*

28. Following the primary decision to refuse the protection visa an application for review was lodged [in] December 2008. [In] January 2009 the Tribunal received a Statutory Declaration from the applicant stating as follows:

“I, [applicant] of [address] in the State of Victoria, Unemployed, do solemnly and sincerely declare the following:



1. I make this Statutory Declaration in response to issues raised by the Department of Immigration and Citizenship in the refusal of my application for a protection visa dated [date] December 2008.
2. I say that the contents of my Statutory Declaration dated [date] October 2008 remain true and accurate as they relate to my claims for asylum in Australia.
3. The contents of my Statutory Declaration dated [date] September 2008 are incorrect. My relative [Person 4] assisted me with that statement and mistranslated almost everything I said. When he read it back to me I told him that it was all wrong but he yelled at me and said that I had to sign it because I had no time. He said that if I did not sign it and send it to the Department immediately I would not be able to apply for a protection visa. I felt that I had no choice so I signed it.
4. I wish to clarify that [Person 4] is just a distant relative, not my uncle. In the letter that [Person 3] wrote to the Department of Immigration and Citizenship he stated that [Person 4] is my uncle. This mistake was made because in Burma we call elderly men, particularly those who are our relatives, 'uncle.'
5. The Department said that there is no evidence that the authorities know that I photocopied and delivered anti-Government brochures or that I have come to their adverse notice.
6. I say that I do have proof that the Burmese authorities know about my actions and have an adverse interest in me. My daughter [Child 3] who is still in Burma has told me that the Burmese authorities have gone to my house in Rangoon on two occasions to look for me. Once on [date] October 2008 and again on [date] November 2008.
7. On [date] October 2008 my daughter [Child 1] called me from Dubai. She said that she had just called [Child 3] who had told her that two Special Branch policemen and two Ward Committee members had come to our home the day before and asked about me. The ward committee is like a local council. One of the Ward Committee members told [Child 3] that the policemen were from the Special Branch and wanted to see me. [Child 3] said that I had gone to Australia. The policemen then went into my home and searched it. When they had finished one of the Ward Committee members told [Child 3] to report to him at the Ward Committee office as soon as I got home.
8. After I finished talking to [Child 1] I called [Child 3]. She was very frightened and said that she did not know what to do. I told her not to worry and that I would get [name] to come and stay with her. I also asked her to write me a detailed letter about what had happened. She said she would. She already had my address in Australia as I had given it to her before I left Burma.
9. About three days later I called my previous migration agent, [name] from the [organisation], to tell her about what had happened. She was not in the office. I kept trying to call her at work over the next week but she never answered her phone. After about two weeks of trying I finally managed to contact her. I told her all about what had happened and that [Child 3] had promised to write me a letter about it. [Agent] told me that it was very important for my case that I got the letter and that I should call her as soon as I got it.
10. About a month later I had still not received the letter from [Child 3]. I called her and asked her what had happened. She said that she had written the letter immediately after our phone call but that she had been too scared to post it. I told her that it was very important for me to have the letter and she promised to send it.
11. On [date] November 2008 [Child 3] called me and said "Mum, today the same thing happened again." Her voice was shaking and I knew that she meant that the police had come to look for me a second time. I told her not to worry and that I would make sure she was safe. I asked if she had sent the letter yet. She said 'no' because she was still too scared. I told her that I had to have the letter for my case and asked her to go to another suburb and send it. I thought that this would be safer. I was very firm with her and she promised that she would do so. I knew that this was a risk and was very worried about her but [agent] had told me that I had to have the letter.
12. When I finished talking to [Child 3] I called [name] and asked her to go and get [Child 3] and take her back to her home. She said she would do so.
13. [Child 3] is still staying with [name] at the moment. She is very scared.

14. I received the letter from [Child 3] sometime at the start of December 2008.
15. I tried to call [agent] but I could not contact her. Whenever I called the [organisation], [agent] was not there. Over the next two weeks I tried to call her a lot of times but could never get onto her. It was very frustrating.
16. I finally managed to talk to [agent] on [date] December 2008 when I saw her at the [organisation] Christmas party. I told her that I had been trying to call her but that she never answered her phone. She told me that it was probably because she only worked on Monday's and Wednesday's. I do not think this is true because I had called her on those days.
17. I then told [agent] that I had the letter from [Child 3] at home. I also told her that the police had come to my home again on [date] November 2008. She told me to get the letter translated and then bring it to her. She said that the [organisation] office would be closed until [date] January 2009 but that I could bring it then.
18. I was worried that it was taking too long to get the letter to the Department of Immigration but [agent] had said that I would have an interview so I thought that I could always show it then. I also thought that [agent] knew what she was doing and that she would look after my case.
19. On [date] December 2008 I got a letter from the Department of Immigration stating that my case had been rejected. I was very upset that I had not been given an interview; I wanted a chance to tell the Department in person why I can not go back to Burma and to show them the letter from [Child 3]. I was also very upset with [agent], I felt that she had really let me down.
20. I have now had the letter from [Child 3] translated and attach it to my statutory declaration.
21. The Department refused to grant me a Protection Visa because it said that it was not satisfied that I am at risk of being identified by the Burmese authorities. It stated that my role in helping the monks was minor and it was not clear how any proof could be obtained to confirm my involvement.
22. Firstly, I say that my role was not minor. Photocopying and delivering pamphlets that advocate for the overthrow of the military regime in Burma is a serious crime. The military regime in Burma imprisons or kills anyone who is against it. The smallest act of opposition is enough. People are even scared to tell their friends that they oppose the Government.
23. Secondly, I say that the Burmese authorities do have proof that I assisted the monks in their opposition to the Government.
24. My daughter [Child 3] told me that the authorities have gone to my house in Rangoon to look for me on two occasions; once on [date] October 2008 and again on [date] November 2008. This makes me believe that Sayadow [Person 1] finally told the authorities that I helped him by photocopying and delivering the anti-Government brochures to Reverend [Person 2]; why else would the authorities be looking for me?
25. Sayadow [Person 1] was arrested in November 2007 and as far as I know he is still in jail. I do not know why it took him so long to disclose my name to the authorities. I can only guess. It may be because nearly 6000 monks were arrested and it took the authorities a long time to question them all. Or because Sayadow [Person 1] was able to resist telling the authorities anything for a long time. He is a brave man with a very strong will and I do not believe he would have told the authorities anything unless he was severely tortured.
26. I also think that when the Nagis Cyclone hit Burma in May 2008 the authorities would have had to stop everything they were doing and focus on getting the country back into order. It was a huge disaster and all of Burma was in chaos for the following four or five months. Because of this I believe that the Burmese authorities would not have been able to focus on interrogating the monks they had arrested.
27. The Department noted that although I learned of the monks arrest in November 2007 I remained in Burma until September 2008. It was not satisfied that I went into hiding between February 2008 and August 2008. It stated that if I had been concerned for my security at the time of Sayadow [Person 1's] arrest in November 2007 I would have taken steps earlier to ensure my safety.

28. Firstly, I never said that I went into hiding from February 2008 to August 2008. This information was in my initial Statutory Declaration dated [date] September 2008 and as I have said, this statement is incorrect.

29. Secondly, I say that I thought about my safety as soon as I found out that Sayadow [Person 1] had been arrested and that I got out of Burma as soon as I could.

30. When I heard about Sayadow [Person 1's] arrest I considered trying to get out of Burma and going to a refugee camp in Thailand but people told me that it would be very dangerous for me and my daughter to go there on our own. They said that two females travelling by themselves across Burma could easily be killed or raped by soldiers. I was very scared and I decided that it was not an option.

31. I asked some friends of mine who had relatives in Australia if they knew how I could get a visa to go there. They told me that I could not get a visa to Australia or any other safe country without a sponsor. At that stage I did not know anyone who could sponsor me out of Burma I knew that I had distant relatives in Australia but I had never had any contact with them.

32. I felt that I did not have any way of getting out of Burma at the time. I was very scared but all I could do was put my fate in Buddha's lap.

33. I did not try to hide within Burma because I did not think that there was any use. I knew that if Sayadow [Person 1] disclosed my name to the authorities I would not be safe anywhere in the country. The security system is so tight in Burma that the authorities can find you anywhere you go.

34. Even though I knew that the authorities would find me if they wanted to, being at home made me feel very anxious because I knew that it was the first place they would look. For that reason I decided that [Child 3] and I would stay with my friend [name] whenever we could. Her house was about a one hour drive from my house. We went between my home and [name] home until I came to Australia. We would usually spend a week at each place. I did not believe that staying there would protect me from the authorities but it made me feel a little better.

35. The first opportunity I got to leave Burma came when I met [Person 3] in December 2007 at my friend [name] party. He was a Burmese man who lived in Australia. We exchanged telephone numbers and started meeting regularly. We fell in love very quickly and after a few weeks I felt that I could trust [Person 3] completely. I told him about my troubles and that I was terrified that I would be arrested, tortured and imprisoned if I stayed in Burma. I asked him to help me get out. He said that he wanted to marry and would sponsor me to Australia.

36. [Person 3] returned to Australia on [date] January 2008. I received a sponsor letter from him sometime in February and immediately began to gather all of the necessary documents to apply for a visitor visa to Australia. It took me a month because the application required so many things.

37. I lodged my application for an Australian Visitor Visa in April 2008 at the Australian embassy in Bangkok. I applied for myself and [Child 3]. About a month later this application was rejected.

38. I told [Person 3] and he called the embassy officer who had rejected my application. Her name was [name]. He told her that we were in love and that I wanted to visit him in Australia to see if I could marry him. She told him that I should lodge another application and that she would reconsider our case.

39. In June 2008 I made my second application for an Australian Visitor Visa. This time I only applied for myself because my friend who had relatives in Australia told me that my first application was rejected because I had applied for both [Child 3] and myself. She said that it would have made the Australian embassy think that I did not intend to come back to Burma.

40. The application I made in June 2008 was approved at the end of August 2008. As soon as I got my visa I went to the travel agent to fix the date of my flight. I got the first available flight which was on [date] September 2008.

41. I say that I did everything in my power to leave Burma as soon as I could.

42. The Department goes on to say that I had previously travelled out of Burma and that if I had been concerned for my safety I would have made earlier arrangements to depart.
43. I have only travelled out of Burma on two occasions before coming to Australia; once in 2005 to visit my children in Dubai, and again in 2006 to visit my sister in Japan.
44. In November 2007, when I found out that I was in danger, I could no longer go to Japan because my sister was back in Burma and could not sponsor me.
45. I may have been able to get a visitor visa to Dubai but I did not think it was worth trying. I knew that I could only stay there for a short time, I think one month is the limit for a visitor, and that I could not seek asylum there. I did not think that it was a good idea to spend all of my savings just to get out of Burma for one month. I was also scared that travelling would draw the authorities' attention to me and did not want to risk that for only a month of safety.
46. I say that I got out of Burma as soon as I could.
47. The Department also stated that my youngest daughter [Child 3] has remained in Burma and there is no indication that she is at risk as a result of her or my actions.
48. I say that [Child 3] has not been hurt by the Burmese authorities because they do not suspect her of helping the monks' campaign against the Government. Sayadow [Person 1] asked me, not [Child 3], to help him and I was the one who photocopied and delivered the pamphlets. Sayadow [Person 1] had no idea that I had taken [Child 3] with me to deliver the pamphlets and so would not have disclosed her name to the authorities. For this reason the Burmese authorities would only be interested in me, not [Child 3].
49. Since I have been in Australia the Burmese authorities have gone to my house in Rangoon twice to look for me. [Child 3] was there both times and they did not hurt her. They told her that the special police wanted to speak to me and that she should notify them as soon as I return from Australia. This makes me believe that the authorities do not suspect that [Child 3] was involved in helping the monks.
50. The Department states that I have provided photographs of myself giving donations to the monks. It states that these photographs were taken in public place and if my activities at the time were illegal, action would have been taken against me. It concludes that because I did not say that I faced any consequences as a result of these actions it can be assumed that they were not unlawful.
51. I say that I never claimed that giving donations to the monks was unlawful. The only unlawful thing that I did while in Burma was to photocopy and deliver pamphlets that agitated for the overthrow of the military regime.
52. The photographs I submitted to the Department show me giving food and money to monks. This is legal in Burma. The only reason I submitted these photos is to show that I am a devote Buddhist.
53. The Department found that I do not have a profile that would be of interest to the Burmese authorities.
54. I say that I do have profile. I have profile because I helped Sayadow [Person 1] who was arrested in November 2007 and as far as I know is still in jail. I helped him by photocopying and delivering pamphlets about overthrowing the Burmese military regime. This is a very serious crime in Burma I believe that the Burmese authorities know about my actions because they have come looking for me at my home twice. They may have come again but my daughter is no longer living there so there is no one there to tell me about it.
55. I believe that the Burmese authorities are interested in anyone who assisted any of the imprisoned monks.
56. The Department found my claims to be inconsistent. It stated that I refer to myself as a political activist and at the same time say that I have never been involved in politics in Burma.

57. I say that I have never called myself a political activist. The term 'political activist' is only in my first statement dated [date] September 2008. As I have said, this statement was mistranslated and is incorrect.

58. The Department did not accept that I have been actively involved in politics in Burma.

59. I have always said that I was never involved in politics in Burma because I was too scared of the regime. The only political act I have ever done was to photocopy and deliver anti Government pamphlets. This is considered to be a very serious crime by the Burmese authorities and is the reason they want to harm me

60. The Department stated that if I had been of adverse interest to the Burmese authorities at the time of my departure they could have taken action against me and prevented me from leaving Burma. It said that I was able to depart Burma without difficulty which indicated that I was not of adverse interest at that time.

61. I agree with the Department. I believe that when I left Burma I was not of adverse interest to the authorities because Sayadow [Person 1] had not yet disclosed my name to them. That is why I could get through the airport without a problem. I believe that the Burmese authorities only found out that I helped Sayadow [Person 1] when I was already in Australia.

62. The Department raised the fact that in my Australian visitor visa application I stated that the purpose of my visit to Australia was to clarify [Person 3]'s situation and to ascertain if he was free to marry.

63. I say that this was only one of my purposes for coming to Australia. I am in love with [Person 3]'s and want to marry him. It is true that I wanted to come to Australia to see if he is divorced and free to marry me. However, my main purpose for coming to Australia was to protect myself from the Burmese authorities. I did not put this purpose in my application for an Australian Visitor Visa because I was scared it would make the embassy reject my application.

64. The Department of Immigration and Citizenship stated that my application for a protection says that my children are currently in Burma. It said that this is contradictory to my application for an Australian visitor which stated that two of my children were working in Dubai but one was planning to return to Burma in order to care for my younger daughter.

65. I say that there is no inconsistency in the information I have provided. In Question 9 of form 866 B I state that my daughter [Child 3] and my adopted daughter [name] are in Burma. This is correct. There is no country of residence provided for my other two children, my son [Child 2] and my daughter [Child 1]. Both of them are still in Dubai. Unfortunately, neither of them was able to get leave from work to return to Burma and care for [Child 3]. Nowhere in my protection visa application have I stated that all of my children are in Burma.

And I make this solemn declaration by virtue of the Statutory Declarations Act 1959 as amended and subject to the penalties provided by that Act for the making of false statements in statutory declarations, conscientiously believing the statements contained in this declaration to be true in every aspect."

### *Evidence at First Hearing*

29. The applicant appeared before the Tribunal [in] March 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
30. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
31. The applicant told the Tribunal that she was born in Rangoon on [date deleted: s431(2)]. She is a practising Buddhist and is a widow. Her father is alive and lives in the same town in

which she lived in Burma. Her mother is deceased. The applicant has three children aged 30, 26 and 18. The two older children live in Dubai and the youngest, in Burma.

32. The Tribunal pointed out that there was evidence on the Department's file indicating that she had adopted a child after she had been granted her visa to enter Australia and only days before she made the journey to Australia. The applicant said that she had adopted a child of her neighbours, before she left Burma and that she did this because she loved the child but the child remained with the parents because the parents wanted to keep her. The Tribunal expresses the view that it did not understand why she adopted the child days before she came to Australia and she said this was because she wanted her children and the public to know that she had adopted the child. The Tribunal observed that this explanation did not make sense because she was travelling to Australia within a few days and people would not find out what she had done. She responded that one day people will be shown the adoption order.
33. The applicant said that she worked as a manager on a casual basis for three days a week with a company called [Company A] which was owned by a friend named [Company A]. The applicant said that she commenced employment with that company in 2006. She also conducted her own real estate business for three days a week which she started in 1990.
34. The Tribunal pointed out to the applicant that the Department's file contained a letter which purported to be from the [Company A] which stated that she commenced employment in May 2008 and that a letter from that company included on the applicant's visitor visa application had been forged. Pursuant to section 424AA of the Act the Tribunal said that it had conflicting information as to the date on which the applicant commenced her employment with [Company A]. It told her that that she had said earlier at the hearing that she started in 2006, the letter from [Company A] on the visitor visa file stated that she started in 2003 and that the dob-in letter stated that she started in 2008 and that the earlier letter had been forged by the applicant. The Tribunal told the applicant that one of the significant aspects of her case was her credibility and that the above information may have an adverse affect on her claim and may lead the Tribunal to a conclusion that she was not a truthful witness which in turn may lead the Tribunal to not be satisfied with her claims.
35. The Tribunal offered the applicant an adjournment to consider responding to the information and she elected to respond immediately. The applicant's adviser then expressed the view that the applicant elected to respond immediately because she felt that any delay in responding would be seen in an adverse manner. The Tribunal suggested therefore that the applicant and her adviser had the opportunity to discuss the matter and adjourned the hearing for a short period of time.
36. When the hearing resumed the applicant stated that she commenced as an apprentice in 2003, that she had not been paid between 2003 and 2006 and she considered that she formally started her employment in 2006. The applicant denied the allegation that she forged the letter and told the Tribunal that she did not know why the dob-in letter was sent. The applicant expressed a view that the owners of the business fear that there will be adverse effects on them for sending the letter. She also told the Tribunal that two people from the company had been jailed for about three months in 2006 because the business was in competition with another business owned by the daughter of a senior military officer and that the owners had been blacklisted and constantly watched by the authorities. She said that the authorities did not watch employees of the company.
37. The Tribunal then raised the issue of the applicant having lodged two statutory declarations in regard to her claims. In relation to the first statutory declaration the applicant told the Tribunal that she had been unable to locate an interpreter for the purpose of giving

instructions to her adviser so her second cousin agreed to be the interpreter. The applicant said that [Person 3], a professional interpreter and the applicant's sponsor did not feel that he was permitted to interpret for her. The applicant gave instructions to her adviser in the presence of her uncle/second cousin who acted as interpreter. She said that she was unhappy with the way in which her uncle was interpreting her instructions to her adviser and that she had an argument with him in the presence of the adviser.

38. The applicant told the Tribunal that several items in the initial statutory declaration were untrue. Those items were: that she went into hiding, she started her employment with [Company A] straight after her husband died, she saw monks being killed, she became involved in anti-government activity and she participated in street marches. The applicant also said that the original statutory declaration was incorrect where it is suggested that the authorities knew about her activities and intentions and that she told her employer that she was assisting the monks.
39. The applicant said that the monastery she attended was close to where she lived and that it was destroyed [in] September 2007. She said that the monk she assisted, [Person 1], was arrested in November 2007 and that another monk went to her house and told her of the arrest and that it may be dangerous for her. She went on to say that she did not actually see the monk but that he spoke to her daughter, [Child 3], and told her that the applicant should go into hiding. The applicant said that she was at work when the monk visited her home.
40. The applicant said that she was very fearful and said she and her daughter moved from place to place although she kept working three days a week.
41. The hearing was adjourned at this stage as the interpreter had another commitment.

#### *Evidence at Second Hearing*

42. The applicant appeared again before the Tribunal [in] April 2009 to give evidence and present arguments. The Tribunal also received oral evidence from [Person 3], a friend of the applicant and [Child 1], a daughter of the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
43. The applicant was again represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
44. At the commencement of the hearing the Tribunal observed that the letterhead on the dob-in letter from [Company A] differed from the letterhead provided by the applicant in support of her visitor visa application. The applicant said that she did not know why the letterheads differed. As the Tribunal did not regard the change of letterhead was an issue that may have caused it to make an adverse finding, it did not raise the matter under s.424AA.
45. The applicant told the Tribunal that there were three people in the room at the time she gave instructions concerning her first statutory declaration, namely, her adviser, her uncle [Person 4] and herself. She said that another person by the name of [deleted: s431(2)] moved in and out of the room during the interview. Her adviser provided her with a typed version of her statutory declaration on another day after the interview telling her to have it signed. [Person 4] took her to a pharmacist where she signed the document. The applicant said that she did not think the document contained the truth but she had been pressured by [Person 4] to sign it as time was running out on her visitor visa.

46. The applicant told the Tribunal that she was living with [Person 3] at the time but that he did not want to become involved in the matter and he did not see the statutory declaration before she signed it although the applicant claimed to have told [Person 3] that [Person 4] did not interpret properly.
47. The applicant said that she hand wrote the second statutory declaration and [Person 3] translated it for her. She then took it to a shop where it was typed and she gave it to the person she called [name deleted: s431(2)] at her adviser's office. She said that [Person 3] did not tell her what to write in her statutory declaration.
48. The applicant said that there were two or three assistant abbots in the monastery she attended and that one of them was still in prison. She last heard of him just before she left Burma when another monk went to her house and told her that the assistant abbot had been sent to the Insen prison. She said that she has not been back to the monastery since November 2007. The applicant claimed that there was general talk about the status of the assistant abbot. On being asked, she said she did not know why an assistant abbot would not have been on the list of prisoner monks as previously referred to by the Tribunal. She also said that she was sure that the monastery had been destroyed because she had seen so for herself but she does not know if it has been reopened.
49. The Tribunal asked the applicant what she regarded to be the age group of women who were vulnerable in Burma and she stated that unprotected women were vulnerable regardless of their age. She also said that a woman is at risk if there was no one to protect her and that if a woman is not married and has not done anything wrong she is protected.
50. The applicant told the Tribunal that her daughter, [Child 3], was present when the monk visited her home and also when the applicant took the copied letters to the abbot. She said that she left her daughter in Burma because the monk did not say that she, [Child 3], was part of the issue concerning the copying of the letter. The applicant said that her daughter was in their house alone with a maid and that the applicant's father visited her for about three days. She said that she knew her daughter was at risk.
51. The Tribunal asked the applicant if it was only single women who have done something wrong who were at risk or whether single women generally were at risk. She responded by saying that every woman has dangers and that she is worried about her daughter.
52. The Tribunal asked the applicant what made her think that the assistant abbot had reported her involvement in the letter copying incident to the authorities and she said that she assumed this was the case.
53. [Person 3] told the Tribunal that he travelled to Burma in December 2007 where he met and proposed to the applicant. At that time she told him about her involvement in the letter copying incident. When the applicant arrived in Australia she initially stayed with [Person 3] and two of her uncles went to his house wanting to take her to their house. [Person 4] took her to the adviser to make a statement concerning her claims for protection and when she returned after the interview she complained to [Person 3] about [Person 4]'s interpreting of her statement. [Person 3] said that he read the original statutory declaration after the applicant had signed it. He said that the applicant's uncle forced her to sign the original statutory declaration. He also said that the applicant received and signed the original statutory declaration within a few days of having given instructions to her adviser. [Person 3] said that the applicant attended the adviser's office for her first interview near the end of September 2008 and that the papers were signed a few days later. He said that he and the applicant did not communicate between the time of the first interview and when she showed



him the signed statutory declaration and that they saw each other immediately after she signed the first statutory declaration. The applicant hand-wrote the second statutory declaration which he translated. The applicant did not receive any advice concerning her second statutory declaration.

54. The Tribunal then telephoned the applicant's daughter living in Dubai who said that [in] October 2008 her sister [Child 3] told her about a visit from a member of the Special Branch in the company of a police officer. She is said that [Child 3] told her that they asked about their mother and told her that they were looking for her. She said that the visit was unusual and that there had been two visits, one in October and another in November but that there had been no visits since that time. She said that [Child 3] left in November 2007 to stay with a friend and was no longer living in the house. The telephone contact with the witness failed and the interview did not continue.
55. Pursuant to s.424AA, the Tribunal told the applicant that it was not satisfied with the evidence concerning the first statutory declaration and in particular, the contradictory evidence the Tribunal considered was given by [Person 3] concerning where the applicant was living at the time she attended her first appointment with her advisor. The Tribunal said it was going to give the applicant some time to consider her answer because it impacted on whether the Tribunal thought she was telling the truth. The Tribunal said that if it thought she was not telling the truth concerning the circumstances surrounding the document it may lead it to think that none of her claims were true which in turn may mean that she did not meet the definition of refugee. The Tribunal offered the applicant time to consider her response and she elected to respond immediately. Although her response was convoluted, her evidence indicated that she was picked up at the airport by [Person 3] and initially went to his house. Two or three days later she was picked up from [Person 3]'s house and taken to her first appointment with her migration adviser where she gave instructions concerning her protection claim.
56. The first statutory declaration took about two weeks to prepare and after giving instructions, she went to [Person 3]'s house. She then lived with [Person 3] for part of the time and with her relatives in [suburb deleted: s431(2)] for the other part.
57. The Tribunal then asked the applicant about the conversation she had with her employer after having been told to do so by her adviser. When asked, she said she did not know why her adviser told her to speak to her employer. She also said she believed her employer did not report her situation to the authorities because they had children in Australia and wanted to be able to travel here. She later said that her employer told her that she intended reporting her to the authorities and it was possible that this was the reason for the visit to her home by the authorities several weeks later.

#### *Post-hearing submission*

58. [In] May 2009 the applicant's advisor made a written submission to the Tribunal addressing a number of issues concerning the case and in particular made additional claims being; that the applicant was a member of a particular social group being a failed asylum seeker who are returned to Burma and her membership of a particular social group being a Burmese woman without male protection.

#### *Evidence at third hearing*

59. The applicant appeared again before the Tribunal [in] October 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
60. The applicant was again represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
61. The Tribunal told the applicant that the Department's file in relation to her visitor visa contained a document issued by the Burmese authorities and dated [in] June 2008 certifying that she did not have a criminal record. Pursuant to section 424AA the Tribunal indicated to her that, subject to her response, the Tribunal may find that the applicant was not of interest to the authorities until at least that date. On the advice of her adviser the applicant sought an adjournment to consider her response and when the hearing resumed she said that the authorities had been occupied by the events surrounding cyclone Nargis in May 2008 and the monk had not revealed her name to them.
62. The applicant told the Tribunal that if she returns to Burma, the fact that she has applied for protection will be seen as an act of rebellion and that her employer had told the authorities that she is seeking protection. The Tribunal asked the applicant who told the employer that she was seeking protection and she initially said it was an acquaintance by the name of [deleted: s431(2)]. The applicant then said that she never told her employer that she was going to seek asylum. She said that [name deleted: s431(2)] told her employer after the applicant had talked to her employer by phone. The Tribunal asked the applicant what reason did she give the employer for needing the letter and she said that she required the details of her job. The Tribunal pointed out that at a previous hearing she had said that when she spoke to her employer, the employer became angry and threatened to report her to the authorities and the applicant agreed. She said that when she asked for the letter, the employer told her not to ring again and hung up. The applicant's representative said the applicant was consistent in saying the applicant did not say she was seeking asylum. The Tribunal expressed the view that it could not see why the employer would react so strongly in threatening to report the applicant to the authorities unless there was something else to have provoked the response.
63. The applicant then detailed a series of events that occurred when she arrived in Melbourne which caused a falling out with the employer and members of her family. The applicant had a conversation with the employer when she was staying with [Person 3]. She said she did not tell the employer of her intentions to apply for asylum. She said she asked for the letter [in] September. The Tribunal suggested that her employer would not have threatened to report her to the authorities because the applicant did not stay with her sister in Melbourne or the fact she had asked for the letter. The applicant said that the employer said it was because she knew the applicant had applied for asylum and that if she dared come back she would report the applicant to the military.
64. The Tribunal then said that the applicant had said earlier that the employer heard she was seeking asylum from [name deleted: s431(2)] after the applicant's phone call to the employer. The Tribunal asked the applicant when did she think her employer first discovered she was seeking asylum and who did she think told her. The applicant said that [in] September she told her employer that she was not coming back. The Tribunal told the applicant that it had difficulty in getting clear and consistent answers from her.
65. The applicant told the Tribunal that her daughter [Child 3] is still staying with the applicant's friend [name deleted: s431(2)] and that she is scared because she fears the police may come and ask her more questions. She last spoke to her daughter the week before the hearing and

her daughter is still studying. She also said that her daughter initially applied for a visa with the applicant.

66. The applicant's representative submitted that it was plausible that the authorities were not aware of the incident where the applicant assisted the monks with the brochure at the time she left Burma but that she will be questioned when she re-enters the country because of her lengthy unexplained absence and that the threshold for the authorities' suspicion is very low in Burma. He also submitted that the applicant would have difficulties in holding up under interrogation.

## **FINDINGS AND REASONS**

67. The applicant claims to be a national of Myanmar and arrived in Australia on a Burmese passport. The Tribunal accepts that the applicant is a Myanmar national and, for the purposes of the Convention, has therefore assessed her claims against Myanmar as her country of nationality.
68. 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. 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.)
69. 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.
70. 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). On the other hand, 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).
71. The Tribunal finds the applicant to be a witness who lacks credibility. Her evidence was inconsistent and lacked plausibility in significant respects, namely:
  - The applicant swore a statutory declaration [in] September 2008 which was lodged as an attachment to her claim for protection. She swore another

statutory declaration [in] October 2009 which was lodged [in] October 2009 with a request from her former adviser that the applicant wanted to give her own true version of events and that the new declaration over-ride the claims made in the declaration [in] September 2008. [In] February 2009 the Tribunal received a further statutory declaration from the applicant which was sworn [in] February 2009. The information contained in the statutory declarations differed in a number of respects. In her third declaration and during the hearings the applicant claimed that she signed the first statutory declaration whilst under duress applied by her “uncle [Person 4]”.

- While the third declaration confirms the information in the second declaration, the differences in the claims made in the first and second declarations can be summarized as follows: Firstly, in the first declaration the applicant claims that she saw the monks being mistreated by the authorities whereas in the second declaration she states that “....I have never heard in my entire life that they killed, kicked, and dragged away the peacefully enchanting Buddhist prayers monks on the street of Yangon”; secondly, in her first declaration she claimed to be involved in anti-government activities and to be a political activist, however in her second declaration she claims that she was never involved in politics; thirdly, in her first declaration she claimed to have gone into hiding between February and August 2008, and in her third declaration and at the hearing she denied going into hiding; fourthly, in her first declaration she claimed to have participated in street marches however this was not mentioned in her second or third declarations but at the hearing she specifically stated that she did not engage in marches; fifthly, in her first declaration she claims that her employer knew of her activities in supporting the monks and provided her with financial support so she could hide from the authorities. This issue was not mentioned in the second or third declarations but at the hearing the applicant denied that her employer had such knowledge.
- The dob-in letter from the applicant’s employer also casts doubt on the credibility of the applicant. The applicant did not deny that her employer sent the letter, in fact, her discussion with the Tribunal about the letter during the hearing indicated that the letter was authentic. Despite the discrepancy in the letterhead the Tribunal is satisfied that the applicant's employer wrote the letter. The letter accuses the applicant of engaging in fraudulent conduct and it also provides contradictory evidence as to the employment history of the applicant.
- During the first hearing the applicant initially said that she commenced employment with [Company A] in 2006 and later in the hearing changed the date to 2003. She explained this discrepancy by saying that between 2003 and 2006 she was not familiar with all of the aspects of the job so she said that she started in 2006. The Tribunal does not accept her explanation of this discrepancy because there seems to be nothing for the employer to gain by not telling the truth.
- The applicant claims in her declarations that she believed the authorities visited her home because she believed the monk who had been imprisoned told the authorities of her involvement in the letter copying incident. At the second hearing she said that she believed her employer reported her to the authorities.

- After being evasive in responding to the Tribunal's questions as to the time that elapsed between giving instructions to her adviser for her first declaration and the signing of it, the applicant finally stated that it was a period of two weeks. This being the case, the Tribunal does not accept her claim that she signed the document under duress from her "uncle [Person 4]". At the time she was represented by registered migration agent and she had a close relationship with and was living with, on a part-time basis, [Person 3], a Burmese person who acted from time to time as an interpreter, and she did not complain of her "uncle's" coercion to either the adviser or [Person 3]. On the basis of the applicant's evidence there was a two week period between having given instructions to her adviser and signing the document, which would have given her ample time to report her concerns. If she did complain to either of them the Tribunal finds it implausible that they would have not intervened before she swore the declaration.
- The Tribunal also notes that according to the applicant's evidence her daughter, [Child 3], did not post the letter dated [in] October 2008 until December of that year even though this was after the second alleged visit by the authorities. The Tribunal would expect that, given its significance, the letter would have mentioned both visits or would have been altered before posting to ensure that the second visit was mentioned.
- The applicant changed her evidence regarding the phone call [in] September 2008 in two respects. Firstly, at the second hearing she said that her employer told her that she was going to report her to the authorities because the employer felt she had put her at risk by forging the employment letter and because she was seeking asylum. She also said that she did not believe her employer reported her to the authorities because they wanted to travel to Australia to visit their children who are living here. Secondly, at the third hearing she told the Tribunal that she feared returning to Burma because her employer had reported her because she had applied for protection.
- At the third hearing the applicant gave differing versions as to when her employer found out she was applying for protection. On one occasion she said it was before the phone call [in] September and on another occasion said it was after the phone call.

72. The Tribunal does not accept the applicant's adviser's argument that while there have been changes in the declaration, the applicant's core claims have not changed. This argument proposes that the Tribunal selectively overlook discrepancies in regard to some issues, no matter how small they may be, and accept changes in other evidence. Furthermore, the Tribunal does not accept that evidence such as the applicant's political activity, whether or not she went into hiding, whether she knew of action by the authorities against the monks or whether her employer knew of her activities and assisted her are not matters of significance.

73. In regard to the evidence of [Person 3], the Tribunal notes that his evidence contradicted the evidence of the applicant in two significant respects, one being where she was living at the time she first visited her former adviser to give instruction regarding her protection visa application and the other being the time that elapsed between when the applicant gave her instructions and when she was handed documents for signing. Other than to demonstrate the unsatisfactory and inconsistent nature of the applicant's version of events, the Tribunal gives the evidence of [Person 3] little weight.

74. In regard to the evidence from the applicant's daughter living in Dubai, the Tribunal notes that she only repeated the evidence that [Child 3] had told her about the alleged visits by the authorities. The evidence did not provide firsthand knowledge of events and therefore the Tribunal gives her evidence little weight. The Tribunal places no significance on the fact that the call was prematurely terminated and is satisfied that the witness had no further first-hand evidence to add.
75. The Tribunal also notes that the applicant was able to leave Myanmar in late August 2008 without incident. This demonstrates that until the time of her departure she was not of interest to the authorities and this is confirmed in the applicant's second statutory declaration. The Tribunal also notes that the only basis for her claim that the authorities knew of her involvement in the letter copying incident was an assumption that either the monk or her former employer told them of it.
76. For the reasons given above, the Tribunal does not accept that the applicant was involved in anti-government activities, that she was visited by the monk, [Person 1] or that she distributed brochures for monks or visited and gave brochures to Rev. Sayadaw [Person 2], was involved in marches, made copies of a letter and gave it to a monk of the monastery, that the monk known as [Person 1] has revealed her involvement in the distribution of brochures, that she was informed by other monks that she should hide as the authorities knew about her activities and intentions, that she went into hiding, that her boss knew she was helping the monks and supported her financially, that she was a political activist, that she was involved in anti-government activities, that her employer reported her to the authorities for seeking asylum in Australia, that officers of the government visited her home in October or November 2008, that she was or is of any interest to the Burmese authorities or that she fears persecution from the Myanmar government
77. The Tribunal has considered the applicant's claims that she will face persecution because she is an unprotected woman.
78. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:
- ... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
79. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.
80. In regard to the applicant's claim that she is at risk of persecution because she belonged to a particular social group being a Burmese woman without male protection the Tribunal notes that it was very difficult to obtain a clear answer on the issue from the applicant. While questioning the applicant about the subject during the hearing she responded in a number of different ways and it was necessary for the Tribunal to restate the question on a number of

occasions. In her submission, the adviser suggested that the applicant was unable to clearly articulate that she feared persecution because she was an unprotected woman and therefore the Tribunal should draw an inference to this effect from the applicant's answers. In this regard, the Tribunal notes that on the two occasions that the subject was raised at the hearing the applicant stated four times that she considered the danger to her arose from her political activity. This, in the view of the Tribunal was the only consistency in her responses. The Tribunal does not agree with the adviser's contention that it should infer that the applicant's responses amounted to her claiming to have a fear of persecution because she is an unprotected woman. Furthermore, the Tribunal notes that the applicant has left her 18 year old daughter in Burma and apart from the alleged visits in October and November 2008, no evidence has been provided of any further approaches to her by the authorities. There was no suggestion from the applicant that her daughter was harmed in any way during the previous alleged visits. The Tribunal notes that the applicant claims her daughter is living away from her home but is still studying at the same educational institution. This would indicate to the Tribunal that if the applicant and her daughter were of interest, the authorities would be able to locate her daughter. On these bases, the Tribunal is satisfied that the applicant does not have a well founded fear of persecution nor is there a real chance of persecution in the reasonably foreseeable future because of her membership of a particular social group being a Burmese woman without protection.

81. In so far as the applicant's claim to fear persecution as a failed asylum seeker returning to Burma, the applicant came to Australia on a visitor visa with the stated purpose of assessing her relationship with [Person 3] and as protection visa proceedings are confidential, the Tribunal does not accept that the Burmese authorities would have information to suggest that she is seeking protection in Australia. As the Tribunal does not accept that the applicant has been politically active in Burma it does not accept her agent's submission that the authorities would have any interest in her because of her past conduct in Burma. Further, the country information quoted by the applicant's adviser states that the authorities monitor travel of citizens who have a political profile. As stated above the Tribunal does not accept that the applicant engaged in political activity in Burma or that she has a political profile and therefore will not monitor her movements. Furthermore, the applicant's stated reason for visiting Australia was to assess the prospects of marriage to [Person 3] so the Tribunal considers it reasonable that this will be seen as a legitimate reason for her extended stay. The Tribunal does not accept that the applicant will be seen by the authorities to be a failed asylum seeker if she returns to Burma. Accordingly, there is no real chance that she would be persecuted for this reason now or in the reasonably foreseeable future.
82. In considering conduct in Australia in relation to an applicant's claims to fear persecution, regard must be had to the provisions of s.91R(3) of the *Migration Act 1958*. Section 91R(3) provides that in determining whether a person has a well-founded fear of being persecuted for one or more of the Convention reasons, any conduct engaged in by the person in Australia must be disregarded unless the person satisfies the Minister that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.
83. In this regard the Tribunal has considered the applicant's claimed action in making a telephone call to her former employer. The Tribunal accepts that the applicant did phone her former employer sometime in September because it explains why she changed her claims set out in her first statutory declaration and why her employer wrote to the Department in relation to the alleged forged letter. At the hearing the applicant said that she made the call because her former adviser told her to see if she could get corroborative evidence to support her claims. The Tribunal accepts this as the reason for the applicant making the call. Accordingly, the Tribunal is not satisfied for the purposes of s.91R(3) of the Act that the

applicant engaged in this conduct otherwise than for the purpose of strengthening her claims to be a refugee. Therefore, the Tribunal disregards the applicant's conduct in Australia in making the phone call in assessing whether she has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol.

84. Further, the Tribunal finds that the applicant does not face a real chance of suffering serious harm in the reasonably foreseeable future if she were to return to Burma.

### **CONCLUSIONS**

85. 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**

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

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. RCHADW</p>
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