

**1111810 [2012] RRTA 200 (30 March 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1111810

**DIAC REFERENCE(S):** CLF2011/111537

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

**TRIBUNAL MEMBER:** Andrew Jacovides

**DATE:** 30 March 2012

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Burma (Myanmar), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2011 and applied to the Department of Immigration and Citizenship for the visa [in] July 2011. The delegate decided to refuse to grant the visa [in] October 2011 and notified the applicant of the decision.
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] November 2011 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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 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 applicant appeared before the Tribunal on [two dates in] March 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.
21. The applicant was represented in relation to the review by a registered migration agent.

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22. The applicant stated in her protection visa application that she was a citizen of Myanmar (a.k.a. Burma). She provided a copy of her Myanmar passport. She indicated that she was born in Yangon (a.k.a. Rangoon) on [date deleted: s.431(2)]; she was fluent in Burmese and English; she belonged to the Bamar ethnic group; she was a Buddhist; she had never married; she lived in Rangoon before she came to Australia; she had seventeen years of education and she obtained a Bachelor of Medicine in [year deleted: s.431(2)]; she worked as a doctor before she came to Australia; and she arranged her journey to Australia with the aid of a broker. The applicant indicated that her parents and one brother were living in Myanmar at the time of application.
23. The applicant submitted a letter from [name and position deleted: s.431(2)] of the *National League for Democracy (Liberated Area)* (NLD(LA)), dated [in] June 2011, who stated that the applicant was an active member of the group since 2009. He stated that she undertook dangerous political activities on behalf of the group while she lived in Burma.
24. The applicant claimed that she was opposed to the military government in Burma and she participated in political activities against the regime while she lived there. She claimed that she had strong political and personal links with the NLD(LA) and she undertook covert activities for the group since 2009. The applicant stated that she was part of the network of political activists in Burma who were seeking to challenge the military government.
25. The applicant claimed that in late 2009 she suspected that she was a “watched person”, so she resigned from her government appointed medical position and she returned to Rangoon. She stated that she resumed contact with political activists in the city but she was discreet regarding her political activities because she was fearful that she had become a person of concern to the authorities. She claimed that her neighbours told her that “people” had made inquiries about her activities. The applicant claimed that the police raided her house, while

she was at work, and they took items belonging to her, including her computer and books. She stated that she decided not to return to her home after the raid and she lived with relatives and colleagues in Rangoon. The applicant claimed she decided to leave the country and she used an agent to facilitate her departure. The applicant stated that she was fortunate to be able to leave the country without incident. She indicated that when she arrived in Australia she was able to participate in political activities with the NLD(LA). She claimed that in Burma she would be questioned and detained by the security forces on “trumped up charges”.

*Interview with the delegate*

26. The applicant was interviewed by the delegate [in] September 2011. The Tribunal has listened to the interview. The applicant repeated claims and information she had already provided and described further the sequence of events which led to her departure from Burma. The applicant stated that her house in Rangoon was raided [in] March 2011. The delegate commented that if the applicant was a person of interest to the authorities in Burma they could have found her while she was still in the country. She stated that they went to her parents’ house a few times and made inquiries about her. The delegate commented that if the applicant was a person of concern to the authorities in Rangoon, they could have found her at the clinic where she worked. She stated that she was “lucky” not to be found.

*Further submissions to the Department*

27. The Department received a submission from the applicant [in] September 2011. She provided a letter from [Ms A], of the NLD(LA), dated [in] September 2011. She stated that the applicant was an active member of the group.
28. The applicant provided a list persons who were involved with the NLD (LA); photographs taken during NLD (LA) meetings since 1996; information from external sources regarding the status of the NLD(LA) in Australia; information from external sources relating to human rights conditions in Burma and the targeting of political activists by the government; letters from persons associated with NLD(LA) who indicated that the applicant was political active against the government of Burma; a letter from her mother, dated [in] July 2011, telling her that the authorities in Rangoon were seeking to find her; and photographs of herself taken during political activities with the NLD(LA) in Australia.

*The delegate’s decision*

29. The delegate did not accept that the applicant provided a credible account of her circumstances and he was not satisfied that she was a person of interest to the authorities in Burma for political reasons. The delegate was not satisfied that the applicant participated in political activities in Australia otherwise than for the purpose of strengthening her claim to be a refugee.

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30. The Tribunal received a submission from the applicant’s adviser [in] March 2012 (folios 35 to 122). He provided the following documents:
  - a submission from him, dated [in] March 2012, in which he repeated the applicant’s claims and argued that she had provided a genuine account of her

circumstances in Burma and that her fear of harm by the authorities in Burma was well-founded;

- recent articles from external sources which indicated that despite positive political developments in Burma, the government was continuing to target and harm political activists and opponents;
- a statement from the applicant responding to issues raised in the delegate's decision, particularly the issue of her passport; the events which led to her decision to leave Burma, the sequence of events which led to her departure, the status of the NLD (LA) in Australia; her relationship with persons in the group; her political activities in Burma; and her political activities in Australia;
- letters from persons associated with the NLD(LA) in Australia and [Country 1] regarding the status of the group and the applicant's involvement with it;
- photographs of the applicant attending political activities in Australia;
- personal references from medical colleagues, the Buddhist association, and Burmese community groups, and other community groups, indicating that the applicant was an active and well-regarded person in the community;
- and, letters from two doctors who indicated that they were treating the applicant for depression and anxiety.

*The hearing – [in] March 2012*

31. The applicant attended the hearing with her adviser and her aunt [Ms A]. She provided additional information from external sources relating to human rights conditions in Burma and the targeting of political activists by the military.
32. [Ms A] indicated that she was attending as a support person for the applicant and she did not intend to provide evidence. However, the Tribunal asked her if she could be witness because she had information regarding the applicant's involvement in political activities. [Ms A] agreed to be a witness.
33. The applicant repeated the claims she provided to the Department. She stated that in Burma she will be arrested, tortured, and put in prison, because of her political beliefs and activities. She stated that she had been politically active against the regime since 2002, but more recently, since 2009, she worked for the NDL(LA) in [Country 1]. The Tribunal asked the applicant to describe her political activities and she essentially stated that she was a courier for the NLD. She stated that she received instructions from NLD persons in [Country 1] and Australia. She stated that her work involved picking up and delivering parcels.
34. The Tribunal asked the applicant to describe the information or contents of the parcels she picked up and delivered. She stated that she did not know. She stated that the information was confidential. She stated that she was never told what was in the packets or parcels. She was asked who gave her the parcels and where they were delivered. The applicant stated that she did not know the persons involved. She stated that she received instructions on where to pick

up and deliver the packages but she was not told who was involved or what she was transporting.

35. The Tribunal commented that the applicant's evidence regarding her activities in Burma was very vague. It commented that she was referring to unknown persons giving and receiving unknown material. She was asked how she knew she was involved in political rather than criminal activities. The applicant stated that she was taking instructions from the NLD in [Country 1] and Australia so she knew that her work was political.
36. The Tribunal referred to the applicant's earlier claim that she was a person of interest to the authorities in Burma. She was asked how she was able to avoid direct contact with the authorities if indeed they were seeking to find her. The applicant stated that when her house was raided she was at work and thereafter she did not return to her home. She stated that she lived with friends and relatives until she was able to come to Australia approximately three months later. The Tribunal commented that the authorities could have found her by going to her work. The applicant stated that she worked as a locum in various clinics around the city. The Tribunal commented that the authorities in Burma had the ability and resources to find her if indeed she was a person of interest to them. It commented that it will have to consider whether the authorities in Burma did not contact her directly, before or after the raid on her parents' home, because she was not a person of particular interest to them and they were not seeking to find her. The applicant stated that they went to her parents and made inquiries about her which frightened them and her.
37. The Tribunal took evidence from [Ms A] who confirmed the applicant's claim that she was involved with the NLD(LA). The Tribunal asked the witness to describe exactly what the applicant was doing in Burma and in particular what she was couriering from person to person. The witness stated that she was [an office bearer] of the group and she did not know the details of "operations" She was asked who knew the details. The witness stated that [Mr B] and her former husband, [Dr C], were directly involved in giving the applicant her assignments.
38. The Tribunal indicated to the applicant that it had decided to adjourn the hearing so that arrangements could be made to obtain evidence from [Mr B] and [Dr C].

*The hearing – [on a later date in]March 2012*

39. The applicant attended the hearing with her adviser, [Ms A], who came to the previous hearing, and [Mr B]. [Dr C] provided evidence by telephone from [Country 1].
40. The witnesses essentially provided the same information. [Mr B] indicated that the applicant was involved in the youth wing of the NLD in 2002 and she agreed to act as courier for the NLD and affiliated groups. He stated that they were involved in raising funds for the NLD in Australia and the applicant was one of several couriers who assisted in delivering the money to the NLD in Burma. He provided details on how it was done. He stated that the applicant sometimes delivered information which the NLD could not have obtained from inside Burma.
41. [Dr C] confirmed the applicant's claim that she was a courier for the NLD (LA). He stated that she was a courier for them while he was living in Australia but after December 2009, when he moved to the headquarters of the NLD (LA) in [Country 1], she acted as a courier for the [Country 1] branch. He stated that they sent money and information to the NLD in Burma. He was asked to describe the information. The witness stated that the NLD (LA) in

[Country 1] had ongoing discussions with groups considered by the Burmese military to be insurgency or terrorist groups. He stated that those groups and organisations were seeking to overthrow the military regime in Burma. He stated that the NLD in Burma communicated with those groups through couriers such as the applicant.

42. Both witnesses stated that in their view the applicant was a genuine political activist who had demonstrated her opposition to the military government of Burma. The Tribunal commented that human rights conditions have improved substantially since the last election. [Mr B] stated that there have been encouraging signs but the repression against political activists was continuing.
43. The applicant repeated claims she provided previously. She also stated that in her work she witnessed the hardship of ordinary people and the extent to which they were suffering under the policies of the military. She stated that in the countryside many people were starving and they had no health care. She stated that she wanted political change in Burma for those persons as well as persons like herself. The applicant stated that she intended to do as much as she could to encourage others to maintain the campaign against the military regime in Burma. She was asked what she intends to do. The applicant stated that she has attempted through personal contact and community work to encourage young people to be involved in political activities against the military regime in Burma. She stated that there is apathy on the issue but she was trying to change that.
44. The applicant and [Mr B] provided further information from external sources relating to the targeting of activists and details of the laws which are commonly used by the military to imprison political activists.

## **FINDINGS AND REASONS**

45. The applicant claims to be a citizen of Burma. The Tribunal considered the evidence she provided in this regard, including her Myanmar passport, and it accepts that the applicant is a citizen of Burma.
46. The applicant claims that she has been politically active with the NLD, against the military regime in Burma, since 2002. She claims that she acted as a courier for the NLD (LA) in Australia since 2002; and she undertook similar political work for the NLD (LA) [Country 1] from 2009 until she left the country in 2011. She claims that she left Burma when the authorities began to make inquiries about her. The applicant claims that she has been politically active against the government of Burma since she arrived in Australia. She claims that she will persist with her political activities in the future. The Tribunal accepts these claims.
47. The applicant claims that if she expresses her political views in Burma she will face serious and possibly life-threatening harm by the authorities. The Tribunal has considered whether the applicant's fear in this regard is well-founded.
48. The 'well-founded fear' aspect of the definition has a subjective and an objective element.<sup>1</sup> The subjective element of "well-founded fear" concerns the state of mind of the applicant. The Tribunal accepts that the applicant is afraid to return to Burma for the reasons provided.

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<sup>1</sup> *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559



Nevertheless, for a fear to be well-founded there must also be a factual basis for that fear. In *Chan v MIEA*, the court found that a well-founded fear “requires an objective examination of the facts to determine whether the fear is justified”.<sup>2</sup> It was further noted that whilst “there must be a fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear”<sup>3</sup> and that the Convention, “in speaking of ‘well-founded fear of being persecuted’, posits that there should be a factual basis for that fear”.<sup>4</sup> A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.<sup>5</sup>

49. Information from external sources, which the applicant provided in support of her application, provides persuasive evidence to the Tribunal that despite a few recent positive political developments in Burma, the former military government is maintaining its control of the country and the authorities are continuing to engage in human rights violations against political activists. The Tribunal has noted that several hundred political prisoners have recently been released by the government. However, thousands of political prisoners remain in prison and more are being detained and mistreated for criticising the military and the government. The information indicates to the Tribunal that political dissidents in Burma are subjected to serious and sometimes life-threatening harm by the authorities. The Tribunal finds that persons who are targeted by the authorities have no opportunity to defend themselves.
50. The Tribunal finds that the applicant will not be able to express her political views freely and safely in Burma. It finds that if the applicant does express her views against the government she faces a real chance of being subjected to serious harm by the authorities, including arbitrary arrest and torture, without the opportunity to defend herself. The Tribunal finds that the applicant cannot avoid the harm she anticipates by relocating within the country as the military and the authorities continue to quash dissent throughout the country.
51. Accordingly, the Tribunal finds that there is a real chance that the applicant will be subjected to persecution by the government of Burma for reasons of political opinion.

## CONCLUSIONS

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

## DECISION

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

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<sup>2</sup> *Chan v MIEA* (1989) 169 CLR 379 per McHugh J at 429

<sup>3</sup> *Chan v MIEA* (1989) 169 CLR 379 per Dawson J at 396

<sup>4</sup> *Chan v MIEA* (1989) 169 CLR 379 per Dawson J at 412

<sup>5</sup> *MIEA v Guo* (1997) 191 CLR 559 at 572.