

0905235 [2009] RRTA 742 (27 August 2009)

DECISION RECORD

RRT CASE NUMBER: 0905235

DIAC REFERENCE(S): CLF2009/38792

COUNTRY OF REFERENCE: Burma (Myanmar)

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 27 August 2009

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 [in] February 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2009. The delegate decided to refuse to grant the visa [in] June 2009 and notified the applicant of the decision and her review rights by letter dated [in] June 2009.
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] July 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 file CLF2009/38792, with the protection visa application and the delegate's decision, and the Refugee Review Tribunal (RRT) file 0905235, with the review application.
20. The applicant appeared before the Tribunal [in] August 2009 to give evidence and present arguments. The Tribunal also received oral evidence from two witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Burmese and English languages.

Department file CLF2009/38792

21. The applicant stated in her protection visa application that she is a citizen of Burma. She stated that she was born in the town of Pathein [date of birth deleted under s:431(2) of the Migration Act 1958 as this information may identify the applicant] She described her ethnic background as "Arakanese". She stated that she had thirteen years of education; she was widowed in 1985; she was never in paid employment; she had three sons and two sisters living in Burma; and she had a daughter in Australia. The applicant stated that she lived at the same address in Burma from 1975 until she came to Australia.
22. The applicant stated that her daughter migrated to Australia in 1994 but she was deeply involved in religious activities in Burma and she did not want to leave. She stated that she worshipped and assisted a senior Buddhist monk, [name deleted s:431(2)], a great teacher and a person active in helping the poor and the families of political prisoners. She stated that she assisted him in all these activities. She claimed that her association with the monk, and her activities with him, attracted the adverse interest of the military authorities. She claimed that her house was searched and she was interrogated several times.
23. The applicant stated that in 1996 she visited her daughter in Australia and during the visit she participated in fundraising activities within the Arakanese community. She stated that she received donations for [Buddhist monk's name deleted: s431(2)] work in Burma The applicant claimed that two weeks after she returned to Burma two military intelligence officers came to her house and questioned her. She stated that she told them that she was visiting her daughter to see her new born grandchild. She stated that she showed the officers a photograph of her grandson and they left. The applicant claimed that she distributed the money she raised in Australia among the families of prisoners.
24. The applicant claimed that in 2006 she visited Australia again and she repeated her earlier fund raising activities. She stated that when she returned to Burma she gave some of the money to a monastery which looked after persons suffering from AIDS. The applicant stated that she was again questioned by the military regarding her visit to Australia She was asked if she participated in any activities of a political nature. She stated that she told the officers that she was visiting her daughter who was seriously ill at the time.

25. The applicant claimed that in August 2007 there was civil unrest in Burma and monks were leading the campaign against the military government. She claimed that [Buddhist monk's name deleted: s431(2)] was active in this movement and she participated with him in protest activities. She claimed that she was harassed by the military. She claimed that they searched her house and questioned her regarding her involvement in protest activities. The applicant stated that she was afraid the authorities would arrest her so she went to a small village in Patheingyi and she hid there for one month.
26. The applicant claimed that when she returned to Rangoon she was asked by [the Buddhist monk] to deliver documents to other monasteries and monks. She stated that the documents were political in nature and she was afraid that the military would arrest her if they discovered what she was doing. She claimed that [in] September 2007, [the Buddhist monk] was detained and his monastery was searched. She stated that he was accused of being a leader in the political movement against the government. The applicant stated that she was distressed by his arrest and she continued to do "what he had left to be done".
27. The applicant claimed that [in] March 2008 three military officers came to her house and took her to a police station. She claimed that later she was taken to a place where political activists were kept and she was interrogated for three days regarding her association with [the Buddhist monk]. She stated that they tortured and threatened her during that period and she was told that she was trying to ruin the country by assisting the anti-government activists. She claimed that her son paid a bribe and she was released. She stated that the military told her not to assist the monks in the future.
28. The applicant claimed that [in] October 2008 she was again harassed by two military officers in her home. She stated that they insisted she give them an undertaking that she would not get involved in [the Buddhist monk's] work. She stated that she refused to co-operate and she was told that her attitude would be reported to a higher authority. She stated that she was afraid of further harassment by the military so she left the country and came to Australia. The applicant claimed that two weeks after she arrived in Australia her neighbour in Rangoon telephoned her and told her that the military had come to her house looking for her. She stated that when they found that she was not there, they searched the house, took some items, and sealed the house. The applicant assumed that the items taken were documents which had been left in her care by [the Buddhist monk]. She claimed that if she returns to Burma she will be detained and tortured by the authorities as an anti-government activist.
29. The applicant was interviewed by the delegate [in] June 2009. The Tribunal has listened to the recording of the interview. The applicant submitted sixteen photographs including three photographs of her house in Rangoon which she claimed had been sealed by the government. She also submitted photographs taken during various activities with monks in Burma and while she was participating in political meetings in Australia. The applicant essentially repeated her written claims. She stated that she was entrusted with letters and documents by [a Buddhist monk] and those documents were found by the authorities when they searched her house. She stated that they will mistreat her if she returns to Burma because those documents were in her possession. The applicant stated that she did not have an opportunity to distribute the documents, as she was instructed to do, because she was monitored by the authorities and she was fearful that she would be caught if she tried to pass on the letters and documents.
30. The applicant repeated her claim that she was a person of adverse interest to the authorities and that on one occasion she was detained and tortured by the authorities for three days. She

stated that she was threatened with further detention and harm if she continued to assist the monks and their anti-government campaign. The delegate asked the applicant if her claims can be verified by the Department, in particular that her claim that her house in Rangoon had been sealed. The applicant indicated that she did not object to the Department verifying her claims.

31. The applicant stated that if she returns to Burma she will be arrested and interrogated because the military authorities has evidence that she was implicated in anti-government activities and she was associated with the monks who were implicated in anti-government activities. She was fearful that she may be tortured in detention. She was asked why it took her almost eleven months to leave Burma after she was released from detention. She stated that after her release the situation became “calmer” and she felt that she could remain there. The applicant stated that when the arrests resumed, and some of her associates were arrested, she decided to leave the country for a while.
32. The delegate found that the applicant’s claims were general, sketchy, and unsubstantiated. She found that the applicant lacked credibility and on that basis the application was rejected.

RRT file 0905235

33. The Tribunal received a submission from the applicant [in] August 2009. She submitted letters of support from the Burmese Community Welfare Group; the National League for Democracy (Liberated Area) Australia Branch; the All Young Burmese League; the Australia Burma Council; a letter from a doctor who stated that the applicant was suffering from depression and anxiety disorder because of her experiences in Burma; and ten photographs taken in Australia while the applicant was attending various social, welfare, and political activities within the Burmese community. The letters were written after the applicant arrived in Australia. The authors indicated that the applicant was a political activist and that she will be subjected to persecution by the military government if she returns to Burma.
34. The applicant submitted a statement dated [in] August 2009. She repeated claims already provided to the Department. She stated that since she arrived in Australia she has been involved in activities against the military government in Burma. She stated that in Burma she will be detained because of her beliefs and activities.

The hearing

35. The applicant attended the hearing accompanied by two witnesses. She essentially repeated claims previously provided to the Department. She stated that when she decided to come to Australia she was not intending to stay here. She stated that she wanted to leave Burma for a while in the hope that the government campaign against activist monks, and their associates, would subside. She stated that after she learned that her house had been searched and sealed she realised that if she returns to Burma she will be detained and mistreated by the authorities. She stated that [the Buddhist monk] and some of his associates were still in prison.
36. The Tribunal asked the applicant if she had read any of the documents given to her by [the Buddhist monk] which were later taken by the authorities from her house. She stated that she had not read the letters as they were sealed. She stated that she had been acting as a courier for [the Buddhist monk] for many years and it was only more recently that the correspondence and documents she was transporting related to political activities against the

government. She stated that when [the Buddhist monk] realised that his arrest was imminent he gave her some documents for safe keeping.

37. The applicant stated that she has supported the movement against the military government since 1988 but her activities were often connected with her temple and the monks she worked for. She stated that the authorities did not demonstrate interest in her until the most recent anti-government campaign which was led by the monks. She stated that in March 2008, when she was detained for three days, she was seriously mistreated by the authorities. She claimed that after she was released she had to be discreet because she realised that she had become a person of interest to the authorities.
38. The applicant provided information regarding her political activities in Australia. She stated that when she realised that she could not return to Burma, because the authorities had effectively demonstrated that she would be detained if she returns, she decided to express her views against the government more openly. She provided details of some of her activities.
39. The applicant's daughter essentially confirmed the applicant's claims. The other witness stated that he was detained and mistreated by the authorities in Burma during 1988 because he was involved in the movement against the military government. He stated that he has known the applicant since then and in 1988 she actively supported the pro-democracy movement in Burma. He stated that she made a financial contribution to the movement, she provided moral support to the persons involved, and she took part in educational activities. He stated that her commitment and determination is continuing. The witness stated that since the applicant arrived in Australia, she has attended various political activities against the military government in Burma. He stated that in his view she will be detained and mistreated by the authorities in Burma because she has been identified as being an opponent of the military government.

Information from external sources

40. The Tribunal considered the following information from external sources dealing with human rights conditions in Burma:
 - Human Rights Watch 2008, *Vote to Nowhere – The May 2008 Constitutional Referendum in Burma*, May;
 - Freedom House 2008, 'Burma (Myanmar)', in *Freedom in the World 2008*;
 - US Department of State 2009, *Country Report on Human Rights Practices for 2008 – Burma*, 25 February;
 - Human Rights Watch 2007, *Crackdown – Repression of the 2007 Popular Protests in Burma*, Volume 19, No. 18(C), December;
 - 'Myanmar detains dozens of opposition members' 2009, *Yahoo News*, (source: *Associated Press*), 19 July;
 - '87-year old opposition member imprisoned' 2009, *Democratic Voice of Burma*, 14 July;

- ‘Lengthy sentences for opposition prayer arrestees’ 2009, *Democratic Voice of Burma*, 18 June;
- ‘Burmese junta cracks down on Suu Kyi’s party’ 2009, *Democratic Voice of Burma*, 15;
- ‘Harsh Sentences for Myanmar Dissidents’ 2008, *Amnesty International*, 13 November.

FINDINGS AND REASONS

41. The applicant claims that she is a citizen of Burma. She claims that she is a committed political activist who has participated in protest activities against the government of Burma. She claims that in March 2008 she was arrested and subjected to persecution over a three day period because she was implicated in protest activities against the government. She claims that after she left Burma her house was sealed by the authorities and evidence of her involvement in anti-government activities was taken by the military. The applicant claims that she will continue to express her views against the military regime in Burma. The Tribunal accepts these claims.
42. The applicant claims that she will be subjected to persecution by the authorities in Burma for expressing her political views.
43. Information from external sources summarised above, which the Tribunal accepts, indicates that the applicant’s fear that she is at risk of serious harm by the authorities in Burma, because of her involvement in political activities against the military regime, is well-founded. The information supports the applicant's claim that her political activities, and her commitment to continue with such activities, will attract the adverse interest of the military in Burma. The security forces in Burma do not tolerate dissent and political activists are commonly subjected to serious violations of core human rights including arbitrary arrest and torture. The Tribunal finds that the applicant is at risk of arrest and torture by the authorities in Burma because she has been, and will continue to be, implicated in political activities against the government of Burma. The Tribunal finds that the applicant cannot avoid the harm she anticipates in Burma by relocating within the country as the military maintains an extensive intelligence network which it uses to suppress dissent throughout the country.
44. The Tribunal finds that the applicant is at risk of being subjected to circumstances amounting to persecution by the military government in Burma. It is satisfied that she will be targeted by the authorities in Burma because of her political opinion and the political opinion which has been attributed to her by the authorities due to her close association with monks who were implicated in protest activities against the government.
45. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution by the military in Burma, including arbitrary detention and torture, for reasons of political opinion and there is a real chance that she will be subjected to persecution by the military in Burma for a Convention reason.

CONCLUSIONS

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

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer's I.D. prrt44