



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA16/00190

Date and time of decision: 02 June 2016 17:41:01
Denny Hughes, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a stateless Rohingya from Myanmar. The applicant applied for a temporary protection visa (TPV) [in] August 2015.
2. While the delegate accepted that the applicant was of Rohingya ethnicity and a Muslim, he did not accept that the applicant was stateless. The delegate concluded that while he accepted the applicant may face discrimination if he returned to Myanmar, there was no real chance of the applicant being seriously harmed in his home area of Yangon for reasons of his ethnicity or religion. For the same reasons, the delegate was also not satisfied there was a real risk that the applicant would suffer significant harm on return to Myanmar.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant made no further submission to the IAA.

New country information obtained by the IAA

5. In addition to the above information, I have also obtained new information relating to the treatment of stateless Rohingya returnees to Myanmar.¹ In assessing the applicant's case, the delegate found that the applicant was a citizen of Myanmar and thus did not consider country information relating to the treatment and punishment of stateless Rohingya returnees. I have concluded that the applicant is in fact stateless. The new information considers an issue that was not squarely addressed by the delegate and which is critical to the assessment of whether the applicant satisfies s.36(2). I am therefore satisfied that there are exceptional reasons to justify consideration of the new information.

Applicant's claims for protection

6. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He fears harm as a stateless Rohingya from Yangon, Myanmar.
 - Both he and his parents are stateless. He left illegally and has no legal right to return to Myanmar. If he were forced to return to Myanmar, he would face harm there.
 - He claims that the Rohingya are not recognised as citizens and have no rights. He fears being arrested or executed on return to Myanmar by government officials or other citizens and that they would 'definitely do something to [him]' on his return.
 - He suffered difficulties and persecution in the past due to his religion and statelessness. He fears harm from the authorities and Buddhist extremists.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT CIR report No. 14-29 - Rohingya returnees", 8 December 2014, CX1B9ECAB9403.

- As he is stateless, he was never issued identification documents. In order to obtain permission to enrol in school, every year he had to pay a bribe to a local community leader. He and his family also had to pay bribes to travel or visit family members.
- He claims to have suffered verbal abuse and insults in the past because he is Rohingya, both at school and in public. He has experienced discrimination and oppression in the past. He was prevented from attending university because he was Rohingya and it is difficult to find employment.
- He fears being punished for leaving Myanmar illegally and for seeking asylum abroad. He fears that he will be imprisoned and tortured on return to Myanmar. His information was published on the Department of Immigration and Border Protection's (the Department) website and this increase the risk to him.

Factual findings

Travel to Australia and identity

7. I accept that the applicant's parents live in Yangon, and that he has [siblings]. His father works as a [occupation] of an [certain] business. His mother is not employed and one of his [siblings] is attending university.
8. The applicant has provided an account of his religious practise, both in Myanmar and [country]. I accept that the applicant is Muslim.
9. The applicant speaks Burmese, and used a Burmese interpreter in his departmental interview. He advised the delegate that his parents speak Rohingya and he understands a little bit only. I agree with the delegate's finding that as a Rohingya youth raised and schooled in Yangon, it is plausible that he would speak Burmese as his first language. I find that the applicant is Rohingya.

Statelessness

10. While I have some doubts about the applicant's claim not to be a citizen of Myanmar, for the following reasons I find that the applicant is stateless as claimed.
11. Citizenship in Myanmar is governed by the Burma Citizenship Law of 1982. The 1982 law created three classes of citizen – full, associate and naturalised citizenship. It also established a 'Central Body' with powers to determine citizenship issues.²
12. Burmese authorities have specified eight 'national' and 135 'ethnic' groups as Myanmar citizens. The majority of Burmese citizens fall within these categories and automatically acquire citizenship as a result of being members of these groups.³ The Rohingya are not considered or listed as one of these national ethnic groups, and are therefore ineligible for full citizenship.⁴ To be eligible for associate citizenship, a person must be both eligible under the previous

² Burma Citizenship Law of 1982, 15 October 1982, CX75226; Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 1 May 2004, CIS19010, at p.9 and 37.

³ Tomás Ojea Quintana, "Report of the Special Rapporteur on the situation of human rights in Myanmar", UN Human Rights Council, 1 April 2014, CIS29119, at p.13

⁴ Tomás Ojea Quintana, "Report of the Special Rapporteur on the situation of human rights in Myanmar", UN Human Rights Council, 1 April 2014, CIS29119, at p.13. Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 1 May 2004, CIS19010, at p.9.

citizenship law (1948) *and* have had applied for citizenship under that Act in 1982. Few Rohingya met this threshold, and most were unaware of the 1948 law or did not understand its importance at the time.⁵ In terms of ‘naturalised citizenship’, this requires conclusive evidence of entry and residence before 4 January 1948. Amnesty indicates that few Rohingya are in possession of the necessary documentation and even if they are, the ‘wide powers conferred on the Central Body mean that any theoretical entitlement to citizenship may not be realised in practice’.⁶

13. In addition to these legal barriers, there are other impediments to Rohingya obtaining citizenship. DFAT reports there is evidence of government officials being unwilling to provide citizenship to Rohingya. Rohingya also consider it discriminatory and inaccurate that they must be classified as ‘Bengali’ in order to obtain citizenship.⁷
14. While the government has stated that the Rohingya are recognised as ‘permanent residents within Myanmar’, the 1982 law means that the vast majority of Rohingya are prevented from attaining citizenship, effectively rendering them stateless.⁸ The government includes the Rohingya in official family registries and gives them temporary registration cards. However, such documents do not mention place of birth and are not considered as evidence of birth in Myanmar.⁹
15. Although there are significant impediments for Rohingya seeking to obtain documentation or citizenship in Myanmar, the situation is considered to be better in Yangon than it is in areas such as Rakhine.¹⁰ In a response to a request for information, Chris Lewa, head of The Arakan Project, has suggested that while very few Rohingya have statutory (full) citizenship, some are entitled to citizenship under Burmese citizenship laws and may have obtained it through the paying of bribes. She also indicated that most Rohingyas in Yangon hold a National Registration Card (NRC), which were issued prior to changes to citizenship laws in 1982. However, she emphasised that that an NRC is “not proof of citizenship, but of identity and permanent residence”.¹¹ DFAT has advised that while it could not confirm whether a majority of Rohingya in Yangon have citizenship, a significant number of Rohingya in Yangon have NRCs and can obtain passports.¹² In practice there is doubt as to whether Rohingya that hold NRCs could in fact obtain citizenship.¹³
16. In addition to NRCs, since 1995 the Burmese authorities have issued the Rohingya with Temporary Registration Certificates (TRCs or White Cards). TRCs are usually only issued to

⁵ Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 1 May 2004, CIS19010, at p.9.

⁶ Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 1 May 2004, CIS19010, at p.9.

⁷ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084, at p.9.

⁸ Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 01 May 2004, CIS19010, at p.10; UK Home Office, "Operational Guidance Note: Burma (Myanmar)", Volume 8, 1 July 2013, CIS29321, at p.24.

⁹ UK Home Office, "Operational Guidance Note: Burma (Myanmar)", Volume 8, 1 July 2013, CIS29321, at p.25.

¹⁰ Danish Immigration Service, "Rohingya refugees in Bangladesh and Thailand", 1 May 2011, CIS20659, at p.38; Aye Nai, "Rohingya minority given ID cards", Democratic Voice of Burma, 9 April 2010, CX242408.

¹¹ Chris Lewa, "Email to DIBP: Re: Information request from the Australian Department of Immigration & Border Protection", 13 June 2015, CISEC96CF12736. These NRCs can be contrasted with other cards issued to Burmese citizens, being “pink cards” (Citizenship Scrutiny Cards - CSCs) for full citizens, “green cards” (Naturalised Citizenship Scrutiny Cards - NCSCs) for naturalised citizens and “blue cards” (Associate Citizenship Scrutiny Cards – ASCSs) for associate citizens. See DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.25.

¹² DFAT, "CIS Request No. BUR13329 Rohingya in Rangoon", 15 June 2012, CX289305.

¹³ ‘Crimes against humanity in western Burma: The situation of the Rohingyas’, Irish Centre for Human Rights, 2010, CIS18891, at p.97. The Irish Centre For Human Rights has indicated that in practice the Burmese regime has no intention of extending citizenship to the Rohingya and that those that possessed NRCs were ordered to turn in their cards when they made an application for citizenship under the new law and that many had complained that they had received neither new documents nor the old ones back.

citizens between ten and twelve years of age, to citizens who have lost their NRCs, or to those citizens whose NRCs have become illegible.¹⁴ TRCs issued to the Rohingya are clearly marked 'not evidence of citizenship'.¹⁵ Some Rohingya outside Rakhine have managed to secure documentation by registering as another Muslim ethnicity, such as Kaman, but DFAT advises that this practice is neither legal nor widespread.¹⁶

17. The situation for Rohingya that have not obtained citizenship is one categorised by high levels of discrimination and restrictions. Without citizenship, Rohingya Muslims lack access to secondary education in state-run schools, cannot be issued government identification cards (essential to receive government benefits), and face restrictions on freedoms of religion, association, assembly, and movement. Rohingya are also reported to be prevented from owning property, residing in certain townships, or serving as government officials. Muslims are restricted in the number of children they may have and have difficulties obtaining birth certificates for newborns.¹⁷ Rohingya that hold NRCs or TRCs have limited access to education services and work, and face restrictions in starting or owning businesses. They are also subject to limitations on ownership of property and face severe restrictions on movement throughout the country.¹⁸
18. The applicant was questioned by the delegate on how he was able to access schooling if he was in fact stateless. He responded that this was done through the payment of bribes to the authorities. He also indicated that his family had to pay bribes to receive permission to travel.
19. The applicant's claims are supported by country information. The rule of law is weak in Myanmar and there is considerable evidence in the country information of corruption among government officials and authorities. Country information indicates that it is common, and sometimes necessary, to bribe officials to obtain documentation such as ID documents, travel permissions, marriage licenses and even citizenship cards.¹⁹
20. While the situation is better for Rohingya in Yangon compared with Rakhine, there are still difficulties associated with Rohingya obtaining citizenship or proper documentation:

Many Rohingya in this category that the Australian Embassy has spoken to reported being forced to pay hefty "fees" to obtain these documents (and household registration lists), and routine discrimination whenever they dealt with government authorities (i.e. enrolling a child in school, harassment by local officials over the legal status of small businesses etc). This discrimination may not be based on a person being identified as Rohingya per se, but rather by appearance (South Asian), possible Islamic dress and an accent when speaking Burmese that identified the person as having come from Rakhine State. It is possible that other, non-Rohingya, Muslims from Rakhine State would face similar treatment. Muslims throughout Burma are regularly subject to discrimination.²⁰

21. The applicant claims his parents were both born in Rakhine, although he could not provide specific details about where they came from within Rakhine, or a reliable chronology of their

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084, at p.10.

¹⁷ UK Home Office, "Operational Guidance Note: Burma (Myanmar)", Volume 8, 1 July 2013, CIS29321, at p.36

¹⁸ 'Crimes against humanity in western Burma: The situation of the Rohingyas', Irish Centre for Human Rights, 2010, CIS18891, at p.97.

¹⁹ Danish Immigration Service, "Rohingya refugees in Bangladesh and Thailand", 1 May 2011, CIS20659, at p.38; Aye Nai, "Rohingya minority given ID cards", Democratic Voice of Burma, 9 April 2010, CX242408, at p.39; Human Rights Watch, "The Rohingya Muslims: ending a cycle of exodus?", September 1996, at p.21.

²⁰ DFAT, "CIS Request No. BUR13329 Rohingya in Rangoon", 15 June 2012, CX289305. [Errors in original]

move to Yangon, apart from saying that they moved there when they were young. While current country information indicates difficulties for Rohingya seeking to move between Rakhine and Yangon,²¹ I accept that the applicant's parents are originally from Rakhine and moved to Yangon when they were young. This is consistent with country information indicating that there is an established Rohingya community in Yangon that moved there prior to the early 1990s, when restrictions on movement were placed on those residing in Rakhine.²²

22. While it is difficult to establish exactly when his parents moved to Yangon, it is apparent that they have been there for at least [number] years given that the applicant's [sibling] was born in Yangon in [year]. Based on the information provided in his TPV application, the applicant's father and mother would have been [ages] respectively at the time the 1982 citizenship laws were passed and may have been issued NRCs.
23. The applicant's claims of past discrimination and verbal abuse are consistent with country information about the status of Rohingya. Other aspects of his evidence appear to undermine his claim to be stateless and would instead indicate that he has obtained a level of citizenship, or at a minimum is registered with the authorities, through the possession of an NRC or other type of documentation.
24. In particular, while the applicant's parents were born in Rakhine, the applicant has lived in Yangon his entire life. The applicant completed his primary and higher schooling in [name] Township in Yangon prior to departing Myanmar. His siblings also studied there and one of his [siblings] is currently studying at university. His father is employed as a [occupation] and most senior employee at an [certain] business. His parents own and live in their own home and the applicant indicated that their residence would be registered with the regional office.
25. While the evidence may suggest that the applicant and his family are Burmese citizens, it is equally possible, having regard to the country information, that the applicant and his family's level of schooling, home ownership and employment were secured without them holding citizenship. If he or his family possessed an NRC or other registration and/or they were able to pay the necessary bribes to obtain such documentation – something the country information indicates is common in Myanmar²³ – this would plausibly account for his family's circumstances even in the absence of them acquiring citizenship.
26. In terms of the applicant's parents' ability to obtain naturalised citizenship, the country information above indicates that few Rohingya are in possession of the necessary "conclusive" evidence to establish residence prior to 1948. The country information indicates that very few persons from Rakhine possess adequate documentation.²⁴ Even if they had the necessary evidence, any decision would have been subject to a Central Body that continues to be unsympathetic towards the Rohingya.²⁵
27. While some of the applicant's circumstances suggest that the applicant may be recognised as a citizen of Myanmar, the applicant's own evidence and the country information supports a contrary conclusion. Weighing the available material, I cannot be sufficiently confident that the

²¹ Ibid.

²² Chris Lewa, "Email to DIBP: Re: Information request from the Australian Department of Immigration & Border Protection", 13 June 2015, CISEC96CF12736.

²³ Chris Lewa, "Email to DIBP: Re: Information request from the Australian Department of Immigration & Border Protection", 13 June 2015, CISEC96CF12736.

²⁴ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084, at p.25.

²⁵ Amnesty International, "Myanmar: The Rohingya Minority: Fundamental Rights Denied", 1 May 2004, CIS19010, at p.9; DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084, at p.9.

applicant does in fact possess such citizenship, and have therefore proceeded on the basis that the applicant is not a citizen of Myanmar or any other country.²⁶

28. It follows that I accept the applicant is stateless as claimed. I therefore find that Myanmar is the receiving country as it is the applicant's country of former habitual residence.

Rohingya claims

29. When asked why he wanted to leave Myanmar, the applicant replied that they were against him ethnically and he did not want to stay in the country any more. He said he did not want to live a life oppressed all the time.

30. I accept the applicant he experienced teasing and racial putdowns and was called '[name]', that his family had to pay bribes for his schooling, that he and his [sibling] were prevented from engaging in certain activities (such as sporting events) that were only available to Buddhist Burmese, and that he felt oppressed.

31. The applicant claimed to want to study [course] at university, but chose not to apply. When asked why he did not apply for university, he said that if he did apply there would have been a lot of difficulties and financial bribery involved.

32. The applicant conceded that his [sibling] is attending university, but that [sibling] had had to bribe [sibling's] way through to do so. The applicant claimed his [sibling] allowed [self] to be persecuted religiously. When asked to expand on these claims, he advised that they had used derogatory terms like '[name]', that they don't get the same opportunities as other Burmese. As an example, he said that when there are sporting activities, they are not allowed to go, but the Bamar (Buddhist ethnic majority) are.

33. When the delegate noted that it at least seemed possible for him to attend university, the applicant agreed that this was true, but reiterated that he did not want to stay in the country any more.

34. The current situation in Yangon remains difficult for the Rohingya. There is evidence of a growing anti-Rohingya sentiment in Myanmar exacerbated by the nationalist Buddhist '969' movement.²⁷ While this has manifested as significant violence in Rakhine and elsewhere in Myanmar, the situation in Yangon remains comparably stable. There have been isolated clashes between ethnic groups in Yangon, but the country information does not suggest that the harm faced by Rohingya in that area is escalating, or becoming more frequent.²⁸ Equally, there is also nothing to suggest an improvement in circumstances for the Rohingya in Yangon.²⁹ I find that the Rohingya continue to experience moderate levels of discrimination and mistreatment in Yangon, including difficulties accessing schooling and employment. I am also satisfied that they are restricted in their movements throughout the country.

²⁶ *MIEA v Guo* (1997) 191 CLR 559 at 575; *MIMA v Rajalingam* (1999) 93 FCR 220.

²⁷ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.11.

²⁸ Chris Lewa, "Email to DIBP: Re: Information request from the Australian Department of Immigration & Border Protection", 13 June 2015, CISEC96CF12736.

²⁹ Chris Lewa, "Email to DIBP: Re: Information request from the Australian Department of Immigration & Border Protection", 13 June 2015, CISEC96CF12736; Patrick Winn "Myanmar's '969' crusade breeds anti-Muslim malice", Global Post, 28 March 2013, CXC2812941448; DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.14-15.

35. The situation for Rohingya in Rakhine (Arakan) Province is less equivocal. As noted in the delegate's decision, the region is beset by systematic and endemic discrimination, restrictions on movement, and economic deprivation.³⁰ The region has been described as being in the midst of a humanitarian crisis.³¹ Conditions are reportedly so dire in Rakhine that many Muslims (including Rohingya) have fled by boat to Malaysia.³²
36. Estimates are that at least 125,000 Rohingya and other Muslims have been placed in internally displaced person (IDP) camps. The camps are reported to be overcrowded and lack adequate food, shelter, water, sanitation, and medical care.³³ People have been prevented from access to markets, livelihoods, and humanitarian assistance.³⁴ Since the conflict has escalated, there is evidence of ongoing attacks, torture and killing of the Rohingya in Rakhine.³⁵ In 2014, the UN Special Rapporteur concluded that the pattern of widespread and systematic human rights violations in Rakhine may constitute crimes against humanity:

He believes that extrajudicial killing, rape and other forms of sexual violence, arbitrary detention, torture and ill-treatment in detention, denial of due process and fair trial rights, and the forcible transfer and severe deprivation of liberty of populations has taken place on a large scale and has been directed against the Rohingya Muslim population in Rakhine State. He believes that the deprivation of health care is deliberately targeting the Rohingya population, and that the increasingly permanent segregation of that population is taking place. Furthermore, he believes that those human rights violations are connected to discriminatory and persecutory policies against the Rohingya Muslim population, which also include ongoing official and unofficial practices from both local and central authorities restricting rights to nationality, movement, marriage, family, health and privacy.³⁶

37. DFAT reports that taking into account their lack of access to citizenship, employment, health and education services, Rohingya in Myanmar, whether in IDP camps or not, face a high level of official discrimination.³⁷ More broadly, DFAT assesses the Rohingya in Rakhine at being at a high risk of violence and societal discrimination.³⁸
38. The country information overwhelmingly paints a picture that Muslims and Rohingya, both in Rakhine generally and the IDP camps, continue to be at risk of serious and significant harm.

Illegal Departure / Failed Asylum Seeker

39. In addition to fearing harm as a stateless Rohingya, the applicant has claimed that he fears being punished for leaving Myanmar illegally and for seeking asylum abroad. He fears that he will be imprisoned and tortured on return to Myanmar.

³⁰ United Nations General Assembly, "Situation of human rights in Myanmar", 1 September 2011, CIS21781.

³¹ Human Rights Watch, "All you can do is pray: Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State", 1 April 2013, CIS25360, at p.15

³² International Crisis Group, "The Dark Side of Transition: Violence Against Muslims in Myanmar", 1 October 2013, CIS26454, at p.25.

³³ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.10-11.

³⁴ Human Rights Watch, "All you can do is pray: Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State", 1 April 2013, CIS25360 at p.6.

³⁵ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.19-20. Human Rights Watch, "All you can do is pray: Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State", 1 April 2013, CIS25360 at p.53-56

³⁶ Tomás Ojea Quintana, "Report of the Special Rapporteur on the situation of human rights in Myanmar", UN Human Rights Council, 1 April 2014, CIS29119, at p.13.

³⁷ DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084 at p.11.

³⁸ Ibid.

40. The UK Home Office indicates that it is a criminal offence to leave Burma illegally punishable by a substantial prison sentence. It has advised that there also harsh penalties for people who return to Burma without a valid passport:

Under the terms of the Burma Immigration (Emergency Provisions) Act of 1947, section 3 sub section 2, 'no citizen of the Union of Burma shall enter the Union without a valid Union of Burma passport, or a certificate in lieu thereof, issued by a competent authority' and, if a citizen violates this provision, he is automatically liable to 'be punished with imprisonment for a term which may extend from a minimum of six months to a maximum of five years or with fine of a maximum of K.1500 or with both' under the terms of section 13 sub section 1 of the same Act.

A Foreign and Commonwealth Official (FCO) official at the British Embassy in Burma stated, with regards to a certificate of identity, in a letter dated 2 February 2011, that: A person holding a certificate of identity will be able to travel (e.g. buy plane tickets etc) to Burma. On arrival they are likely to be subjected to questioning from immigration authorities over the lack of passport. This could include being taken to an interrogation centre, where practices such as sleep and food deprivation are known to have occurred, although not necessarily. If no evidence of past crimes or political activity is found, then no action will be taken. A person with only a Myanmar ID card would not be able to buy plane tickets etc. If they arrived at Yangon airport they would certainly be held for questioning, as above, and, even if no charges were held against him/her, they would not be permitted to hold a passport again in the future (unless they have connections/give sufficient bribes etc). Questions would be asked about how they had left Burma in the first place, if found to have exited illegally they could be charged under the illegal immigration law and subject to a prison sentence.³⁹

41. In terms of the likely penalty, country information draws a distinction between those who have left Myanmar lawfully and those that left illegally without a passport. The UK Home Office observes that the Burmese authorities maintain detailed records of those who leave Burma legally and, as a result, are likely to know when a person has left without the required authorisation, or whether they have failed to comply with the terms of their authorisation. A person who left Myanmar lawfully, and who is not perceived to be a political dissident, should be able to obtain a valid replacement passport and return to Myanmar and not face imprisonment.⁴⁰ In contrast, if a person returns to Burma without a valid passport and is unable to obtain a new or replacement passport, they will be deemed to have left illegally. The UK Home Office concludes in its assessment that such a person is likely to face imprisonment on return to Myanmar.⁴¹
42. The applicant claimed to have left Myanmar illegally with a broker, travelling south by bus over several days before leaving for [country] by boat at [location].
43. The applicant was extensively questioned by the delegate on that journey. He was able to provide a general account of his travel, but was not able to provide much detail about the journey, for example the names of towns or places where he and the broker stopped when travelling through Myanmar, or specifics about the buses travelled on or people met along the way.
44. While the applicant's account is general in terms, it was also broadly consistent and presented as a truthful account of his departure. Throughout the interview, the applicant provided brief

³⁹ UK Home Office, "Operational Guidance Note: Burma (Myanmar)", Volume 8, 1 July 2013, CIS29321, at p.43.

⁴⁰ Ibid, at p.42 and 44.

⁴¹ Ibid, at p.42-43.

and direct answers to the delegate's questions, as was the case when questioned about his departure. Departure by boat to [country] is also consistent with country information.⁴² In considering the degree of detail in his evidence, I have had regard to the applicant's age at the time of his departure and also to the time that has passed since that date, and the events that followed – notably his time living in [country] unlawfully, his travel to [a second country], and then on to Australia by boat. In those circumstances, it is understandable that he may not have a very detailed recollection of that departure and I draw no adverse conclusion from his evidence.

45. The Australian Department of Foreign Affairs and Trade indicated in late 2011 that individuals who had engaged in, or were perceived to have been engaged in, political activities centring on ethnic minority rights, would most likely be subject to a higher level of scrutiny than many ethnic Burmese individuals (depending on what political activities they had engaged in or were perceived to have been engaged in).⁴³
46. The applicant has not claimed to be politically active, nor is there any suggestion that he has any distinct profile apart from being a Rohingya and having departed Myanmar illegally. The applicant is from Yangon, appears to have no criminal history in Myanmar and has completed his higher schooling.
47. The UK Home Office indicates that prison conditions in Burma are severe, categorised by unhygienic conditions, high infection rates of HIV/AIDS, violence, exploitation and sexual abuse of young males, corruption and poorly maintained physical premises.⁴⁴
48. In late 2014, the following information was provided by the Australian Department of Foreign Affairs and Trade:

A. Can post provide an opinion on how Rohingya who are forcibly returned to Burma are likely to be treated on arrival?

Post's assessment is that the treatment of returnees would likely depend on the returnees' citizenship status, as viewed by Burmese authorities, and personal identification documentation. It is highly likely that returnees whom the Burmese Government did not recognise as its citizens and who arrived without valid travel documents would be deported to the place from which they had most recently departed. In cases where immediate deportation was not possible, the returnees would likely be detained by the authorities until deportation could be arranged. It is possible that if they were not recognised as citizens and were not deported or detained on arrival, they could be sent to an internally displaced persons' (IDP) camp in Rakhine State [emphasis added].

...

C. If they return without a passport how long are they likely to be detained for and under what conditions?

⁴² Danish Immigration Service, "Rohingya refugees in Bangladesh and Thailand", 1 January 2011, CISD9559B11859, at p.44-45

⁴³ DFAT "Situation for individuals who have, or are perceived to have, a political profile and who return to Burma from abroad and the treatment they may receive from Burmese authorities", 23 November 2011, CX277330.

⁴⁴ UK Home Office, "Operational Guidance Note: Burma (Myanmar)", Volume 8, 1 July 2013, CIS29321 at p.45-46.

Given weaknesses in the rule of law in Burma, it is difficult to assess this with certainty. While it is likely that authorities would first seek to deport returnees arriving without a passport, they may instead detain the returnees in prison. It is also possible that Rohingya returnees without travel documents could be sent to live in an IDP camp in Rakhine State.

...

E. If a Rohingya was born in Rakhine State but lived most of their life in Rangoon [Yangon] could they return to live in Rangoon or would they be required to return to Rakhine State?

While it is difficult to assess with a high degree of certainty, if they were not recognised as citizens and were not deported or detained on arrival, it is possible that they could be sent to an IDP camp in Rakhine State.⁴⁵

49. It is not entirely clear from the country information whether a person such as the applicant would be detained in prison for illegally departing Myanmar or instead be sent to an IDP camp in Rakhine. The UK Home Office report focuses on the treatment of Burmese citizens who depart the country illegally and/or breach the terms of their travel authorisation, whereas the DFAT country information is focussed specifically on the treatment of stateless Rohingya returning to the country. While there would be provision for the punishment of the applicant under the Burma Immigration Act, I find that the later DFAT country information more specifically addresses the circumstances of the applicant.
50. The above information indicates that if not deported, it is possible that the applicant, as a stateless Rohingya, would not be taken to a prison in Myanmar, but would instead be relocated to an IDP Camp in Rakhine. This appears to be the case regardless of the fact that the applicant may have previously lived in Yangon.

Data breach

51. In February 2014, a report released on the Department of Immigration's website unintentionally enabled access to certain personal information about people who were in Immigration Detention on 31 January 2014. That data breach was removed from the website. As the applicant was in detention [in] January 2014, the applicant's personal information (name, date of birth, nationality, gender, detention details and details of any other family members in detention) may have been accessed from the Department's website during the period of the data breach.
52. While I accept that the applicant's information would have been available during the period of the data breach, I find that the possibility of the Burmese authorities accessing or obtaining the information, whether in general or in a way that specifically identified the applicant, to be highly remote.

Refugee assessment

53. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-

⁴⁵ DFAT, "DFAT CIR report No. 14-29 - Rohingya returnees", 8 December 2014, CX1B9ECAB9403.

founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

54. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

55. I am satisfied that the applicant is a stateless Rohingya from Yangon that departed Myanmar illegally in 2011. I am satisfied the applicant has no political profile in Myanmar. I am also satisfied that the Burmese authorities would not have identified the applicant from the Departmental data breach in 2014.

56. If the applicant were returned to Myanmar, I find he would be arrested upon return for breaches of the Burma Immigration Act. Based on the country information above, I find it is likely that he would face a term of imprisonment of six months to five years.

57. It is well established that non-discriminatory enforcement of generally applicable laws does not constitute persecution.⁴⁶ There is nothing on the face of the provisions of the Burma Immigration Act, or the available country information, which indicates the terms of the law have a discriminatory intent. Nor is there any obvious country information indicating that these laws are selectively enforced.

58. Information from DFAT cited above indicates that is highly likely that returnees whom the Burmese Government do not recognise as its citizens and who arrive without valid travel documents would be deported to the place from which they had most recently departed. ‘Valid travel documents’ is not further explained, although it suggests that it may be more than not possessing a valid Myanmar passport. Other aspects of the advice addressing the position of stateless Rohingya returning without *a passport*, is more equivocal, and indicates that while it is likely that the authorities would first seek to deport a returnee without a passport, they may instead detain them in prison or in an IDP camp in Rakhine State. Having considered the report and the applicant’s circumstances as a whole, I am satisfied that while the applicant may be deported on return, there is also a more than remote chance that he would be detained and sent to prison or an IDP camp in Rakhine.

⁴⁶ *Applicant A v MIEA* (1997) 190 CLR 225.

59. Accordingly, I find that if the applicant was returned to Myanmar, there is a real, as opposed to remote, chance that the applicant would be identified as a stateless Rohingya who departed Myanmar illegally without any travel document in 2011 and that as a consequence he would be detained in prison or be sent to an IDP camp in Rakhine province. I find this is the case regardless of whether it is determined that the applicant previously resided in Yangon.
60. While I do not accept that the applicant experienced serious harm in Yangon in the past, as I have found that there is a real chance he would be sent to an IDP camp in Rakhine it is not necessary to consider further the risk of harm to him in this region.
61. If the applicant were to be placed in an IDP camp in Rakhine Province, I find that there is a real chance that the applicant would face serious harm for reasons of his ethnicity or religion while in detention. His ethnicity and religion would be the essential and significant reasons for the persecution. I find that the harm would include indefinite detention, deprivation of liberty, high level discrimination, and the potential for torture and ill-treatment in detention. I find that this would constitute serious harm and I am satisfied that the harm is a result of deliberate conduct by the authorities towards the Muslim and Rohingya populations in Rakhine, and thus involves systematic and discriminatory conduct.
62. I find that as a consequence of the applicant being returned to Myanmar, there is a real chance the applicant would be immediately detained on return and confined indefinitely to Rakhine by the State. As a result I am satisfied the real chance of persecution effectively relates to all areas of the receiving country.
63. I find that harm is perpetuated, or condoned, by the Burmese authorities and the applicant would be unable to obtain effective state protection from the harm he fears. As the feared persecution relates to his religion and ethnicity, I find that there are no reasonable steps available to the applicant to modify his behaviour to avoid a real chance of harm. I find that the applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

64. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of well-founded fear of persecution, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...