



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

MALAYSIA

IAA reference: IAA19/06247

Date and time of decision: 12 February 2019 11:18:00

D Corrigan, Reviewer

Decision

The IAA remits the decision for reconsideration with directions that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.
- s.36(3) of the *Migration Act 1958* does not apply to the referred applicant.

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 stateless. On 20 October 2015, he lodged an application for a Safe Haven Entry Visa (SHEV).
2. In a decision dated 10 January 2019, a delegate of the Minister refused to grant the visa. The delegate was not satisfied that the applicant originates from or has ever habitually resided in Myanmar and he found that the applicant's claims for protection against Myanmar lacked a sufficient factual basis.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The IAA has a submission from the applicant's representatives. To the extent that it discusses the findings of and other matters before the delegate and includes statements of principles about international refugee law and socio-economic rights by academic writers and foreign courts and tribunals, this is not new information for the purpose of s.473DC(1) of the Act.
5. The submission included new information, namely photocopies of the following documents:
 - World Food Programme (WFP), Myanmar National Registration card, Myanmar household list (with translation), temporary identity card (with translation) for [name, with aliases], said to be the applicant's [Relative A] residing as a refugee in Bangladesh.
 - WFP card and Myanmar National Registration card issued in 2017 of [name] (aged [age]) said to be the applicant's [Relative B] residing as a refugee in Bangladesh and Myanmar National Registration card of [name] who is said to her husband.
 - Myanmar household list (with translation) of [name] said to be the applicant's [Relative C] residing in Myanmar.
6. It is submitted that the applicant was not aware of what documents he should have provided to support his claims, especially as the country, he comes from does not provide any documents to Rohingyas. Whilst I have taken into account that the applicant was not represented at the primary stage, he was subject to an identity interview and SHEV interview where his identity was clearly in issue and the delegate did not make his decision for seven months after the later interview. I do not accept that he could not have obtained these from his family and provided them to the delegate before he made his decision. I consider the evidence itself to be very much lacking in probative value and credibility. The documents do not indicate or demonstrate that any of the persons are actually the [relatives] of the [applicant]. Furthermore, at his identity interview, the applicant stated that he did not know if his [family] had [such relatives]. I am not satisfied there are exceptional circumstances to justify considering this material. Nor am I satisfied that this information could not have been provided to the delegate, before he made his decision. Nor am I satisfied that it is credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
7. The submission also includes a copy of a letter from the [named mosque], dated [in] January 2019 and a letter from the [Rohingya Group 1], dated [in] January 2019 which are generally

supportive of the applicant's claims. These are new information and both post-date the delegate's decision. The latter claims that the applicant has been a member since [April] 2016 and that he is a genuine Rohingya. I note the applicant was not represented during the primary stage, but he was subject to an identity interview and SHEV interview where his identity was clearly in issue and the delegate did not make his decision for seven months after the latter interview. I do not accept that he could not have obtained these and provided them to the delegate before he made his decision. I note the applicant had already submitted a membership card of [Rohingya Group 1] and that both of these items of new information are photocopies of a poor quality. I am not satisfied there are exceptional circumstances to justify considering this material. Nor am I satisfied that they are credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.

8. The submission also includes new information, namely:
 - The Rohingya community has one of the lowest rates of literacy in South Asia.
 - [Rohingya Group 1] is a very close knit community.
 - The applicant was aware of Chittagong and Dhaka and was asked if he had ever been to those places, not whether he knew of them.
 - He knows traditions by practise but not their significance or the handing down of practice from by past from elders. In the age of globalisation and inter village or township marriages, the traditional practise becomes diluted and hybrid practises develop.
9. No supporting information has been provided to support any of these assertions and I consider them to very much lacking in probative value. Though he was not represented at the primary stage, he was on two occasions (as well as his SHEV application) able to give written information to the delegate about his claims. I have listened to his identity interview and he was clearly asked whether he knew of the cities and not whether he had been to them. There is nothing before me to indicate that these questions were wrongly interpreted. I am not satisfied there are exceptional circumstances to justify considering this new information. Nor am I satisfied that this information could not have been provided to the delegate, before he made his decision. Nor am I satisfied that it is credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
10. The submission also includes new information that the applicant is currently making inquiries with [a business] to get a testing done to confirm his sibling relationship with his brother. I note the applicant's identity assessment report stated that they are almost certainly brothers and I have also accepted that they are. I am not satisfied there are exceptional circumstances to justify considering this new information.
11. The submission also includes new information, namely that his [Brother A] is mentally depressed and this is evidenced from the time he spent in detention and his medical files. It is stated that his brother is not mentally capable to make a statement. It is stated that the applicant is in the process of obtaining medical documents from his brother but due the brother's lack of prioritisation and urgency cognition it has become difficult to obtain such proof in a timely manner. It is stated that his brother has been referred to a psychologist by his doctor. There is nothing in the referred material before me to indicate that the applicant's brother has any mental condition and I note his brother was able to answer questions coherently at his own SHEV interview. At the applicant's identity and SHEV

interview, he was clearly put on notice of the issues of inconsistency between his brother's evidence and his own evidence and he did not raise any issue of his brother's mental health or capacity. The delegate did not make his decision until seven months after the SHEV interview and the applicant did not provide this information despite being able to send written information about his claims to the Department. I am not satisfied there are exceptional circumstances to justify considering this new information. Nor am I satisfied that this information could not have been provided to the delegate, before he made his decision. Nor am I satisfied that it is credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.

12. The submission also includes new information, namely a number of sources of information concerning human security from the United Nations and various writers. All these items of new information substantially pre-date the delegate's decision. They involve discussion of principles related to the topic of human security and do not specifically concern any of the countries where the applicant has claimed to have resided or his particular claims and circumstances. I am not satisfied there are exceptional circumstances to justify considering this material. Nor am I satisfied that this information could not have been provided to the delegate, before he made his decision. Nor am I satisfied that it is credible, personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
13. In this decision, I have obtained new information, namely the latest Department of Foreign Affairs and Trade (DFAT) reports concerning Bangladesh and Malaysia.¹ These reports are highly authoritative sources. I have also obtained the following new country information which is also authoritative and which contains relevant information in assessing the applicant's claims:
 - A. Milton & others, "Trapped in Statelessness; Rohingya Refugees in Bangladesh", *International Journal of Environmental Research*, 21 August 2017.
 - United States Department of State, "Country Reports on Human Rights Practices for 2017 Malaysia", February 2018.
 - Human Rights Watch, "World Report 2019, Events of 2018", February 2019.
 - Equal Rights Trust, "Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia", 17 October 2014.
 - Amnesty International, "A Blow to Humanity, Torture by Judicial Caning in Malaysia", December 2010.
 - SUARAM in conjunction with International Federation for Human Rights, "Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination", 1 March 2008.
14. I consider there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

15. The applicant's claims can be summarised as follows:

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 2 February 2018; DFAT, "DFAT Country Information Report Malaysia", 19 April 2018.

- He is stateless and he was born in [his home town], Maungdaw, Rakhine State in Myanmar in approximately [year]. When he was [age] old, his family moved to Bangladesh.
- His family, along with other Rohingyans, experienced the authorities' harassment and restrictions in Rakhine. The Nasaka would come to his father's farm and steal his crops. During forced labour, his father was bitten and had his leg broken. The authorities have his family tree on a list and will kill him if he returns.
- In Bangladesh his family resided in [Refugee Camp 1] and after few years in a rented accommodation in Teknaf. His family experienced discrimination because they were Burmese and ill treatment and lower pay. The applicant worked as a [role] from the age of [age], but he does not have any rights to work or study in Bangladesh.
- He moved to Malaysia in [year] at the age of [age]. In Malaysia he registered with the UNHCR in [year] as a refugee. He did not have work rights but he worked as a cleaner and labourer. As an illegal worker, the police would arrest him and hit him and extort money of him for not having a valid visa or documents. He was detained in [a named] detention centre for three months and sent to [Country 1]. His brother paid a smuggler to assist him to return to Malaysia.

Refugee assessment

16. 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-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

17. 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.

Myanmar and Bangladesh

18. I have carefully considered all of the referred materials relating to the applicant and his brother as well as country information. Though I have some concerns as to the truthfulness of the applicant's account of his and family's lives in Myanmar and Bangladesh which are discussed below, I am of the view that he has given generally credible and consistent evidence that is supported by country information.
19. The applicant has been consistent in his account of his and his family's history in his entry interview, identity interview, SHEV application and SHEV interview. He has consistently maintained that he was born in Maungdaw, Myanmar in [year] and that he and his family fled Myanmar when he was baby and moved to a refugee camp called [Refugee Camp 1] in Cox's Bazar district where they resided for five years. A critical reason for the rejection of the applicant's claims by the delegate was that the written record of the applicant's entry interview indicated that he had stated that he departed Myanmar in [an earlier year]. However, I have listened to the interview and the applicant did not say that. Rather he clearly stated that he had departed when he was a baby. The applicant has been consistent that his family (other than his [siblings] who were married) moved from the camp in [year] to Teknaf which is also in Cox's Bazar district. He has been consistent that he did not receive any education (other than some religious teaching) and that he commenced working [in a role] when he was [age] years of age. He has also been consistent that he departed Bangladesh when he was [age] and that he resided in Malaysia before coming to Australia.
20. The applicant's account is consistent with country information. DFAT have reported that Bangladesh has a long history of hosting a minority Muslim population from Myanmar's Rakhine state who identify as "Rohingya". The Myanmar government does not consider them one of the country's official ethnic groups and has denied them citizenship since 1982, effectively rendering them stateless. Since the 1970s, official crackdowns, clearance operations and communal violence have led hundreds of thousands of Rohingya to flee Myanmar in successive waves to Bangladesh and other Southeast Asian countries. The overwhelming majority of both new and previous Rohingya arrivals are located in Cox's Bazar district, adjacent to the Myanmar border, which is one of Bangladesh's poorest districts. Regardless of their arrival date in Bangladesh, Rohingya are not eligible for citizenship (including through marriage) and are not legally entitled to work. DFAT understands that many Rohingya who arrived before 25 August 2017 have been able to work informally in Bangladesh using fraudulent identity documents, including National Identity Cards. Local sources have reported that law enforcement agencies generally do not actively seek to enforce legal provisions restricting Rohingya access to employment, although Rohingya generally receive lower wages and poorer conditions than those available to locals.²
21. The applicant has not provided any official documentation as evidence that he and his family are or were Rohingya refugees in Bangladesh. DFAT have stated that approximately 33,000 Rohingya who arrived in Bangladesh in the 1990s and who are registered refugees possess several forms of identification, including UNHCR Identity Cards, birth certificates and WFP Cards, which list primary and secondary household recipients. The government also reportedly maintains a "Rohingya Family Book", which contains the details of all documented Rohingya in Bangladesh.³ However, other country information country information indicates

² DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018.

³ Ibid.

that in 1991-1992, there was an influx of 250,000 Rohingya refugees to Bangladesh and that in 2015 that there are a very large number of undocumented persons from Myanmar in the country other than the around 33,0000 documented refugees in two refugee camps.⁴ Given this information, I have given only limited adverse weight to the lack of documentation provided in support of the applicant's claims. The applicant has not provided any evidence (such as a family list or a temporary registration card) that he or his family were resident in Myanmar; however I note that the applicant has claimed that he left this country when just a baby and the family's departure was very many years ago I have thus given only limited adverse weight to the lack of documentation provided in support of the applicant's claims.

22. The applicant's claims are also supported to some degree by two UNHCR cards for himself and his brother that were issued in Malaysia and which list their countries of origin as Myanmar. Information in the referred materials indicates that the Department has been advised by UNHCR Malaysia that the applicant was recognised as a refugee in [year]. An UNHCR fact sheet relating to the applicant indicates that he was born in [year] in Maungdaw and that he is a Rohingya. The applicant has also submitted a card from [Rohingya Group 1], issued [in] April 2017, which further supports his claims to some degree. The applicant has also spoken the Rohingya language fluently at all the Departmental interviews. I have given this some weight though I note the Rohingya language is closely related to the Chittagonian language spoken in the neighbouring south-eastern Chittangong Division of Bangladesh.⁵
23. The major concern I have with the credibility of the applicant relates to the inconsistency of his evidence with that of his older brother, [Brother A], who had arrived earlier in Australia in 2012. The brother claimed in his entry interview and SHEV application, that the family had moved to Bangladesh in [an earlier year]. In his SHEV interview, the brother stated that he had been told by his mother that they went to Bangladesh in [a different year] and he was very young at the time. However, later in the interview after a natural justice break, the representative stated that [Brother A] had stated that he had been confused about the dates and years and that the family had moved in [an earlier year]. The brother had claimed that in [that year] the army had raped his sister and he was forced to do work for the Burmese army at their base and he was assaulted when he did not keep up with the required work. I cannot discount the possibility that the brother has substantially embellished his own claims to increase his chances of being accepted as a refugee and I note the brother's evidence when directly asked at the SHEV interview was consistent with the applicant's. In the story of Genesis, Cain said to the Lord "Am, I my brother's keeper?" as a reference to his lack of responsibility for his brother's actions. I have given substantial adverse weight to this inconsistency but similarly I am of the view, that in considering all the evidence and circumstances including the applicant's own general consistency, I should not rely upon this inconsistency with the brother to reject the applicant's claims. I note the delegate has relied upon other inconsistencies between the brother's evidence (such as stating that the applicant was born in [different year] and that the family had moved to a refugee camp called [another name]) but I consider these to be minor and I have given these only limited adverse weight.
24. I have also taken into account the identity assessment report and interview conducted by Departmental officers and the factors that they have identified which led them to believe that the applicant was not a Rohingya. I have given the concerns only limited weight for a number of reasons. For example, the report opines that the applicant was unable to explain

⁴ A. Milton & others, "Trapped in Statelessness; Rohingya Refugees in Bangladesh", International Journal of Environmental Research", 21 August 2017.

⁵ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) 2012, "Myanmar Update", European Country of Origin Network, November, Section 5.5.

the difference between Rohingya, Burmese and Bangladeshi languages to any great degree. However, given the similarity between the Rohingya and Chittagonian language and that the applicant has claimed that he left Myanmar when he was a baby, I do not believe this to be a significant concern. At the identity interview, when he was asked what differentiated Rohingyas from Burmese, he stated that Rohingyas are Muslims. He mentioned some dishes he said were Rohingya. I note the applicant has claimed that he left Myanmar when he was a baby and left Bangladesh at the age of [age] years so this limited knowledge of the differences of Rohingyas does not appear particularly problematic.

25. At identity interview, the applicant was uncertain about the ages of his [siblings] and inconsistent about the age of [Brother A] stating that he was 2-3 years older compared to the 8 years difference in his SHEV application. He also did not know the names of his grandparents, where they died or any other details. I note, however, the applicant has claimed that he left Myanmar when he was a baby and Bangladesh when he was [age] years old and I am of the view that is a partial explanation for these matters. At the identity interview, the applicant was unaware of the large city of Chittagong (about six hours north of Teknaf) and the national capital Dhaka. However, I do not consider this to be adverse factor, given if he was a Bangladeshi national he would be more likely to aware of this, than his account of being a Rohingya refugee with no school education, who resided in the far south of the country. The applicant was aware of the largest city (Cox's Bazaar) which is directly to the north of Teknaf and some of the other places near Teknaf such as Shah Porir. At the identity interview, the applicant was not able to give an estimate of the number of mosques in the area and the name of the mosque he attended; however, I note he left Teknaf over a decade before when he was [age] years old, so I have given this only limited adverse weight.
26. Considering all the evidence before me, I am satisfied that the applicant is a stateless Rohingya who was born in Myanmar and that he departed with his family when he was a baby. I accept that he lived in Bangladesh until he was [age] before departing for Malaysia where he resided for seven years before coming to Australia. I find that he is not a national or citizen of any of these three countries.
27. There is no direct Australian authority on the requirements necessary for the identification of a country of former habitual residence. The High Court has said that the phrase "usual residence" (which it likened to "habitual residence" as used in a different context) involves a broad factual inquiry, which will include relevant factors such as the actual and intended length of stay in a state, the purpose of the stay, strength of ties to the state and to any other state (both past and current), and the degree of assimilation into the state.⁶ These considerations have been applied to the determination of "habitual residence" as it appears in the pre-16 December 2014 definition of "receiving country". In this context, the Court in *SZUNZ v MIBP* observed that a short period of residence in a country during a person's childhood would not establish a basis for a finding of habitual residence.⁷
28. Whilst the applicant was born in Myanmar, he was only resident there for a very short period and left as a baby. He has no immediate family members there. He has been resident in two other countries for significant periods. Accordingly, I find that Myanmar is not a country of former habitual residence of his.
29. The applicant resided in Bangladesh for [number] years during his formative years and worked there for two and his mother is still resident there. I consider Bangladesh is a country

⁶ *Tahiri v MIAC* [2012] HCA 61 (French CJ, Bell and Gageler JJ, 13 December 2012) at [16].

⁷ *SZUNZ v MIBP* (2015) 230 FCR 272 per Buchanan J at [36], and separately Flick J at [67] and Wigney J at [122].

of former habitual residence of his, but given my findings concerning Malaysia, I have not addressed his claims to fear harm there.

Malaysia

30. The applicant's evidence about his period of residence in Malaysia was consistent, generally credible and in accordance with country information regarding the situation of refugees and asylum seekers in Malaysia.
31. I accept that the applicant arrived in Malaysia in [year] and that he sought and obtained refugee status there with the UNHCR in [year]. I accept that he did not have work rights but he worked illegally as a cleaner and labourer. I accept that he was detained in [a named] detention centre for three months due to working illegally and that he was sent to [Country 1]. I accept that his brother paid a smuggler to assist him to return to Malaysia. I accept that he illegally departed Malaysia in 2012 to come to Australia.
32. The applicant resided in Malaysia for seven years from the age of [age] years, which is a substantial period and he was recognised by the UNHCR as a refugee when he was there. He (illegally) worked there and he has siblings who are resident there. I consider Malaysia is also a country of former habitual residence of the applicant and I find this to be his receiving country. Australian courts have held that there is no obvious reason why a claimant could not have more than one country of former habitual residence. A claimant with more than one country of former habitual residence is not required to satisfy the Convention definition in relation to each such country.⁸
33. DFAT has reported that Malaysia is not party to the 1951 UN Refugee Convention and does not have any legislation in place specifically dealing with asylum-seekers or refugees. The Malaysian government classes all undocumented migrants, including refugees and asylum seekers, to be "illegal immigrants". Undocumented migrants have no right to employment, health or education. All undocumented migrants are subject to the Immigration Act (1959/63), which enables the police to arrest and detain them at any time. The Malaysian government has given no indication it intends to formalise the status of Rohingya in Malaysia and, as such, they will continue to be undocumented and will not have access to formal employment or citizenship. The Malaysian government cooperates with UNHCR to allow the provision of humanitarian support to undocumented migrants and UNHCR provides limited levels of support with assistance from a number of NGOs. UNHCR performs all activities related to the reception, registration, documentation and status determination of asylum-seekers and refugees. UNHCR identification cards allow the holder to reside within communities rather than detention centres; to access discounted hospital treatment; to access education and to participate in a small UNHCR pilot work program. UNHCR cards are often the only form of personal identification that bearers have.⁹
34. The United States Department of State have reported that migrants, refugees, and stateless persons are considered "illegal immigrants" and receive no government support or recognition. The government allows UNHCR and a range of NGOs to work with these populations, but cooperation with UNHCR was inconsistent. As "illegal immigrants", refugees and others are subject to deportation at any time. They also face up to five years'

⁸ *Al-Anezi v MIMA* (1999) 92 FCR 283 at [22]. In *Taiem v MIMA* [2001] FCA 611 (Carr J, 25 May 2001), Carr J agreed with the view expressed by Lehane J in *Al-Anezi* that there is no reason why a person may not have more than one country of former habitual residence.

⁹ DFAT, "DFAT Country Information Report Malaysia", 19 April 2018.

imprisonment, a fine of 10,000 RM (\$2,310), or both, and mandatory caning of not more than six strokes if convicted of immigration law violations.¹⁰

35. Human Rights Watch has recently reported that over 150,000 refugees and asylum seekers, most of who come from Myanmar, are registered with the UNHCR in Malaysia but have no legal status and are currently unable to work, travel, or enrol in government schools. Asylum seekers arrested by authorities are treated as “illegal migrants” and locked up in overcrowded and unhealthy immigration detention centers. The new government had committed to improve the situation for refugees and asylum seekers, but had not yet taken concrete steps to do so at time of writing.¹¹
36. Equal Rights Trust has also reported that the situation for refugees and asylum seekers in Malaysia remains extremely precarious and they face constant risk of arrest, detention, financial penalties and judicially imposed caning. Refugees and asylum seekers, including the Rohingya are also vulnerable to extortion by the police and immigration officers. There are also significant barriers in accessing healthcare and children are not permitted to attend government schools.¹²
37. Amnesty International has reported that in 2002, the Malaysian Parliament made certain immigration offences punishable by caning, notably illegal entry into the country. These amendments to the Immigration Act further boosted the number of caning is, by putting many of Malaysia’s two million undocumented migrant workers at risk of caning. Migrant workers who do not have documentation or whose employers confiscated their documents are frequently arrested in immigration sweeps and sentenced to caning coupled with imprisonment.¹³
38. The International Federation for Human Rights has reported that after their removal, undocumented migrants often come back to Malaysia, where they will be subject to section 36 of the Act. If apprehended again by immigration enforcement officers, they will be liable to a fine not exceeding 10,000 ringgit, to imprisonment for a term not exceeding five years or to both, but also, to whipping of not more than six strokes.¹⁴
39. Based on the country information as a whole, I find that the applicant is a member of a particular social group consisting of undocumented migrants. I find this group has a common characteristic or attribute that sets them apart from the rest of society and that this common characteristic or attribute is not a shared fear of persecution.
40. I note the applicant has been able to work illegally in the past in Malaysia, but on one occasion he was arrested, detained for three months and subjected to removal to [Country 1]. I note the applicant would be returning to Malaysia as a person who had already been deported and who had returned unlawfully. I find that he would need to work to support himself upon return as he has done in the past. I consider these factors would increase his individual risk of coming to the adverse attention of the Malaysian authorities upon return.
41. Based on the country information relating to undocumented refugees and asylum seekers in Malaysia and his individual circumstances, I find that there is a real chance the applicant will

¹⁰ United States Department of State, “Country Reports on Human Rights Practices for 2017 Malaysia”, February 2018.

¹¹ Human Rights Watch, “World Report 2019, Events of 2018”, February 2019.

¹² Equal Rights Trust, “Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia”, 17 October 2014.

¹³ Amnesty International, “A Blow to Humanity, Torture by Judicial Caning in Malaysia”, December 2010.

¹⁴ SUARAM in conjunction with International Federation for Human Rights, “Undocumented migrants and refugees in Malaysia: Raids, Detention and Discrimination”, 1 March 2008.

suffer serious harm for reasons of his membership of a particular social group of undocumented migrants in Malaysia now or in the reasonably foreseeable future. I find the persecution would involve serious harm (including a threat to his liberty, significant physical harassment and significant physical ill-treatment) and systematic and discriminatory conduct. As the harmed feared is from the state, I find that the real chance of persecution relates to all areas of Malaysia and that effective protection measures are not available to him. His fear of persecution is well-founded.

Refugee: conclusion

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

Third country protection

43. Section 36(3) of the Act (as set out in the attachment to this decision) provides that, subject to certain qualifications, Australia is taken not to have protection obligations to an applicant who has a right to enter and reside in any country apart from Australia and has not taken all possible steps to avail themselves of that right.

Application of s.36(3) to this case

44. The applicant has resided in Bangladesh for a substantial period and Myanmar for a short period. However, there is nothing before me to indicate that the applicant has a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (including Bangladesh and Myanmar) apart from Australia.
45. Section 36(3) does not apply to the applicant.

Decision

The IAA remits the decision for reconsideration with directions that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.
- s.36(3) of the *Migration Act 1958* does not apply to the referred applicant.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.