



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA19/06484

MYANMAR
IAA reference: IAA19/06486

MYANMAR
IAA reference: IAA19/06485

MYANMAR
IAA reference: IAA19/06487

Date and time of decision: 30 May 2019 14:31:00
D Hughes, Reviewer

Decision

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

- each of the referred applicants 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 applicants (the applicants) claim to be stateless Rohingya Muslims from Myanmar. The first and second applicants (IAA19/06484 and IAA19/06485) arrived in Australia [in] December 2013. The third and fourth named applicants (IAA19/06486 and IAA19/06487) were born in Australia in [Year 1] and [Year 2] respectively. The applicants applied for protection visas on 6 June 2017. A delegate of the Minister for Immigration refused to grant the visas on 20 March 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicants made two submissions to the IAA. The first, dated 16 April 2019, contained a range of new information, including information about the applicant's family and personal circumstances, and supporting country and academic reports. The second, also dated 16 April 2019, included copies of papers connected to the initial submission, relevantly papers relating to the assessment of credibility and memory and applicants' claims to be Rohingya.
4. In terms of the country reports and academic papers relating both to the situation in Myanmar, and the limits of memory and protection visa assessments, there is no suggestion these papers contain credible personal information in the sense contemplated by s.473DD(b)(ii) of the Act. I note that each of these reports predates the delegate's decision, and I am not persuaded on the submissions that this information could not have been provided to the delegate before the decision was made. Indeed, I consider the post interview submission addressed issues relating to the applicant's credibility, memory and advice relating to the security environment in Myanmar. It follows that I am not satisfied that this new information meets the threshold requirements in s.473DD(b)(i) or (ii).
5. The applicants have also provided information relating to the first named applicant's UNHCR status, an assessment from a [organisation] in Australia, and documentation regarding the age and status of his [sibling]. I am satisfied these documents contain credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
6. In terms of exceptional circumstances, as it relates to all of the new information provided in the submissions, the representative contends that the applicants were denied procedural fairness because the first named applicant was not given sufficient notice of the information he had provided in the protection interview that the Minister (the delegate) considered to be adverse.
7. There is a distinction between the delegate having obligations to put adverse information to the applicant under s.57 of the Act, and the assessment of claims based on the applicant's own oral and written evidence and the available country information. Both the latter categories of information are exempt under s.57(1)(b) and (c) of the Act. In that context, I do not agree the delegate had obligations to put information to the applicant under s.57 of the Act as contended in the submission. Equally, and for the same reasons, I also do not consider the delegate was under an obligation to put her further concerns to the applicant following

the receipt of the post applicant's interview submissions, or otherwise particularise the issues of concern arising from those submissions.

8. I also do not agree that any perceived delay in the delegate providing the applicant's representative with a copy of the interview recording disadvantaged the applicant. Firstly, the applicant's representative was present in the visa interview. She was aware of the matters the applicant was questioned on and the relevance to the assessment. The applicant and his representative very capably addressed a number of those concerns at the end of the visa interview, and in post interview submissions. Secondly, in my experience it is very unusual for the delegate to accede to such a request. In this sense, I consider the applicant in fact benefitted from the receipt of the interview recording.
9. I accept that procedural fairness requires the delegate to put the applicant on notice of determinative issues. However, I also note it is an applicant's obligation under the Act to specify all particulars of his or her claims and provide sufficient evidence to establish a claim. I consider the first named applicant's oral and post interview submissions demonstrate that the applicants and the representative were alive to the determinative issues. To the extent that they disagree with those findings, I have weighed those submissions and, as will be apparent in my findings below, I am persuaded by a number of aspects of their submissions. With some exceptions, I am not satisfied there are exceptional circumstances to justify considering the new information provided in the IAA submissions.
10. In terms of those exceptions, I agree that the applicant may not have anticipated some of the delegate's findings. Specifically, the delegate's focus on the UNHCR documentation, and the birth year discrepancy identified in his [sibling]'s [Country 1] visa documentation. I note that the information provided in response to these findings is from third parties, and the information appears to be highly credible and highly material to this assessment. It is also apparent the representative has gone to some lengths to obtain this information. Having regard to all the circumstances, I am satisfied there are exceptional circumstances to justify considering the new information provided in the IAA submissions regarding the applicant's UNHCR status in [Country 2], and his [sibling]'s status in [Country 2] and the [Country 1].
11. In undertaking this review, I have also obtained new information, specifically the most recent version of the DFAT Country Report for Myanmar (18 April 2019). An earlier version of this report was before the delegate and relied on substantially in that assessment. Given the age of the previous DFAT report, and the grave and significant security developments in the country relating to groups sharing the profile of the applicants in this matter, I consider it would be highly problematic to rely on the older version of that report. I have also obtained new information confirming the location of the applicant's home area, and country advice which appears to confirm that area has been directly impacted by the violence against Rohingya and the razing of Rohingya villages in Rakhine State. This relatively recent and independent information has significant relevance to the applicant's claims. Ultimately, I am satisfied there are exceptional circumstances to have regard to this new information.¹

¹ Myanmar Information Management Unit, "Maungdaw Township - Rakhine State", 3 May 2016, CIS38A80122482; UNITAR, "UNOSAT analysis of destruction and other developments in Rakhine State, Myanmar", 7 September 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/UNOSATReportMyanmar_20180912.pdf; Reuters "Burned to the ground", <http://fingfx.thomsonreuters.com/gfx/rngs/MYANMAR-ROHINGYA/010060630DW/index.html>, 31 December 2017; Jonathan Head, "Rohingya crisis: Seeing through the official story in Myanmar", BBC <https://www.bbc.com/news/world-asia-41222210>, 11 September 2017; DFAT, "DFAT Country Information Report Myanmar" 18 April 2019, 20190418091206.

12. To the extent the submissions otherwise contain argument responding to the delegate's decision and reassert claims and information (including country information and other papers) that was before the delegate, I am satisfied these matters do not constitute new information as defined and I have had regard to those matters in this assessment.

Applicants' claims for protection

13. The applicants' claims can be summarised as follows:
- They are stateless Rohingya and Sunni Muslims. They are not recognised as citizens by the Myanmar Government or any other state.
 - The first and second named applicants were born in Maungdaw, Rakhine State in Myanmar. The third and fourth named applicant children were born in Australia.
 - The first named applicant is unable to provide copies of his family or household list, or white card (a Myanmar national identity card) as they were destroyed in a fire at his family home in 2012. The Myanmar authorities did not provide them with replacement documents.
 - He was first recruited for forced labour with the Myanmar (Burmese) military when he was [a certain age]. Before leaving Myanmar, he was arrested and forced to work [a number of] times. On each occasion, he was forced to work , [and] then he would return to his village in the evening. While undertaking forced labour, he would be beaten and abused by the military. The military tried to arrest him for forced labour on other occasions but he managed to run and hide before they could take him.
 - He could not practice his religion freely in Myanmar. There was always a risk of arrest if he attended mosque. Many of the mosques in his area had been destroyed by the military.
 - He did not have freedom of movement. If he wanted to leave the village, he would need to bribe officials to obtain an authority to travel. He fled Myanmar because he has no rights.
 - In or around 2007 he was arrested by the NaSaKa (Myanmar immigration officials) and beaten. He was detained [before] he was released.
 - His family's land was confiscated by the Myanmar authorities in 2012 and given to Buddhists living in Maungdaw.
 - He fears that he will be killed, tortured and detained by the Myanmar authorities, the Myanmar military and Buddhists in Rakhine State. He knows this will happen because of the violence against Rohingya in Rakhine State. He would be targeted because of his ethnicity as a Rohingya and his religious profile as a Sunni Muslim. He would also be targeted because he is stateless and because he left Myanmar illegally.

Factual findings

14. The first named applicant (IAA19/06484, hereafter 'the applicant') claims to be a stateless and undocumented Rohingya Muslim from Myanmar. The remaining applicants have not advanced specific claims, but their claims and profile are principally the same as shared by the (first named) applicant.

15. Claims related to statelessness are difficult to assess. Invariably a stateless person will have little or no documents to support their claims in relation to their country of former habitual residence. Equally, a person could conceal documentation in order to advance a claim of statelessness that is not genuine. In the absence of documentation, an applicant's credibility in these cases becomes paramount, as does the corroboration of third party and country information.
16. Since the initial arrival interview in December 2013, the applicant has claimed to be from Village [1] in Maungdaw District in Rakhine (Arakan) Province in Myanmar. He claimed the same in an interview in 2015. In the visa application statement made in May 2017, he claimed to be from [Village 1]. There has been some variation in the spelling of his home village, but based on the country information the IAA has obtained, I am satisfied the applicant is claiming to be from [Village 1] in Maungdaw District in Rakhine (Arakan) Province in Myanmar.
17. During the visa interview, the applicant spoke freely about his home village area. While his evidence was not overly detailed, I consider his account gave the impression of a lived experience, describing the location of his house, the local school and neighbouring mosques, as well as describing how he would travel to the central Maungdaw Township when necessary. The applicant discussed neighbouring villages without obvious difficulty, however while it appears that the interpreter may have written down the names of the villages, the verbal interpreting provided on the recording was limited. While there is no evidence before me of maps drawn or village names written down at the visa interview, I have listened to the audio recording with reference to maps of Maungdaw. I am satisfied the applicant gave a satisfactory account of where [Village 1] is relative to Maungdaw, as does some of his oral evidence appear to refer to neighbouring townships identified on maps obtained by the IAA (notably, the applicant appeared to refer to *several locations*), the neighbouring area he claims he left by boat). I accept the submissions made at the end of the interview that the applicant has had a limited education, that he has limited knowledge of distance and had never previously drawn a map.
18. I do not consider his limited knowledge of landmarks in the central Maungdaw Township undermined his evidence in a significant way. His evidence indicated his life in his home area was simple. I note he was young, attended school for a couple of years, and I accept from the oral and post interview submissions that he did not travel to the Maungdaw town centre itself with any frequency. I note his evidence about restrictions on movement within the country were consistent with DFAT advice. I consider the applicant has given a plausible account of his experiences visiting Maungdaw Township and I consider his inability to identify all the landmarks shown to him in photos at the visa interview has been adequately explained.
19. The delegate expressed some concerns with the applicant's lack of documentation. The applicant spoke about his family having a family list in Myanmar and that his family and other households would be visited by the authorities to check family lists and photographs. His evidence was consistent with country advice from DFAT that the household list is often the only formal documentation accessible to Rohingya. When asked whether he was ever issued a temporary registration card, the applicant said he was not, but had heard of others who had the document. When asked what sort of documents Rohingya can hold, he referred to the temporary registration card as a 'white card' and explained that Rohingya did not have access to other documentation. That spontaneous evidence was also consistent with country information before the IAA.

20. The applicant contends his family list would have been destroyed in 2012 when his family home was destroyed by fire and his family left the area. If the applicant is from a village in Rakhine State, it is plausible that the family list was destroyed in a fire. The evidence before me is of widespread razing and burning of Rohingya properties in and around the applicant's claimed home area, including incidents in and around 2011-12. I consider that explanation is plausible, as was his suggestion that he would be unable to obtain a new document because his family has since departed that area – a claim he has consistently advanced. I accept he is undocumented.
21. The lack of documentation makes this assessment more difficult, and while there are certainly aspects of the applicant's evidence that are lacking in detail, I have weighed the submissions about his age, limited education, and the period he spent in Myanmar. To the extent that his evidence lacked detail, I consider that is explained by these factors.
22. Having regard to those factors, I do not consider his limited evidence about differences between Rohingya and Burmese Muslims to have been particularly problematic, nor do I consider his limited evidence about what defines Rohingya people to obviously undermine his claims. I note when the delegate asked him about his history, he confirmed his family had told them that they were multi-generational Rohingya, and that his parents had told him that the issues started in the 1940s, when Burmese first started to accuse Rohingya of being not from Myanmar, but from Bangladesh. I consider this was a reasonably full and accurate response given his background.
23. A strong factor in support of his claims is his Rohingya language ability. The applicant spoke through a Rohingya interpreter at his visa interview. The applicant did not appear to have any difficulty in communicating through the English-Rohingyan interpreter. In reviewing the recording, I did not observe any obvious instances of misunderstanding between the applicant and the interpreter. I note and accept the delegate's concerns regarding the close similarities between the Rohingya language and the Chittagonian dialect spoken in Chittagong in Bangladesh, but I consider his language skills must be seen in context. There are strong indications that the applicant is from Myanmar, indeed this is the delegate's ultimate finding. Accepting the applicant speaks fluent Rohingya and is from Myanmar, this would be a very strong indicator that he is of Rohingya ethnicity.
24. His claims are also corroborated in part by country information, and he has furnished the Department with other supporting documentation that indicates other family members have claimed to be from Myanmar, including his [sibling]'s UNHCR ([Country 2]) and [Country 1] visa documentation.
25. The applicant provided a supporting letter from [an organisation], dated 17 October 2018. The President of this group states that they certify the applicant is of Rohingya origin from Maungdaw in Rakhine State, and this was based on [the organisation's] procedure. It is not clear what metrics are used by this organisation in terms of this procedure, but I accept it is at a minimum an additional corroboration of his claimed ethnicity and origin.
26. Looking to all the circumstances, while I consider the delegate's concerns were reasonable, I also consider the applicant and his representative have addressed those concerns, most persuasively at the end of the visa interview. Also of significance was that I did not find any aspect of his evidence obviously contradicted his claims to be a Rohingya from Rakhine State, nor did I consider his evidence obviously indicated that he was from elsewhere in the country (e.g. Yangon) or outside of Myanmar (e.g. the Chittagong area in Bangladesh). I do not consider a Bangladeshi person from the Chittagong region would have been able to speak as

consistently and freely about life in Myanmar as the applicant has, or that this could have been done without major discrepancies. I consider his claims are consistent with country information and have given considerable weight to the other corroborative evidence provided.

27. Weighing all the evidence before me, I am satisfied the first named applicant is a Rohingya Muslim from the Maungdaw Township District in Rakhine State. I am satisfied and accept his family was undocumented, at least in terms of citizenship documentation. The applicant was not questioned in detail about his specific claims of past harm, but I found his claims about the mistreatment and forced labour he faced while living in Maungdaw to be plausible and consistent with the available country information. I accept his claims of past harm.
28. The second named applicant was not interviewed by the delegate, but she was a party to an 'entry interview' in March 2015. She spoke through an English-Rohingya interpreter without any obvious difficulties. She provided an account of her life in Maungdaw, Rakhine State that is consistent with the first named applicant's history. She also claimed to have suffered mistreatment that I find to be consistent with the country information about mistreatment of Rohingya Muslims in Rakhine by Buddhists and the Myanmar military/officials.
29. I consider the applicant's evidence as it extends to his wife, the second named applicant, has also been consistently advanced. Based on the evidence before me, I am also satisfied the second named applicant is a Rohingya Muslim from a village in Maungdaw in Rakhine State. Based on the birth certificates on file, and having regard to information before me about ethnicity and citizenship/nationality in Myanmar, I am satisfied the third and fourth named applicants are the children of the first and second applicants. I am satisfied they would also be Rohingya Muslims by descent, and share the same legal status as their parents in Myanmar.
30. For clarity, having regard to DFAT and other advice before me about the denial of citizenship to Rohingya from Rakhine State, I accept and am satisfied that the applicants are what DFAT describes as 'effectively stateless' (in the sense that they have been systematically denied citizenship in Myanmar) and undocumented Rohingya Muslims from a village in Maungdaw, Rakhine State. I consider Maungdaw is their home area and, in the sense contemplated by the law in this context, the area they would seek to return should they travel back to Myanmar in the reasonably foreseeable future. I note DFAT's 2019 advice that Myanmar has accepted, or has arranged processes, to accept the repatriation of Rohingya refugees/returnees. I accept, at a base level, that the Myanmar government may accept Rohingya returnees, however I have considered the reality of those arrangements later in this decision.
31. In terms of the issue of statelessness, I note the first and second applicants spent several years living in [Country 2] prior to coming to Australia. There is no suggestion that they ever had any formal or official status, visa or residency in the country, and the evidence before me is that the applicant and their other family members were registered with the UNHCR as refugees. I accept the first named applicant's [sibling] was ultimately resettled in the [Country 1] on this basis. I am satisfied his status in [Country 2] was temporary, informal and unsettled. I am not satisfied he acquired legal residency or status in [Country 2], or that he considered [Country 2] was his country of residence. There does not appear to be any indication that he has legal status in [Country 2] or could return to that country.
32. If it is necessary to conclude upon, I find the applicant only has one country of former habitual residence, namely Myanmar. Whatever the assessment of his legal status in the

country, I am satisfied the applicant is from Myanmar, and that this is his receiving country for the purposes of this assessment. On the available information, I find this is the situation for all four applicants. I am not satisfied any of the applicants have any right to enter and reside in [Country 2]. It follows that I have assessed the applicants against Myanmar only.

33. The situation faced by ethnic Rohingya Muslims within Rakhine State in Myanmar can only be characterised as severe.
34. In its 2019 Myanmar Report, DFAT assesses that official and societal discrimination on the basis of ethnicity against Rohingya in Rakhine State is high, endemic and severe. DFAT states that Rohingya typically lack citizenship, face severe restrictions on their freedom of movement and are the subject of systemic extortion and harassment. These issues combine to restrict this community's access to livelihoods and essential services, including in education and health.
35. Rohingya have also been subjected to extreme violence by the security forces, and to a lesser extent, the ethnic Rakhine population. According to Human Rights Watch, large-scale violent attacks against the Rohingya have occurred repeatedly since Myanmar's independence, and Rohingya have migrated across the region in large numbers to escape violence. Violence against the Rohingya by security forces, including torture, indiscriminate killings, and mass rapes were reported during and following the 2012 and 2016 outbreaks. However, these occurred on an unprecedented scale in the August 2017 security operations. Multiple sources have reported widespread, large-scale and extreme violence against the Rohingya in northern Rakhine State in 2017, by security forces, groups affiliated with the security forces and ethnic Rakhine mobs.
36. In March 2018, Médecins Sans Frontières estimated at least 9,400 people died in Rakhine State between 25 August and 24 September 2017, of which at least 6,700 were due to violence, including at least 730 children under the age of five. MSF reported the main cause of violence-related deaths during this period was gunshots (70 per cent), including for children under five (59 per cent). Around 9 per cent were burned to death in their homes, higher (around 15 per cent) for children under the age of five who died violently. Five per cent of people who died violently were beaten to death, three per cent from sexual violence and one per cent from landmines. MSF concluded that the estimated number of deaths was conservative given their survey methodology, and information collected by the UN Fact-Finding Mission corroborated this statement. While the month following the ARSA attacks has been described as the most violent, multiple credible sources recorded a high number of violent incidents against Rohingya in northern Rakhine State continuing until November 2017, despite the official conclusion of security operations by the government on 5 September 2017. DFAT assesses that some violent acts constituted torture.
37. The UN Fact-Finding Mission found sufficient evidence of violence perpetrated by the Tatmadaw in northern Rakhine State to conclude that war crimes, crimes against humanity, and potentially, genocide occurred. Given the multiple incidents of extreme violence against the Rohingya in recent years, DFAT currently assesses that Rohingya in Rakhine State continue to face a high risk of violence, predominantly from security forces. DFAT assesses there is a high risk of further violence for the remaining Rohingya in Rakhine State.
38. The movement of Rohingya in Rakhine State is limited by government-imposed regulations, informal rules implemented by authorities, and self-imposed restrictions by communities who fear for their safety outside of their townships. All Rohingya living in Rakhine State require official permission to travel between townships, and outside of Rakhine State.

Following the widespread violence in Rakhine State in 2012, local authorities and the Ministry of Home Affairs moved some communities into camps and implemented severe movement restrictions. Around 129,000 people remain displaced in camp-like settings in central Rakhine, primarily Rohingya, but also ethnic Kaman. They remain segregated, restricted to camps and displacement sites, unable to return to their place of origin and without freedom of movement. Sources told DFAT that obtaining travel permits and then using these documents to pass through checkpoints required the payment of 'informal fees' at every stage. This can include payment in the form of forced labour. The size of informal payments varies and can be linked to the perception of an individual's capacity to pay. Amnesty International reported that in addition to extortion, Rohingya are regularly harassed by checkpoint officers with threats and physical violence. There are credible reports that Rohingya remaining in northern Rakhine following the 2017 violence have been prevented from travelling between village tracts, and Maungdaw and Buthidaung Townships, on the basis of security concerns from the authorities.

39. Rohingya also face restrictions in travelling outside of Rakhine State. Travel permission is only granted to Rohingya holding official identity documents (mostly National Verification Cards or NVCs, though some still hold National Registration Cards), meaning very few Rohingya are able to travel legally outside of Rakhine State. The restrictions on movement for Rohingya prevent access to healthcare, education, and income-generating activities. Health services in Rakhine State are generally poor quality.
40. The situation for Rohingya returnees, whether returning from Bangladesh or otherwise, is concerning. DFAT advises that the governments of Myanmar and Bangladesh signed the 'Agreement of Return of Displaced Persons from Rakhine State' in November 2017. According to the agreement, Myanmar will receive former residents of Rakhine State who left for Bangladesh after the violent attacks of October 2016 and August 2017, if they can prove their former residency of Rakhine State. The Myanmar Government has announced that Rohingya who qualify for repatriation will be temporarily housed in one of two 'reception centres', which are reported to be secured by Border Guard Police officers and Tatmadaw soldiers. At the reception centres, returnees will reportedly undergo security checks, including body searches for weapons, and be registered and checked against township records. Returnees will have biometric information (fingerprints, retina scan and photo) taken and then be entered into an electronic identification system. Temporary identity cards will be issued. At the time of publication, the repatriation procedures would require Rohingya returnees to undergo the citizenship verification process and accept NVCs. This of itself is problematic, as Rohingya generally remain unwilling to participate in the citizenship verification process and/or accept NVCs on the basis that it may remove their right to remain in Myanmar long-term, or establish them as a lower class of citizen with fewer rights.
41. Repatriation from Bangladesh would also include health checks, involving a physical examination and checks for contagious diseases will also be undertaken. Returnees will stay at the reception centres for up to two nights, before being transferred to the longer-term transit camp. Returnees will then be relocated to one of 11 designated settlement areas, and required to build their own housing in the undeveloped areas through a government 'cash for work' program.
42. While the Myanmar Government has formally committed to repatriating the Rohingya, there has been widespread international criticism of actions taken to date, with an almost exclusive focus on physical infrastructure for returnees and no clear plans for establishing security, providing information to potential returnees, or addressing inter-communal relations.

43. DFAT advises that in June 2018, the Myanmar Government signed a Memorandum of Understanding on repatriation with UNHCR and the UNDP, however DFAT advises that implementation has been extremely slow. In September 2018, UNDP and UNHCR made initial field assessments in 23 villages and three village tracts of Rakhine State to inform the repatriation process, but to date UNHCR and UNDP have received only partial access to northern Rakhine State. OCHA, UNHCR and ICRC all made public statements in 2018 that the conditions in northern Rakhine State are insufficient for the voluntary, safe, dignified and sustainable return of the Rohingya to Myanmar. Freedom of movement, citizenship rights and recognition as 'Rohingya', and access to their own land and livelihood opportunities are priorities for potential returnees from Bangladesh, but DFAT assesses none of these conditions will be met under the current return arrangements. At the time of the DFAT 2019 Report, the repatriation process had not commenced.
44. DFAT advises that in July 2018, the UN High Commissioner for Human Rights on Myanmar reported that some voluntary informal Rohingya returnees from Bangladesh had been detained upon return to Myanmar, and convicted on unspecified charges. In August 2018, Human Rights Watch reported that BGP officers in Maungdaw Township, Rakhine State, imprisoned and tortured six Rohingya voluntary returnees from Bangladesh in separate incidents. According to the report, officers used stress positions, beatings with fists, sticks, and rods, burning and electric shock, and food and water restrictions during pre-trial detention to force a confession of affiliation with the insurgent Arakan Rohingya Salvation Army (ARSA). Plain clothed military intelligence officers were also reported to beat, punch and kick the returnees during interrogations. The returnees reported that they had no access to legal counsel, and court proceedings were undertaken in Burmese, of which they had limited understanding. The six returnees were sentenced to four years imprisonment for illegally crossing the border, but only served a month of the sentence before receiving a presidential pardon.
45. DFAT advises that a press release issued by the State Counsellor in May 2018 outlined that 58 returnees from Bangladesh (which included the six Rohingya interviewed by Human Rights Watch) would be pardoned and processed in accordance with the agreement between the governments of Myanmar and Bangladesh. It reported that following their transfer to a reception centre and identity verification, the group would be relocated to a transit camp. Four more Rohingya were reportedly later added to this group, taking the total number of returnees in this group to 62. According to Human Rights Watch, the group were forced to accept the NVC provided to them, and were threatened with re-arrest if they attempted to leave the BGP compound where they were held before being transferred to a transit camp. Two groups of Rohingya, including the six interviewed returnees, reportedly fled back to Bangladesh due to fear of re-arrest and torture. The State Counsellor's press release specified that the arrangement for the returnees only pertained to those not involved in terrorism. DFAT was told by credible sources that 77 Rohingya returnees had been arrested, and surmises that some returnees remained in detention following the pardon, but DFAT was unable to verify this.
46. DFAT advises that in October 2018, media and rights groups reported the return of seven Rohingya from India back to Myanmar. DFAT understands from credible sources that at least five members of the group were not deported but returned willingly to their village of origin (location unknown), but is unable to verify if this was with informed consent. In November 2018, Myanmar and Bangladesh announced an agreement to commence the repatriation process, but the 2,000 initial refugees identified for return were found to be unwilling when interviewed by UNHCR. DFAT states that it is not aware of any credible reports of

mistreatment of failed Rohingya asylum seekers stemming specifically from their pursuits for asylum overseas.

Refugee assessment

47. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee. 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

48. 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.
49. I have accepted the applicants are effectively stateless as undocumented Rohingya Muslims from Maungdaw in Rakhine State.
50. As referred above, I have obtained country information from a range of sources that confirms the applicant’s home village, and many surrounding villages in the Maungdaw Township, have been directly impacted by the severe violence, destruction of property and displacement referred to by DFAT, MSF, UNDP, and the UNHCR.
51. On the basis of the DFAT advice cited above and having regard to other country information before me, I am satisfied there is a very real chance that the applicants would face serious harm in the form of serious violence, sexual violence, deprivation of liberty, severe discrimination, torture and other forms of serious harm, for reasons of their Rohingya ethnicity and religious profile as Muslims, if they were to return to live in Maungdaw, Rakhine State within Myanmar.
52. Section 5J(1)(c) of the Act requires that the real chance of persecution relates to all areas of the receiving country.

53. According to DFAT, there are a number of Rohingya living outside of Rakhine State, particularly in Yangon, but the size of the Rohingya population outside Rakhine State is unclear. This is due to both a lack of official statistics that recognise the Rohingya as an ethnic group, and also as some Rohingya in Yangon and other large cities in Myanmar reportedly conceal their ethnic identity, including through attempts to identify as Kaman or other Muslim groups. Anecdotal evidence suggests there are approximately 20,000 Rohingya living in Yangon. Rohingya outside of Rakhine State are not subject to local orders restricting freedom of movement as Rohingya in Rakhine State, however they may choose to live in particular locations due to concern of negative societal attitudes. In February 2018, Rohingya in Yangon described Buddhist neighbours and friends increasingly expressing sympathy with the government's approach to the Rohingya in Rakhine State.
54. DFAT advises that the situation for the Rohingya within Rakhine is different from those living outside of the area. Rohingya outside Rakhine State generally have higher incomes and better access to resources than those in Rakhine State, and are typically able to obtain identity documentation that allows them to live and work without facing the high levels of discrimination otherwise experienced by Rohingya in their day-to-day life. Typically, Rohingya in Yangon are registered as 'Burmese Muslims' or 'Bamar Muslims'. A person willing to record their ethnic group as a Burmese/Bamar Muslim is generally able to access either full, associate or naturalised citizenship (depending on their family history), including national identity cards and residency documents which provide a legal right to a passport. Local sources reported that Rohingya can also pay bribes to officials to obtain a Kaman identity card. University students without citizenship cards, including Rohingya and some religious minorities, are permitted to attend classes and sit examinations, but are unable to graduate and receive qualifications.
55. DFAT concludes that Rohingya who live outside of Rakhine State experience moderate levels of societal and official discrimination on a day-to-day basis. While they are officially denied citizenship rights, Rohingya who choose to identify as Kaman or other Muslim groups face a similar (lower) level of discrimination to that experienced by other (non-Rohingya) Muslims.
56. I accept that the situation for Rohingya living in Yangon and other areas is significantly better than the position of those living in Rakhine State. However, I am not satisfied that the situation for these Rohingya in urban areas, who can speak Burmese, have identity documentation and higher incomes, and who conceal their ethnic background, reflects the situation of the applicant and his family. In contrast, the applicants speak the Rohingya language, but do not speak Burmese. They have no identity documentation, nor is there evidence before me to indicate they have connections in Yangon or elsewhere through which they could obtain documentation, as some Rohingya in Yangon have been able to do.
57. If the applicants were able to find themselves in Yangon on return to the country, I consider they would be in a far more vulnerable and precarious position than the Rohingya described in DFAT's assessment. I find the applicants would be travelling to Yangon as undocumented Rohingya Muslims. I consider their additional and obvious profile elevates the risks to the applicant in terms of official and societal discrimination, and violence on the basis of that profile. I consider this risk profile is higher than the risks faced by other Muslims and documented low profile Rohingya living in the city. It also means that the applicant and his family would not be able to avail themselves of the protections that exist for documented Muslim nationals living in this part of the country. Of additional concern to me is that the applicants would almost certainly be identified by the authorities as having no documentation and no formal permission or entitlement to be in Yangon, being Rohingya

originally from Rakhine, and I consider there is a high risk or chance they would be returned to Rakhine State where I have found there is a very real chance of serious harm.

58. I consider that the country advice provides an incomplete picture for undocumented Rohingya living outside of Rakhine State. I consider the applicant and his family's cumulative profile as undocumented Rohingya Muslims is concerning and I cannot be satisfied that they would be able to live and work in Yangon, or elsewhere in the country, without that profile being identified and leaving the applicants vulnerable to serious harm. I find the weight of the available information before me indicates that there is a more than remote chance of the applicants facing serious harm as undocumented Rohingya Muslims living in Yangon or elsewhere in Myanmar. On the information before me, it follows that I am satisfied the real chance of harm is present in all areas of the receiving country Myanmar
59. In any event, I consider the prospect of the applicants being able to travel and live elsewhere in Myanmar is remote, particularly if they are returned to Myanmar formally. I note they departed the country illegally by boat in Maungdaw, and did not hold passports at the time. Country advice is that strict restrictions on the movement of Rohingya from Rakhine continue to exist. DFAT advice is Rohingya who live in northern Rakhine State (where Maungdaw is) are not permitted to travel outside of northern Rakhine, except for medical emergencies, and restrictions are enforced through curfews and checkpoints. Rohingya are required to obtain travel approval to move even short distances. In December 2017, UNHCR reported that the process for obtaining travel permission had become more stringent. Individuals now require a form of identity card, namely the NVC, NRC or a citizenship document, where previously alternate travel authorisation procedures were available for those who did not hold documentation. According to DFAT, there are credible reports that Rohingya remaining in northern Rakhine following the 2017 violence have been prevented from travelling between village tracts, and Maungdaw (where the applicants are from) and Buthidaung Townships, on the basis of security concerns from the authorities. As undocumented persons, I consider the applicants would be similarly impacted.
60. Advice before the IAA indicates that Rohingya returnees are to be placed in 'reception centres' or IDP camps, before being resettled in designated settlement areas within Rakhine State. While freedom of movement, citizenship rights and recognition as 'Rohingya', and access to their own land and livelihood opportunities are priorities for potential returnees from Bangladesh, DFAT assesses none of these conditions will be met under the current return arrangements. OCHA, UNHCR and ICRC all made public statements in 2018 that the conditions in northern Rakhine State are insufficient for the voluntary, safe, dignified and sustainable return of the Rohingya to Myanmar. Indeed, there are reports of re-arrest and torture of some returnees, and that DFAT surmised that some had not been released from detention.
61. On the basis of the advice before me, I consider there is a very real chance the applicants are, on return to Myanmar, repatriated to Rakhine State by the Myanmar authorities, an area where, on the basis of current country advice, I am satisfied there is a very real chance they would face serious harm. I am not satisfied there is any real chance or prospect of the applicants being able to leave or avoid this area.
62. Weighing all the advice before me, I am satisfied that there is a real chance that the applicants would face serious harm in the form of violence or detention at the hands of the Myanmar authorities, the Myanmar armed/security forces (Tatmadaw or BPG), or Buddhist/ethnic Arakan groups, and/or societal and official discrimination that would pose a threat to their liberty within the country, or result in denial of access to essential services and

livelihoods that would threaten their capacity to subsist. I am satisfied the applicants fear persecution on the basis of their religious and ethnic profile, and that these factors are the essential and significant reasons for the persecution they fear and would face on return to Myanmar. I am satisfied the persecution involves systematic and discriminatory conduct. While I accept the chance of persecution is lower outside of Rakhine State, for the reasons above, I am satisfied the real chance of serious harm (persecution) is present in all areas of the receiving country Myanmar.

63. I accept DFAT advice that effective state protection mechanisms are rarely available for those that identify as Rohingya. Moreover, as the perpetrators are in substantial part from the Myanmar armed/security forces (the Tatmadaw and BPG), I am satisfied that the applicants would not be able to obtain effective state protection against the persecution they fear in Myanmar. As undocumented Rohingya Muslims, I do not consider there are any reasonable steps the applicants are able take to avoid the harm they fear in the sense contemplated by s.5J(3) of the Act.
64. In view of all of circumstances, I am satisfied that the applicants each have a well-founded fear of persecution within the meaning of s.5J of the Act.
65. In the event that I am wrong about my assessment of the chance of harm to the applicants in all areas of the receiving country, for the reasons above, I would alternatively find that the applicants would face a real risk of significant harm in their home area of Maungdaw within Rakhine State. I would find, on the basis of the advice above, that they could not obtain protection from the Myanmar authorities. Having regard to their lack of documentation, financial resources, limited education and skills, lack of Burmese language skills, the reality of having two young children, and the severe restrictions on movement experienced by undocumented Rohingya, I do not consider it would be reasonable for the applicants to relocate to an area of Myanmar where there would not be a real risk that they would suffer significant harm, even if I were satisfied that was possible. I would further find that the real risk is not one faced by the population of the country generally, and is in fact faced by the applicants personally on the basis of their ethnic and religious profile. For those reasons, I would also be satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that the applicants will suffer significant harm in Myanmar.

Refugee: conclusion

66. The applicants meet the requirements of the definition of refugee in s.5H(1). The first, second, third and fourth named applicants meet s.36(2)(a).

Decision

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

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

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.