



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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MYANMAR  
IAA reference: IAA19/06992

Date and time of decision: 12 September 2019 15:37:00  
D Hughes, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

*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

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Myanmar. He applied for a protection visa on 11 July 2017. A delegate of the Minister for Immigration refused to grant the visa on 14 August 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. One submission was made to the IAA. The submission contains a copy of an earlier post interview submission. I am satisfied this was before the delegate, was included in the referred material, and is not new information. I have weighed that submission.
4. Reference within the IAA submission is made to Hathaway and Foster's Law of Refugee Status and the AAT's Guide to Refugee Law, which are not technically information before the IAA and are therefore new information. While the information was not before me, I consider the principles referenced in the submissions are mirrored in the legal authorities that bind and guide the IAA. Indeed, I note the AAT Guide is a recitation of the legal authorities in this jurisdiction. To avoid any uncertainty, while I am not satisfied there are exceptional circumstances to justify considering the new information, I accept the underlying principles made in these legal submissions and have weighed them in this assessment.
5. An allegation from a third party is on the Department file. Other than some basic data, it does not appear to contain any credible detail that would assist in the assessment of this review, nor is other information before the IAA. I have given this information no weight.
6. I have considered whether the IAA should exercise its discretion to obtain information from the applicant. While aspects of my findings differ, I am satisfied the determinative issues in this review remain those as were before the delegate. I note the applicant has benefitted from written submissions and legal representation at the visa interview. Considering all the circumstances, I am not satisfied it is necessary to obtain new information from the applicant, whether via interview or in writing.

### Applicant's claims for protection

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7. The applicant's claims can be summarised as follows:
  - He is a citizen of Myanmar. He was born in Yangon and he is [age]. He is Burmese and a Sunni Muslim. He is married and has [number] children. His family live in Myanmar.
  - In 2003, the applicant was arrested twice by Burmese police while protecting mosques in [Township 2] that were being attacked by Buddhist monks. While protecting the mosque from the first attack in 2003, a group of seven Muslims (including the applicant) were arrested by the police. The police also chased the Buddhists, but they were able to avoid arrest. The applicant and the other men were handcuffed and made to sit on painful stones for 4-5 hours.

- The second attack happened a few nights later. Over 100 men gathered to protect the mosque. The Buddhists attacked a smaller nearby mosque before attacking the main mosque. The applicant and some other men were arrested for protecting the mosque.
- The applicant and the other men were held for 5 days in an army barracks because they had previously defended the mosque. They were handcuffed, beaten and kicked for over 5 days. They did not receive food or water for 2 days. The applicant was fearful that he might die. The applicant believed the police were protecting the actions of the Buddhists. They never arrested the Buddhists, only the Muslims.
- In 2003, the applicant was driving from *Mandalay* to *Metheelar*<sup>1</sup> with two Muslim passengers. When the applicant slowed while approaching a toll bridge, a group of eight Buddhists surrounded the car, forcing him to stop. They demanded their IDs. The applicant was afraid and got out of the car to show his ID. He was pushed, and punched. The applicant witnessed one of his passengers being hit and killed with a baseball bat. The applicant and the other passenger managed to escape.
- In 2004, the applicant's taxi was hired by three Buddhist men who wanted to go to [Location].<sup>2</sup> The applicant was asked to drive through a field. He was then threatened with a knife, punched and dragged out of the car. The men beat him while he was lying on the ground. His arm was slashed with a knife, which later required 69 stitches. The men shouted at him that he was a disgrace, and told him 'all Muslims should be killed'. They stole his car and drove away.
- The applicant reported the attack to the police. The police told him they would investigate and try to locate his car. They found his car, but it was severely damaged. They did not find the perpetrators. The applicant does not believe the police can protect Muslims from this kind of violence.
- He left Myanmar in 2013 and travelled to [Country 1]. Everything had built up and he was in fear every day of the police. They kept trying to make him pay bribes because he was Muslim. He was afraid of Buddhists and the harm they could cause him. He bribed the police so he could leave Myanmar, crossing the border illegally into [Country 2]. His family stayed in Myanmar with his father-in-law.
- On return to Myanmar, he fears he will be harmed and killed by Buddhists, and Buddhist monks. There is constant violence and attacks against Muslims. He would not be safe there. He does not want to go back to a place where his life will be in danger. He is known to the police because of the previous incidents.
- He does not believe he can continue to be a taxi driver, as it is too dangerous. His name, ID and appearance mean he is easily identified as a Muslim. He is afraid he will be harmed by Buddhists during his work. There is no other work he can do.
- He believes it is getting worse in Myanmar, and it is becoming increasingly difficult to practise Islam. Mosques are being destroyed by Buddhists, and the Islamic schools are being closed by the government through the bribery of Buddhist monks.
- No Muslims are safe in Myanmar. He is from an area of Yangon with a mixed Buddhist Muslim population. He believes his proximity to the Buddhists will put him at risk. He fears his family will be harmed if they live with him in Yangon.
- He also fears harm as a failed asylum seeker, and that he will be arrested and jailed by the authorities for having left the country illegally.

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<sup>1</sup> Possibly *Meiktila*.

<sup>2</sup> Possibly [Alternative spelling].

- He does not believe he can obtain protection from the authorities, because the police are all Buddhists. He cannot relocate to other parts of Myanmar, as it is too dangerous. The government conducted a census, and people that are missing are reported. He would be in serious trouble if he returns.
- Every day he is worried, thinking about what is happening to Muslims in Myanmar, and his family and wife. This effects his concentration and his memory. He suffers flashbacks and difficulty sleeping due to the past physical harm he suffered in Myanmar.

### **Factual findings**

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8. The applicant has consistently claimed to be a citizen of Myanmar, born in the city of Yangon. He has spoken at interviews using Burmese interpreters and has provided a range of identity documentation purportedly issued by the authorities in Myanmar that support his claimed identity. At the interview, he was able to freely describe his home area in Yangon, some nearby landmarks (markets and government buildings) and name his local mosque. Based on the information before me, I am satisfied the applicant is a citizen of Myanmar from Yangon.
9. In terms of his ethnic profile, the applicant claims to be a Burmese Surati. He also claims to speak Urdu and Hindi. He has consistently claimed to be a Sunni Muslim. His documentary evidence also supports his claims in this regard. At the visa interview, he was able to recite a *surah* from the Quran. Based on the oral and documentary evidence before me, I am satisfied the applicant is a Burmese (Sunni) Muslim of Surati (Indian) ethnicity.

### **Claims related to ethnic and religious profile**

10. The applicant's main claims relate to the situation in Yangon in Myanmar in 2003. In his written application, he detailed two incidents in which he, and a group of other Muslim men, protected local mosques that were being attacked by Buddhist monks. His evidence at the visa interview was detailed and in large part consistent with his written statement, referring to two incidents over the course of several days, and his detention and mistreatment by the Myanmar authorities. Country advice about attacks against mosques by Buddhist nationalist groups is before me. While not highlighting specific incidents in [Township] (Yangon) in 2003, his claims are consistent with incidents that have occurred in Yangon at other times. I consider his claims are plausible, consistently advanced, and broadly supported by country information before me. I accept these claims.
11. In his written statement, the applicant said he is known to the police because of the previous incidents in 2003, but he did not contend that he faced further issues in connection with his past actions at the mosque, whether from Buddhist monks or the authorities in his area. In his interview, the applicant appeared to claim for the first time that the authorities have gone to his home and searched it. However, given he was released from his second detention and has not contended there were further clashes, the applicant has not satisfied me that the authorities took any ongoing interest in him, or have searched his home.
12. In fact, while I accept the applicant was involved in the protection of local mosques during protests in 2003, and that he was detained and mistreated by the authorities because of his involvement, I am not satisfied he had an ongoing profile with the authorities in the aftermath of these incidents. I consider a range of factors support such a finding.
13. The applicant contends that he is a devout Muslim. He does not claim that he stopped attending mosque after 2003. He also does not claim that he was ever again involved in

protecting a mosque, that there were any other clashes, or that he faced any additional threat or harm from Buddhist monks, the authorities or any other person or group in connection with these incidents. Apart from his unspecific claim at the interview about visits to his home, he did not detail any further issues he had with the authorities because of these incidents. In fact, he contends he sought the assistance of the police in 2004 in connection with other aspects of his claims. I note the applicant lived and worked in Myanmar over several periods between 2003 and 2013, including work as a taxi driver that necessarily would have taken him through official checkpoints. Yet, even in that context, he did not claim to have faced disruption or interference from the authorities because of his past profile.

14. It follows that I accept his claims related to the two incidents in 2003, however I am not satisfied he had or has any ongoing adverse profile in connection with these events. I am not satisfied and do not accept his late claim that the authorities continued to visit and search his home in the years that followed. If this was the case, I consider it would have formed a more significant and detailed aspect of his claims.
15. With the exception of some periods of work in [Country 1], the applicant was in Myanmar for around ten years before he left the country in 2013, notably during a period when there was a significant escalation in religious tension in the country (2012-13). The applicant continued to live and work in Yangon, and I find he would have continued to attend mosque during this time. However, it does not appear that he was involved in any further clashes or the protection of the local mosque. The applicant did not contend he modified his behaviour, and referred to no additional incidents. I have no reason to consider he modified his conduct in any way, and find that the clashes in 2003, at least in terms of his home area, did not continue, nor did his active participation in protecting the mosques.

#### **Claims related to work as a taxi driver**

16. The applicant refers to two violent incidents in which he was attacked and seriously harmed while driving his taxi in 2003 and 2004. The applicant's oral evidence about these claims was brief, but broadly consistent with his written claims. However, I have a number of concerns in relation to these claims.
17. I have concerns with the completeness and plausibility of his evidence in relation to these claims. In terms of the first incident in 2003, in which the applicant claims to have witnessed one of his passengers being killed, the applicant has not explained any aspect of what occurred in the aftermath of this incident. There was no contention that he reported the killing to the police, that the matter was investigated by the authorities or reported in the news, or that he was questioned as a witness in relation to the incident. In terms of the second incident, the applicant's evidence is that he was seriously injured (requiring over sixty stitches). He claims his attackers stole his vehicle and he was abandoned in a remote field away from any houses or people. He claims to have lost a lot of blood, but provided no plausible account of how he was able to extract himself from that situation and get to the hospital in Yangon. These matters are not incapable of explanation, but his failure to advance such details raises questions about the reliability of these accounts.
18. Secondly, despite the significance of the two attacks, the applicant has been unable to provide any supporting evidence that would corroborate the attack in 2003 (in which he claims a Muslim passenger was killed) or the attack in 2004 (which he claims he reported to the police, and attended a hospital for treatment of a serious injury). I am conscious of the difficulties faced by applicants in terms of providing corroborative information, particularly where events took place some time ago. I have also weighed the explanations provided in his

submissions about the competency of the police in Myanmar, and the claim that he contacted his wife in Yangon, but she did not recall or have medical reports in her possession. Equally, I also note the applicant otherwise has a range of documentation and translations, which he has accessed through his family in Myanmar. In this context, I find it concerning that there is a complete lack of supporting evidence in relation to what were two very serious incidents, likely involving the police, hospitals and possibly even the media (I note violent attacks against Muslims are reported by human rights groups). While not determinative, the lack of any supporting evidence is a further concern in relation to these claims.

19. Lastly, I consider the applicant's evidence that he continued to work as a taxi driver in the aftermath of these incidents is difficult to accept. Despite two occasions when his life was seriously at threat, one incident where a passenger was killed, and another where he was almost nearly killed, the applicant continued to work as a taxi driver for the remainder of his time in Myanmar. The representative fairly submits to the IAA that this should not be seen as an indication that he did not fear for his safety when he was driving a taxi, but rather that he continued to do so as it was the best way for him to support his family, and he had no choice.
20. I accept that people do not always make rational decisions, and they are sometimes forced to work in dangerous occupations or remain in insecure areas. However, I consider there are factors that undermine his explanations for continuing to work as a taxi driver. The applicant states the taxi was rented, and that it was severely damaged/burned in the 2004 incident. Yet, other than the periods when he travelled to work in [Country] (between 2007 and 2009), it appears he continued to work as a taxi driver until 2013. The taxi was not his own, and he had a range of other work experience as a chef and salesperson. In that context, I do not accept he had no other viable work options. Given his claims as to the risk, I also do not accept it was the best way to support his family. I consider his decision to continue to drive a taxi is difficult to reconcile with his claims to have faced such serious threat and harm in 2003 and 2004.
21. Considered separately, each of these matters may be capable of rational explanation, indeed the applicant has made some reasonable submissions in that regard. I have also weighed his claims about his mental health and memory. However, when considered in totality, I am unable to overlook my concerns with these claims. I am not satisfied and do not accept the applicant was involved in violent incidents while driving a taxi in 2003 or 2004. It follows that I am not satisfied and do not accept any aspect of the applicant's profile as it relates to the claimed incidents in 2003 and 2004.
22. Notwithstanding the above, I do accept aspects of the applicant's travel and employment history. I consider he has been consistent about his work experiences and travels to [Country 1]. He was able to answer questions about his past work. I accept those aspects of his claims. Having regard to the country information before me about official and societal discrimination, I accept he faced other lower level discrimination when working as a driver – for example, that passengers would sometimes decline to use his taxi when they saw he was a Muslim. I also accept his contention at the interview that the authorities would always 'try to find faults' with him. Having regard to the country advice before me, I accept he would have faced low level interference and bribery demands from Burmese officials in his day-to-day life in Myanmar. I accept DFAT's assessment that these are examples of informal discrimination by mostly Bamar Buddhist public officials, rather than formal policy. I accept his profile would have been part of the reason he was targeted, but also note a 2017 survey from Transparency International (cited in the DFAT report) found that 49 percent of Myanmar people who had contact with police had paid a bribe, indicating that bribery and corruption is endemic in Myanmar and impacts a significant proportion of the population.

## **Illegal departure**

23. The applicant is well documented, and appears to have travelled on several occasions between Myanmar and [Country 1] for work. When questioned as to whether he held a passport, the applicant confirmed he did not. The applicant has a CSC and a household register. According to DFAT, he would need to present both to receive a passport. The applicant said he applied for a passport in the 1990s, but received no contact from the authorities.
24. Given the ease with which he could have obtained a passport, I have some doubt as to whether the applicant in fact travelled to [Country 1] illegally in the past. Nevertheless, the applicant has consistently indicated he does not hold a passport. The applicant's work in [Country 1] was low level, and I consider it plausible he could have undertaken this work without a passport or visa. I accept that irregular migration does occur out of Myanmar. For example, DFAT estimates that up to 18,000 refugees returned to Myanmar informally from [Country 2] since 2012, providing some indication of the porous situation at the Myanmar-[Country 2] border. In the full context, I accept he departed Myanmar illegally in early-mid 2013.
25. In his application, the applicant said the Myanmar Government conducted a census and people who are missing are reported. He would be in serious trouble if he returned. He did not detail these claims further. DFAT refers to a 2014 census, but does not indicate penalties for those that did not participate or who were not present. On the limited information before me, I am not satisfied he would face penalty for failing to be present for any census. However, I have considered the situation and the penalties for his illegal departure below.

## **Refugee assessment**

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26. 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**

27. 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.

### **Ethnic and religious profile**

28. I have accepted the applicant is a citizen of Myanmar, a Burmese Muslim, and a person of Indian (Surati) ethnic descent. While DFAT provides analysis of some ethnic minority groups (eg. Kaman, Chin), it does not refer to the ethnic Indian population as a separate risk profile.
29. In assessing his religious and ethnic profile, I have relied on the assessment of country information as it pertains to Muslims in Myanmar, as I consider that information accurately reflects the situation for a person with the applicant's profile as an ethnic Indian (Surati) and a Muslim, and as a person that identifies as a Burmese Muslim. The reports before me do not indicate Muslims of Indian ethnicity are treated differently to other Burmese Muslims.
30. DFAT confirms that anti-Muslim sentiment is prevalent in Myanmar, especially outside of major cities. DFAT advises that reduced tolerance for Islamic faith activities has been, at least in part, propagated by a rise in anti-Muslim sentiment at both the official and societal level. In its most extreme form, this has resulted in violent incidents against Myanmar's Muslim community. A report submitted by the applicant, from the Burma Human Rights Network, details the breadth of violence, other incidents and discrimination that have occurred over the last several years, including a historical timeline of incidents. While acknowledging that violent incidents occur, DFAT's overall assessment in 2019 was that Muslims (outside of Rakhine State) face moderate levels of official and societal discrimination and a low risk of societal violence on a day-to-day basis.
31. Based on the reports before me, I accept that outbreaks of religiously motivated violence have occurred in Myanmar, notably in 2012 and 2013, when there were a number of serious and violent incidents occurring throughout the country, including within his home area of Yangon. I have accepted the applicant was involved in two earlier incidents in 2003, while he and a number of other Muslims attempted to defend local mosques from Buddhist monks.
32. While I accept violent incidents involving Muslims continue to occur, including recent incidents highlighted by DFAT in Yangon in 2018, the reports before me do not indicate that in the aftermath of 2013, that violence towards Burmese Muslims has continued to occur with any frequency in Yangon and other non-conflict areas in the country. I have weighed the applicant's submissions, but I do not consider the situation for Muslims in Yangon is informed by the security situation faced by Rohingya Muslims in Rakhine State. I have found the applicant does not share this profile. While I accept the reports indicate occasional violent incidents do occur, year on year, the data before me also indicates these incidents have been infrequent in Yangon and the surrounding areas. This is particularly significant given the substantial Muslim population in Yangon and its surrounding townships.
33. Based on the available information, I accept DFAT's assessment that a person with the applicant's profile would face a low risk of societal violence on a day-to-day basis. I consider that profile extends to both his regular future attendance at mosque, or if he was to continue to work as a taxi driver on return to the country. I note that setting aside his claims from 2003 and 2004, the applicant was in Yangon on and off for a period of ten years, during which time I am satisfied he faced no further violence or threat of violence. I consider that would reflect the situation for the applicant on return to his home area. Weighing the information before me, I consider there is no more than a remote chance of the applicant facing violence or related harm for reasons of his ethnic and religious profile within his home area of Yangon.



34. In terms of official and societal discrimination, the country advice before me indicates that societal and official discrimination against ethnic and religious minorities manifests in a range of ways across employment, education, accommodation, access to services (e.g. health and police), issuance of identity documentation, boycotts on Muslim businesses, bureaucratic delays and informal fees (bribery), freedom of movement and/or religious freedoms. DFAT states that state protection is more difficult for Muslims to access, but outside of Rakhine, does not indicate that non-Rohingya Burmese Muslim citizens are denied state protection, which is consistent with its assessment that official discrimination is at moderate levels. The level of discrimination is most acute for Muslims (principally Rohingya Muslims) living within Rakhine State, and this is reflected in DFAT's assessment of the risks for people in that area. However, I accept discrimination is also evident outside of Rakhine. I note recent reference to increases in online hate speech within Myanmar, and reporting of Muslim-free villages and signage in some villages in the country.
35. I have accepted the applicant has faced discrimination in the past in connection with his ethnic and religious profile, including societal discrimination from taxi passengers and official discrimination (bribery and interference) when dealing with officials. I accept those experiences would have been challenging and frustrating for the applicant, as would be the case if the applicant experienced such discrimination on return to the country.
36. In assessing the future chance of discrimination or harm to the applicant, I give weight to DFAT's advice that societal and official discrimination for Muslims in Myanmar is at moderate levels. Moreover, while there is evidence of discrimination for Muslims outside of Rakhine State, the reports before me do not indicate that Muslims living in Yangon are unable to access sustainable employment, education, health care or other basic services. I consider that analysis is consistent with the applicant's past experiences, and I give some weight to the fact that the applicant was documented, steadily employed, had some education, and he maintained a secure family residence in [Township 1] in Yangon for several decades. I consider this provides some indication of the situation he would face on return to Yangon.
37. In its 2019 report, also highlighted in the applicant's submissions, DFAT refers to an increase in restrictions on Muslims being able to practise their faith in recent years. Public events marking Islamic days were cancelled by authorities in Yangon and Bago in 2017, due to pressure from Buddhist nationalist groups. In April 2017, authorities closed two madrassas that educated several hundred primary school students in [Township 2], Yangon. In June 2018, a large community prayer in Thaketa was banned by authorities, and police charged the Muslim prayer leader and two other community members with failure to obtain a permit to organise prayers, punishable by a fine or up to six months in prison. DFAT states that some Muslims restrict their religious practices for fear of discrimination. Muslims in Yangon described to DFAT their decision to practise a less conservative form of Islam, including changing their dress and beards, to avoid visibly demonstrating elements of Bangladeshi or Indian Islam. The US Department of State report from 2019 provides similar analysis.
38. While I accept some schools and mosques have been shuttered because of pressures from Buddhist nationalist groups claiming they are illegal, and that large public events and large public prayer services have been disrupted, I do not consider the information before me indicates Muslims are being prevented from attending mosques or practising their faith at a broader or systematic level within Yangon. In this regard, other than the incidents in 2003, I note and give weight to the fact that the applicant did not detail any claims that he was prevented from practising his faith, or that he was interfered with while doing so.

39. The submission refers to DFAT's advice about the steps taken by some Muslims in Yangon to modify their religious practice. It is not clear how widespread this is, but I note the applicant did not state that he personally restricted his faith, practised a less conservative form of Islam, or dressed to avoid harm, as suggested in DFAT's report. I also find it significant the applicant raised no earlier contention that he had or would need to modify his appearance, behaviour or identity to avoid harm on return to Myanmar. Instead, I consider he would continue to attend mosque as he has in the past. The applicant was not active in protecting mosques in the ten years that followed the 2003 attacks. I note that was the case despite a significant escalation in tensions in Yangon and Myanmar in 2012-13. Given his history, I am not satisfied the applicant would again be active in protecting mosques. I am not satisfied he would be prevented from practising his faith, and I am not satisfied there is a real chance of the applicant facing harm as a Muslim, or in the exercise of his Islamic faith.
40. The situation for non-Rohingya Muslims living outside of Rakhine State in Myanmar is unquestionably difficult. As a Burmese Muslim of Indian ethnicity, I have accepted he will likely face official and societal discrimination based on his ethnic and religious profile on return to the country. However, when looking to all the circumstances, and having regard to the analysis before me, I am not satisfied any societal or official discrimination he may face would prevent him from finding employment, accessing education, identity documentation, securing accommodation or accessing basic services such as health care. While I accept it would be frustrating and challenging for the applicant, I am not satisfied that any societal or official discrimination (bribery, barriers or other interference) he may face on the basis of his ethnic and religious profile would threaten his life or liberty, involve significant physical harassment or ill treatment, would deny him the capacity to earn a livelihood, cause him significant economic hardship, deny him access to basic services, threaten his capacity to subsist, or otherwise amount to serious harm, even when considered in a cumulative sense.
41. For clarity, I am not satisfied and do not accept the applicant would need to modify his behaviour to avoid harm. In any event, as I am not satisfied he would face a real chance of serious harm for the reasons he has claimed, I do not consider he would modify his behaviour, or need to modify his behaviour, to avoid persecution in any relevant sense.
42. The submissions refer to the situation for Muslims and Rohingya Muslims in Myanmar. The situation in Rakhine is difficult to reconcile with the security assessment for the rest of Myanmar, particularly given indications that tensions along ethnic and religious lines continue to deepen in some parts of the country. Analysis of the situation for Rohingya and other Muslims in Rakhine State is sobering. Equally, I consider there is a clear distinction in the risk assessment for Muslims in Rakhine, and the assessment for Muslims living elsewhere in Myanmar, such as Yangon.
43. Even within Yangon, I accept the situation for Muslims is concerning, and one that warrants ongoing attention. However, based on the current analysis and reporting before me, and in full consideration of the applicant's circumstances, I am not satisfied there is a real chance that the applicant will face serious harm for reasons of his religious, ethnic or any actual or imputed profile, from Buddhist monks or Buddhist nationalists, the Myanmar authorities, or any other person or group, in his home area in Yangon or its surrounds, now or in the reasonably foreseeable future. I am satisfied the applicant's fears are not well founded.

#### **Imputed ethnic profile – Rohingya**

44. The applicant considers himself a Burmese Muslim and Surati (a person of Indian heritage). I have accepted that profile. The post interview submission also contends that there is a real

risk the applicant would be harmed in Myanmar based on an imputed Rohingya, ethnicity arising from his ethnic appearance and religious beliefs as a devout Sunni Muslim.

45. The applicant appears to speak fluent Burmese. He also speaks Hindi and Urdu, but there is no indication he can speak Rohingya. The applicant is well documented and holds a national ID (a CSC). I am satisfied he has no documentation that would indicate he is Rohingya, but instead that his documentation confirms his identity and ethnicity as he has claimed. I also note DFAT indicates the presence of an Indian speaking Muslim population in Yangon.
46. The reports before me do not indicate that Burmese Muslims or persons of Indian ethnicity are imputed with a Rohingya profile or targeted for harm for those reasons. On the contrary, I note the country information indicates Yangon has a Rohingya population, but that population lives discretely to avoid facing issues. These people identify as Burmese Muslims, rather than Rohingya, to avoid harm or scrutiny. DFAT assesses that Rohingya outside of Rakhine State face a similar level of discrimination to other Muslims in these areas. Given that, I consider there is little to indicate non-Rohingya Burmese Muslims are at risk of being imputed with such a profile, or harmed because of it. Moreover, I consider that the applicant would not face the same financial, documentation and language vulnerabilities that a Rohingya might face in a city like Yangon. He would clearly be able to demonstrate his identity, ethnic profile, residency in Yangon, and citizenship status, further reducing any possibility that he would be imputed with such a profile or targeted for harm.
47. I accept the risks for Rohingya in Myanmar, specifically Rakhine State, are severe. The reports cited in the applicant's submissions (from the UNHRC, UN Special Rapporteur and others) unequivocally highlight the dire situation for Rohingya living in Rakhine State. I also accept DFAT advice that non-Rohingya Muslims (ethnic Kaman) in Rakhine State also have a risk profile based on their religion and perceived association with the Rohingya. However, the applicant has made no claim he intends to travel to Rakhine State. Indeed, there are restrictions on civilians doing so. I am not satisfied the applicant would travel to Rakhine, and therefore I find he would face no chance or risk of harm in that context.
48. Having regard to the analysis before me, I am satisfied the applicant would return to live and work in Yangon. I am satisfied he would be seen as a Burmese Muslim of Indian ethnicity, and would not be imputed to be an ethnic Rohingya. I am satisfied he would not face any additional chance or risk of harm for these reasons. I find there is no real chance of him facing harm based on an imputed ethnic or religious profile as a Rohingya Muslim.

### **Illegal departure and asylum claims**

49. I have found above that the applicant would not face penalty or harm in terms of his failure to be present for the Myanmar census. I have accepted the applicant left Myanmar illegally at the [Country 2] border. Given his lack of a passport, I am satisfied the authorities will determine he left illegally. On his return to Myanmar, I do not consider there would be any uncertainty about the applicant's identity. The applicant holds a number of Myanmar identity documents, including a CSC and household register. I accept he may not have all of these documents in his possession, but I am satisfied he does have copies, and may be able to obtain the originals from his wife and family in Myanmar.
50. I have accepted he was detained twice by the police in 2003, but I have also found he has no ongoing adverse profile from these incidents. Beyond his illegal departure, the applicant does not appear to have had any other adverse profile with the Myanmar authorities. I am satisfied he has no additional adverse profile.

51. DFAT reports that it is aware of a small number of voluntary returnees entering Myanmar via international airports in 2017 and 2018, but has not received reports of questioning or adverse treatment toward returnees by government officials following their return to Myanmar. Returnees to Myanmar who depart the country illegally are technically subject to up to five years imprisonment for having illegally crossed a border, and DFAT states that it is aware of, but unable to verify, reports of this provision being enforced in recent years.
52. 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. The applicant is not of Rohingya ethnicity, but I have no reason to consider that analysis would not extend to other returnees to Myanmar who are nationals of the country and have a lower ethnic and religious profile. If it were the case, I consider there would be reporting in relation to this.
53. In terms of the applicant's claimed ethnic and religious profile, I have found he would not face a real chance of harm on return to Myanmar. In the absence of advice to the contrary, I consider that assessment would apply to the applicant on arrival and return to Myanmar. I have accepted he departed illegally, but as a citizen of Myanmar, and as a person with no other adverse profile, I am not satisfied there is a real chance he would be subjected to harm or mistreatment on return to Myanmar for reasons of his illegal departure. I have weighed the submissions about DFAT's advice relating to the penalties for illegal departure. I acknowledge that advice is equivocal, but in the absence of verified reporting or data that indicates these provisions are being used and enforced by the authorities, or the profile of persons at risk of these penalties, I am not satisfied there is a real chance the applicant would face any penalty or imprisonment under these laws on his return to Myanmar.
54. I accept that given his time in Australia, the Myanmar authorities would conclude that he sought asylum in Australia. In terms of that profile, I note that even the country's Rohingya population do not appear to have faced penalty or differential treatment for seeking asylum outside of Myanmar. I do not consider there is information before me that would indicate he would face a real chance of harm for having sought asylum in Australia, or that he would be imputed with any adverse profile from having done so.
55. It is apparent that the information about the situation for returnees to Myanmar is limited. However, when considering the available information, and the applicant's low profile, I am not satisfied there is a real chance of the applicant facing serious harm on return to Myanmar, because of his illegal departure, the fact that he sought asylum in Australia, his ethnic and religious background, his past profile, or on the basis of any other related profile.
56. While I am not satisfied the applicant has any ongoing profile from the mosque incidents in 2003, I have accepted he is a religious and ethnic minority, and he left the country illegally. I have accepted he may face official and societal discrimination on return to Myanmar, but it would not constitute serious harm, and there is not a real chance he would otherwise face violence or other serious harm for these reasons. I have found he would not be imputed with any adverse profile from seeking asylum, nor would he face a real chance of harm or penalty for his illegal departure. I consider his actual profile is effectively limited to his ethnic and religious profile, already assessed above. For clarity, I am also not satisfied there is a real chance of the applicant facing harm or serious harm for reasons of his cumulative profile, or that any discrimination or other treatment he may face would constitute serious harm, even when considered in a cumulative sense.

## **Refugee: conclusion**

57. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

## **Complementary protection assessment**

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58. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

## **Real risk of significant harm**

59. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
60. I have accepted the applicant is of Indian (Surati) ethnicity, a Burmese Muslim and a citizen of Myanmar. I have found there is not a real chance he would face violence or similar harm for reasons of his claimed profile. I have found the applicant may face moderate levels of official and societal discrimination for these reasons, but that any discrimination (including official bribery, interference or barriers) he may face because of his profile would not amount to serious harm. I again accept that if the applicant were exposed to official or societal discrimination, it would be challenging and frustrating for him, as I accept it must have been in the past. However, when having regard to the applicant's circumstances, and the country information as assessed above, I am not satisfied the discrimination he may face would involve significant harm as defined, even when considered in totality.
61. I have found above that the applicant would not otherwise face a real chance of harm for the reasons he has claimed, even in terms the applicant's cumulative profile. For the same reasons, and having regard to the same information, I am not satisfied there is a real risk of the applicant facing significant harm for any of these reasons.

## **Complementary protection: conclusion**

62. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

## **Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

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### ***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.