



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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MYANMAR

IAA reference: IAA17/02069

Date and time of decision: 18 October 2017 13:19:00

Denny 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 an 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 stateless Rohingya Muslim from Myanmar. He applied for a protection visa [in] January 2016. A delegate of the Minister refused to grant the visa [in] February 2017.

### 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 applicant made a written submission to the IAA on 11 April 2017. To the extent that the submission contains argument responding to the delegate's decision and reasserts claims and information already before the delegate, I am satisfied it does not constitute new information and I have had regard to those matters.
4. In his submission, the applicant raises a new claim that his family left Myanmar last year and are now living in [Country 1] due to the worsening security situation for Muslims in their home area. This claim was not raised during the visa interview. It is not clear whether this occurred prior to the interview or after, but I accept it is on its face credible personal information and may be relevant to the applicant's claims. Given the recent new information before me about the security situation for Rohingya Muslims in Myanmar, if this claim is accepted, it could inform whether the applicant would be at a chance or risk of harm on return to his home area. I consider there are exceptional circumstances to justify considering this new information.
5. In making this decision I have obtained and had regard to new information, specifically new country information relating to Muslims, ethnic Rohingya, stateless persons, and political expression in Myanmar. The DFAT report cited by the delegate has been superseded by a report published in January 2017. The report relied on by the delegate did not refer to recent developments in the country. Given the reliance by the delegate on the previous report, and the changes in the country, I am satisfied there are exceptional circumstances to justify considering this new information.
6. In the submission, the applicant requests an interview if the IAA is concerned about his claims or credibility. I am satisfied that his submission engages with any concerns the applicant may have had with the delegate's decision and findings, and in support of the applicant's claims. While I have had regard to new information, I do not consider that information is contrary to information relied on by the delegate. Considering all the circumstances, I am not satisfied that an interview is necessary or required.

### Applicant's claims for protection

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7. The applicant's claims can be summarised as follows:
  - He is a stateless Rohingya, born in [City 1] in Burma.
  - He attended [a short duration] of schooling, but his family was poor and he could not afford to attend school beyond that.

- He helped his mother around the house after he left school. His first job was as a driver. He and a friend borrowed a vehicle from an owner. They would drive [around] the city. He worked as a driver until he left his home village following his participation in demonstrations against the government.
- In 2005 his father taken by the Burmese army and forced to [undertake work]. After two years, they heard from a friend that his father had been sent to prison and given a life sentence. They travelled to the area where they believed his father was being held, but they could not find him. The applicant and his family have not seen him since 2005 when he was taken by the Army. They do not know what has happened and believe he has been killed. He fears the same may happen to him. The applicant supported his family from the time his father was taken in 2005.
- In 2007 there was an uprising against the Burmese government. The applicant was involved in a demonstration to call for the release of prisoners and to introduce democracy into the country. They demonstrated for two to three days before the police began to arrest people. The police were dressed as civilians and went from house to house arresting people.
- The applicant's family were scared he would be arrested. The applicant, and later his whole family, travelled down river to hide in a remote village ([Village 1]). They stayed there for about 12 months. The applicant worked as a [occupation] during that time.
- His mother remained fearful he would be in danger from the police, so he escaped with a friend to [Country 2]. His child and then wife later followed him to [Country 2].
- He claims it still very difficult for Rohingya in Myanmar. They are still oppressed by the Burmese. In their town of [City 1] some people have been burned in their houses. He believes it is the government of Myanmar who are deliberately killing Rohingya Muslim people. His mother is fearful of the phones being listened to and she does not say too much on the phone.
- He claims Rohingya are not recognised as Burmese citizens and do not have any legal rights. Rohingya Muslims have no right to education, work, housing, or healthcare. There is racism with no freedom of religion. His siblings have not been able to go to school. He has no rights to own any property in Myanmar. He has no identity so he cannot do anything which requires identity like obtaining a licence or opening a bank account. There are no opportunities for Rohingya. They are not able to open shops. He claims only Hindi, Christian and Buddhist people are allowed to do business. His mother had a shop and it was destroyed by Buddhist Monks. There continues to be violence towards Rohingya and Burmese Muslims throughout Burma.
- There is nowhere in Burma he could live safely with his family. He is Rohingya, Muslim and stateless. People such as him have no identity at all and so cannot live in a new place. They are targeted, hurt and killed throughout Myanmar.

## Refugee assessment

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8. 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

9. 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.
10. The applicant possesses little documentary evidence. He has provided a certified copy of his UNHCR card from [Country 2], which indicates his country of origin is Myanmar.
11. In the record of the arrival/entry interview, the applicant indicated he had a birth certificate and a marriage certificate. He stated that the birth certificate may have been lost, and that he would provide a copy of the marriage certificate. At the visa interview, the applicant said he was not sure about the birth certificate, and that his marriage certificate was a signed piece of paper, not an official document issued by the government. No additional documents have been provided. I accept his UNHCR card as some evidence of his identity, as did the delegate. I do not accept his submission that the delegate accepted the applicant was accepted as a refugee in [Country 2]. The delegate made no such finding and it would have no bearing on this assessment had he done so.
12. The applicant spoke through Burmese interpreters in his interviews before the delegate and other Departmental officers. He did not appear to have any difficulty communicating in the language. The applicant appeared to have knowledge of the geography of Myanmar, and discussed a range of towns and cities he had worked in or travelled to, including those which he passed through in travelling to [Country 1] and [Country 2].
13. While the applicant claims to be from Myanmar, there is some question as to whether he claims to be stateless or Rohingya, which I consider further below. However, regardless of the outcome of that assessment, I am satisfied that Myanmar is the applicant's receiving country for the purpose of this review. I am also satisfied the applicant has no right to enter or reside in [Country 2]. While I accept he faced hardship in [Country 2], as I do not accept he could return there, I have not considered those claims further.
14. In the record of his arrival/entry interview, the applicant indicated he was a Burmese citizen/national. In his visa application, which included a statement from October 2013, the applicant claimed to be a stateless Rohingya Muslim from Myanmar. He did not resile from those claims in his additional statement from January 2016. The applicant indicated during the November 2016 visa interview that his father was a Rohingya Muslim and that his mother was a Myanmar Muslim. He did not know his mother's ethnic group, and he did not know his father's citizenship or where his father was born, as they never talked about it. When asked

how he knew his father was Rohingya, he explained that his mother told him, and that his father spoke Rohingya as well as Burmese.

15. The applicant said that he did not speak the Rohingya language. When asked why not, he said that his family speak Burmese, as it is his mother's language. He did not know how his mother and father met. When asked how they married given his father was Rohingya, he said he did not know.
16. The delegate asked the applicant what his citizenship status was. The applicant said that as he was born in Myanmar, he is a Myanmar citizen, but he did not have documentation. The delegate asked him why he stated in his protection visa application that he was stateless. The applicant said that when he arrived here he did not have any proof, so they (the Department) listed him as stateless.
17. The delegate corrected the applicant and noted that during the arrival/entry interview he indicated he was a citizen of Burma (Myanmar), and that he himself had claimed in his protection visa that he was stateless. The applicant said that he was born in Burma, and had come from Burma, but he did not have any rights or citizenship, and when he came here he was helpless, and he did not have anything to prove his citizenship. The delegate asked him to confirm that because he did not have documents, he thought he was stateless. He asked the applicant if this was correct. The applicant said yes. In his written submission to the IAA, the applicant again contended that he was stateless.
18. I have some concerns as to whether the applicant fully understood the questions being asked by the delegate about his citizenship status in Myanmar. Nevertheless, there are a range of factors that indicate to me that the applicant is not stateless or Rohingya as claimed.
19. According to DFAT, the Government of Myanmar recognises eight major ethnic groups (the Kachin, Kayah/Karenni, Kayin/Karen, Chin, Bamar, Mon, Rakhine and Shan) as part of 135 'national races'. The law grants full citizenship to members of the 135 officially-recognised national races. Under the Burma Citizenship Law 1982, an ethnic group must have been present 'in any of the territories included within the State' continuously since 1823 for its members to be entitled to full citizenship. The law restricts members of other groups from full citizenship. Proof of citizenship is usually required to access government services. The Constitution recognises those national races with greater than 0.1 per cent of the national population ('National races with suitable population') by allocating seats in state and regional parliaments to members of these groups. The law restricts members of other groups from full citizenship. Proof of citizenship is usually required to access government services.<sup>1</sup> Contrary to the delegate's statement at the interview, by law citizenship is derived through parents, both of whom must be one of the 135 officially recognized "national races".<sup>2</sup>
20. The Muslim population who identify as Rohingya are not among the 135 recognised ethnic groups. The vast majority of Rohingya are Sunni Muslim, and almost all live in Rakhine State (formerly known as Arakan State). DFAT assesses that official and societal discrimination against Rohingya in Rakhine State, on the basis of their ethnicity, is endemic. They lack citizenship, face severe restrictions on their freedom of movement and are the subject of systematic extortion and harassment. These issues combine to restrict this community's access to livelihoods and to essential services such as education and healthcare. While movement restrictions imposed on Rohingya have reduced the opportunities for societal violence

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Myanmar", 10 January 2017, CISEDB50AD28. Refer also DFAT, "Burma Country Report June 2015", 9 June 2015, CISEC96CF11084.

<sup>2</sup> US Department of State, "Burma - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C9028.

between Muslims and Buddhists, DFAT assesses that high levels of religious and ethnic tensions remain, and there is a high risk of further violence for this group. This is exacerbated by the recent emergence of an armed Muslim group in Rakhine, with alleged links to international jihadist groups. Violence in Rakhine State has potential to inflame existing religious tensions between Muslim and Buddhist communities in other parts of the country.<sup>3</sup>

21. There are a number of Rohingya people living outside of Rakhine State, particularly in the capital of Yangon (Rangoon). The size of the Rohingya population in Myanmar outside Rakhine State is unclear, as these people generally do not publicise their ethnicity. Rohingya outside Rakhine State typically 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. DFAT assesses that those Rohingya outside Rakhine State experience moderate levels of societal discrimination on a day-to-day basis.<sup>4</sup>
22. In addition to the Rohingya, persons of Indian, Chinese, Anglo-Burmese or Nepali descent are also not among the 135 recognised ethnic groups. The formal restrictions on people who do not hold full citizenship are broad. Officially, they are unable to access state-funded healthcare and education services, although in practice, those with the ability to pay can often secure access to these services. They typically cannot work for state, regional or central governments.<sup>5</sup> DFAT assesses that people in Myanmar, other than those who identify as Rohingya, typically face a low level of official and societal discrimination on the basis of their race or ethnicity. One formal barrier that does exist relates to election to state or regional government. Aside from this form of discrimination, instances of official discrimination on the basis of ethnicity against people recognised as citizens are rare.<sup>6</sup>
23. The first factor which indicates to me that the applicant was not stateless or Rohingya was his early schooling. The applicant attended a government school for at least two years. I accept that the country information also indicates that his parents could have paid to enter him into school (if he was stateless or undocumented) but his evidence is that they were a family of limited means – his father was a [occupation]. In that context, I do not accept they could have paid for the applicant to attend a government school, even if for a brief period, if he was undocumented. This factor suggests to me that the applicant had some form of citizenship and/or formal registration with the authorities.
24. Other relevant factors for me are the applicant's claim to lack documentation, his occupation and movement within the country. The applicant claimed to have no identification documents, no licence and he was not sure whether his family had a household register. He also claimed to have worked as a driver for over two years. The applicant also indicated that he had travelled extensively as a driver, and he had travelled between Rangoon (Yangon) and [City 1] previously.
25. According to information before me, Rohingya could obtain birth certificates for children from 1955 to 2005, and household lists from 1955 to 2005. The absence of a household list significantly restricts a person's movement.<sup>7</sup> Household registration is also required to obtain

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<sup>3</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>4</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>5</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>6</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>7</sup> T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016, CIS38A80121535.

identification documentation and to gain access to services such as electricity and water.<sup>8</sup> According to DFAT, it is rare for a citizen of Myanmar who is resident in the country to not be registered on a household list. If a person is found to be unregistered, the penalty is a maximum of seven days in detention at the police station, during which time the person must prove they belong to a household and have the head of the household come to register them on their household list.<sup>9</sup> There is also evidence of restriction on the movements of ethnic minorities, including Rohingya, and checkpoints exist in the country.<sup>10</sup>

26. The applicant was born in the [a certain decade]. Even if he was stateless or of Rohingya ethnicity, there would have been no formal barriers to his birth being registered, or his family applying for and holding a household certificate. This would apply equally to his own family, including his wife and child. As there were no barriers to him or his family holding these documents at the time, I find his evidence that he did not know if he had a family register to be concerning – particularly given the significance of the register in Myanmar society. I also find his ability to work and travel as a driver, which would necessarily have raised the potential for him to be stopped at checkpoints or otherwise questioned by the authorities, to be a significant indicator that he was in fact documented. Had the applicant been undocumented, I do not accept he would have been able to travel and work in Myanmar without facing scrutiny or penalty, or later being required to formalise or regularise his status. I find his evidence that his family lacked identification documents of any kind to be implausible and unsupported on the country information before me. Particularly so given he claimed not to live or work in Rakhine State.
27. The applicant's evidence about his family's background was also unsatisfactory. The applicant did not speak the Rohingya language, nor did his mother. He appeared to know very little about his father's situation, other than his claim that he was a Rohingya. It is of course not implausible that individual families may not discuss their histories, such as marriage or places of origin, particularly if there are difficulties or trauma associated with those histories. However, I find the applicant's inability to state even in general terms the ethnicity of his mother, or any specific details about his father, to undermine his claims that the applicant is stateless of Rohingya.
28. I find the applicant's mother is a citizen of Myanmar. While the applicant was unable to specify her ethnicity, the applicant did not claim in the end that she was Rohingya, or that she was a member of an ethnic group that was ineligible for citizenship. I also find that she was not barred from holding documentation or registering a household list. I have found the applicant's evidence in this regard to be implausible and unsupported on the country information before me. As I am satisfied the applicant's family could have held a household register, his inability or refusal to give evidence that they held such a document, or provide that evidence, raises a serious question as to whether he is seeking to withhold that information because it would not support his claims that he is stateless, or that his father is a Rohingya.
29. Given the above, and also his lack of detail about his father's ethnic background, I am not satisfied the applicant's father is Rohingya, or stateless as claimed. I find instead that his father is a citizen of Myanmar, and the applicant has sought to conceal this to strengthen his protection claims.

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<sup>8</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>9</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>10</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28; US Department of State, "Burma - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C9028; T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016, CIS38A80121535.

30. As I am satisfied that both his parents are citizens, I find the applicant is also a citizen of Myanmar, notwithstanding that he does not hold a passport, or have any other identification documents in his possession. The applicant's ethnic background is unclear. I am satisfied he is not from the Bamar (Burmese) ethnic majority, but I am also satisfied on the information before me that the applicant is not from an ethnic group that is prevented from holding citizenship in the country.
31. As I do not accept he is stateless or a Rohingya, I do not accept his claims that he has no right to an education, work, housing, or healthcare. I do not accept that his siblings have been unable to go to school, or that he or his family were denied property rights. I also do not accept he has no identity or that he cannot do anything which requires identity documents like obtaining a licence, opening a bank account, or owning a business. In this regard, I also note his claim that his mother had a small shop, which would appear to contradict any claim that they are prevented from doing so. I note that the applicant's family has worked in [a certain industry] in the past, that he had some schooling, and that he worked in transportation and later [another occupation] prior to leaving for [Country 2].
32. Weighing everything before me, I find that there is no chance of the applicant being seriously harmed on the basis that he is a Rohingya, or that he is stateless or undocumented. Based on the country information above, I accept there is a level of social and official discrimination on the basis of race and ethnicity, but find that it is low level and rare. I accept any discrimination he may face on the basis of his ethnic group would be a frustration and difficult to tolerate, but as I have found he is not a Rohingya, I am not satisfied it would threaten his capacity to find employment, that he would be denied access to basic services, that it would threaten his ability to subsist or earn a livelihood in the country, or that it would involve harassment or other harm that would separately or cumulatively amount to serious harm.
33. While I have rejected the applicant's claims to be Rohingya or stateless, I consider his evidence about his religious background has been consistent. He was able to describe his Sunni faith in general terms, indicating that he continues to attend mosque sometimes. I accept the applicant is a Sunni Muslim and that he occasionally attends mosque, and would continue to do so should he return to Myanmar.
34. The applicant's claims to fear harm on the basis of his religion are interwoven with his claims to fear harm as a Rohingya, which I have not accepted. The applicant claims that there is no freedom of religion in Myanmar. He claims Burmese Muslims have no right to education, work, housing, or healthcare. As above, he claims his siblings have not been able to go to school. He has no rights to own any property in Burma. He claims Muslims are not permitted to open shops. Only Hindi, Christian and Buddhist people are allowed to do business. His mother had a shop and it was destroyed by Buddhist Monks. There continues to be violence towards Burmese Muslims throughout Burma.
35. The applicant claims that his mother's shop may have been burned down in the context of such tensions, but as he stated during the interview, he also did not know who burned her shop. Given the lack of detail surrounding that claim, I am not satisfied his mother was targeted (if indeed it was not accidental) for reasons of her religion or otherwise. While the applicant claimed during the entry interview that 'the police usually interrogated him for being a Muslim', he did not express these claims in his written statement or during the visa interview. In his application, he has not otherwise claimed to have experienced adverse treatment on the basis of his background as a Muslim. Given the lack of any further detail or context, I do not accept his earlier claim that the police interrogated him in the past for being a Muslim.

36. In his submission to the IAA, the applicant raised a new claim that his family had left their village and travelled to [Country 1] due to an incident that happened between the Muslim people and a non-Muslim group. He claimed that a group of Buddhist people were harassing the Muslims and it no longer was safe. He claimed that in [City 1], there are only a small number of Muslims left.
37. The applicant's claim was raised late in this process. The applicant was interviewed [in] November 2016, and the delegate made his decision [in] February 2017. If the applicant's family had left [City 1] in 2016 as he claims, he did not provide that information to the delegate during the visa interview or before the decision was made in February 2017. While it is possible that his family left Myanmar after the visa interview, i.e. in December 2016, I find it difficult to accept there would not have been indications to the applicant from his family about this or their intentions to leave Myanmar prior to this. I acknowledge his claim that his mother was reluctant to provide details over the phone, but note the threat in this instance was from non-Muslim Buddhist groups, not the government. I find it implausible that she would not have advised the applicant in general terms about her concerns, or that he would not have been told that the situation in his home village had become perilous from his other siblings. In fact, the opposite occurred. At the interview, he expressly stated that his family remains in his home village and that the problems had not reached that place.
38. While it is not implausible that the situation in his home village changed, I also consider his claims in this regard to have been vague and unspecific. He did not provide specific details about these claims, or explain why the situation was so tenuous that his family needed to leave the country altogether, rather than travelling to a safer area like [Village 1], as they had in the past.
39. In weighing this claim, I also note the delegate placed adverse weight on the fact that his family members continue to live in their home village in Myanmar unhindered, both in a general sense and in the assessment of whether the applicant had an ongoing profile from his involvement in the 2007 protest. In that context, I consider his late claim that his family has left the area could be intended to overcome that weakness in his claims.
40. Looking to all the circumstances, I have concerns about the genuineness of this late claim. I consider it is lacking in detail, and appears to have been contrived to strengthen his claims to protection. I also consider that if the claim was genuine it would have been raised at an earlier point, at least in some respect. It follows that I do not accept this late claim. I am not satisfied the situation for Muslims in his home village and [City 1] has deteriorated, or that his family has left their home area for [Country 1] because of that situation.
41. According to DFAT, Muslims live throughout Myanmar. In addition to the Muslim Rohingya in Rakhine State, there is a much smaller number of non-Rohingya Muslims in Rakhine State and across the rest of the country. Anti-Muslim sentiment in Myanmar is widespread and entrenched, especially outside of major cities.<sup>11</sup>
42. Under Myanmar's Constitution, all citizens of Myanmar are entitled to 'freedom of conscience and the right to freely profess and practice religion subject to public order, morality or health'. DFAT notes that some Muslims outside of Rakhine State belong to ethnic groups that are among those recognised under the Constitution. These groups do not face significant restrictions on access to citizenship, and therefore enjoy a greater level of formal legal protection from discrimination. There are currently no legal barriers to government

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<sup>11</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

employment for non-Buddhist citizens in Myanmar. Muslims outside of Rakhine State can generally access a similar level of government services to other ethnic groups. While there are credible reports of authorities discriminating against people from Muslim groups, DFAT assesses that these incidents represent informal, societal discrimination by mostly Bamar public officials and do not represent official government policy. DFAT assesses that Muslims outside of Rakhine state experience moderate levels of societal discrimination and low levels of official discrimination.<sup>12</sup>

43. In early 2013, a dispute between a female Muslim shopkeeper and a female Buddhist customer in Meiktila escalated into mob violence when rumours spread that the customer had been beaten to death. Community sentiments were further inflamed following the subsequent, possibly unrelated, murder of a Buddhist monk by a Muslim man, which led to two further days of rioting involving more than 1,000 people. Forty-four people reportedly died in the violence, both Muslims and Buddhists.<sup>13</sup>
44. While there have been serious instances of societal violence between Muslims and Buddhists, DFAT advises that these incidents do not occur in every town with a Muslim population in Myanmar, nor do these incidents occur on a regular basis. DFAT states that it has been advised by credible sources that Muslim and Buddhist communities that are mutually dependent for trade and other livelihood purposes generally live together without violence. Muslim communities in major cities also generally live peacefully. DFAT further assesses that Muslims outside of Rakhine state face a low risk of societal violence on a day-to-day basis.<sup>14</sup>
45. I accept the country information before me indicates a level of societal tension and discrimination between Muslims, and that violence can occur between different religious groups in the country. The evidence before me is that many Muslims, principally Rohingya, have faced serious discrimination and serious harm throughout Myanmar's history. The evidence before me also indicates that Burmese Muslims outside of Rakhine state experience moderate levels of societal discrimination and low levels of official discrimination. And that Muslims outside of Rakhine state face a low risk of societal violence on a day-to-day basis. Further, Muslims outside of Rakhine State that belong to ethnic groups that are among those recognised under the Constitution do not face significant restrictions on access to citizenship, and therefore enjoy a greater level of formal legal protection from discrimination.
46. Given the country information before me, I accept the applicant would face a moderate level of societal discrimination and low levels of official discrimination on the basis of religion. However, I also note that as a citizen he would possess a greater level of formal legal protection from discrimination, in contrast to the situation faced by Muslims in the country that lack citizenship or documentation. In this regard, I give weight to the fact that his mother owned a small shop in the past, that his birth was registered, that the applicant was able to access some primary schooling, and that he travelled and worked in transportation and [another occupation] prior to leaving for [Country 2].
47. I accept any discrimination he may face would be difficult and a frustration, but I am not satisfied it would threaten his capacity to find employment, that he would be denied access to basic services, that it would threaten his ability to subsist or earn a livelihood in the country, that he would be prevented from practising his faith, or that it would involve harassment or other harm that would constitute serious harm. I also consider the likelihood that the applicant

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<sup>12</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>13</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>14</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

would be involved in, or a victim of violence or serious harm on the basis of his religion, to be remote.

48. In a cumulative sense, I also consider that any discrimination he may face on the basis of his religion and ethnic background would not constitute serious harm, or that there is any real chance of him facing serious harm on the basis of that cumulative profile. The information before me indicates that discrimination is at low and moderate levels, may involve positive discrimination (e.g. giving preference to the Bamar and Buddhist majorities over other groups), would not involve physical harm, that he would have some protections from discrimination as a citizen, that it would not prevent the applicant from finding work (or opening a business), accommodation or access to services, or otherwise amount to serious harm. In terms of other physical harm, I consider the prospect of the applicant being seriously harmed on the basis of his cumulative religious or ethnic profile is also remote.
49. It follows that I am satisfied there is no real chance of the applicant being seriously harmed by the Myanmar Government, Burmese Buddhists, or any other group or person for reasons of his religion, his ethnicity, his citizenship or documentation status, or any other related profile, including in any cumulative sense, if he were to return to Myanmar in the reasonably foreseeable future.
50. Beyond his religion and ethnic background, the applicant claimed to fear harm following his involvement in a political protest in 2007. In his entry interview, the applicant claimed to have been involved in a demonstration because Aung San Suu Kyi had been detained, as well as his father. He explained the military had tried to arrest him so he fled with the help of his friends who gave him the financial assistance to flee and travel to [Country 2].
51. In his written statement, he claimed that in 2007 there was an uprising in Burma against the Government. He was involved in a demonstration calling for the release of prisoners and to introduce some democracy into the country. They demonstrated for 2 to 3 days and then the police started to arrest people, going door to door. The applicant was fearful and he fled to a remote Rohingya village called [Village 1]. His family later also travelled to [Village 1]. The applicant left in 2009, to travel to [Country 2]. His family then returned to [City 1].
52. The applicant was asked at the interview about his participation in the 2007 protests. He said there was a crisis all around the country, so they participated in activities and movement (against the government). The army arrested the people who were against them. He was one of people involved in the activities, but he ran away. The delegate asked to clarify what activities. He said they boycotted and demonstrated against the government and the army.
53. He said they demanded the release of prisoners who had been arrested, and to reduce rates for business. He said the protestors were local people, around [number] people. He confirmed he was not involved in heading or organising the protest, and that he just participated. No one from his family participated as they were at home in their village. The applicant said he was in an office in [City 1] when the demonstration happened, so he just went along. When asked what he did during the protest, he said they shouted slogans about releasing prisoners and lowering the rates. He was asked how long he was shouting the slogans for, he said for around half an hour. After that, the people continued to protest. The delegate asked what he did after he stayed back, he said he went back home. He claims that the next morning the authorities were searching for people who participated in the demonstration, so he ran away.

54. He confirmed the authorities came to his home and asked for him by name. Sometime later his mother told him not to come back home. He then fled to [Village 1], later with his family. He stayed there for about two years.
55. At the interview, the applicant was asked what the protest was called. He said he did not know.
56. When asked to explain why his family could live in Myanmar without problems, the applicant speculated that the problems had not yet reached that place (his village). He said the main problem is happening in [City 1]. He claimed that because his family are living in a small village, actually they were living in hiding. As above, I have not accepted the applicant's late claim that his family has since left the village and Myanmar. I also do not accept his claim that they are living in hiding. Were there any continuing reason to stay in hiding, I consider they would have returned to [Village 1]. I find the fact that they stayed in their village indicates there is no ongoing risk to them.
57. The applicant has been broadly consistent about his participation in a protest, but his evidence on that matter has not been consistent. In his written statement he claimed they demonstrated for two to three days. In the interview, he claimed that he was visiting an office in [City 1] Township when the demonstration started, and he joined along. He claimed he shouted slogans for around half an hour, and remained there for a while before returning home. During the visa interview it became apparent that his involvement was far shorter and more opportunistic than he claimed in his written statement.
58. In the circumstances, I am prepared to accept the applicant participated in a protest in 2007. I accept the protest centred on people in detention and the cost of government rates. The applicant did not lead or organise the protest, rather his involvement was opportunistic, coinciding with his attendance at an office in [City 1]. I find his attendance at the protest was brief. I give weight to the fact that the applicant did not claim the protest was violent.
59. The applicant claims that the authorities attended his home and questioned his mother about his whereabouts the next day. It is not clear to me how the applicant, who was from a village around [a distance] out of [City 1], would have been so quickly and so easily identified by the police, but it is possible that the authorities could have determined that he was involved through other attendees and may have sought to question him.
60. According to the US Department of State, the Myanmar authorities have arrested, detained, convicted, and imprisoned citizens for expressing political opinions critical of the government, generally under the charges of protesting without a permit. Some participants have faced lengthy delays and myriad court hearings in seeking a verdict in relation to such charges. As one example, following a peaceful protest in September 2012 in commemoration of the International Day of Peace, the government charged event organiser and member of the Kachin Peace Network, May Sabe Phyu, with violating section 18 in six townships. As of mid-November, Phyu had attended more than 130 court hearings without a verdict. However, the US State Department also advises that many individuals reported far greater freedom of speech and expression than in previous years. While freedom of speech was expanding, some people remained wary of speaking openly about politically sensitive topics, due to monitoring and harassment by security services of persons believed to hold anti-government opinions.<sup>15</sup>
61. DFAT advised in 2017 that the establishment of the civilian government in Myanmar in 2011 led to the removal of several restrictions around political commentary and freedom of speech.

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<sup>15</sup> US Department of State, "Burma - Country Reports on Human Rights Practices 2013", 27 February 2014, OG1F18C9028.

Many former political prisoners and exiled activists are now politically active; around 115 NLD members of parliament elected in 2015 are former political prisoners. The NLD government has a policy to release all political prisoners, and has pardoned scores of political prisoners since taking power in March 2016.<sup>16</sup>

62. DFAT assesses that in the course of normal events, Myanmar citizens face a low risk of official or societal harassment, discrimination, violence or imprisonment on the basis of their actual or imputed political opinion. People who actively participate in public protests against the government or the military face a moderate risk of being arrested and detained.<sup>17</sup>
63. The applicant's participation in the protest in 2007 was short in duration, low level and opportunistic. It is plausible that the police visited his home and may have sought to question him on his participation in the event. I accept that may have been enough of a catalyst for the applicant to travel to [Village 1] to avoid any confrontation with the authorities. However, I find it significant that his family returned to his home area in 2008/2009, and these issues did not re-enliven or cause them any concerns. I consider this is due to a range of factors, including the low level nature of his involvement, the effluxion of time, and the loosening of restrictions on political speech in the country.
64. I am satisfied that whatever profile the applicant had from his limited involvement in the 2007 protests is no longer extant. I consider his profile has devolved and the authorities have no active interest in him. I consider the chance or risk of the applicant facing any investigation or other harm from his involvement in the 2007 protest is remote.
65. The applicant only claimed to have once been politically active, but given his past experiences (notably the disappearance of his father), I accept he may be politically active or outspoken in the future. However, I consider any such involvement would be low level, infrequent and peaceful, as it has been in the past. I also do not consider he would take any active role in his political opinion, such as in organising others.
66. In view of those findings, and the country information before me, I find there is no real chance of the applicant being seriously harmed on the basis of his actual or imputed political opinion, or his past or future political profile, including his involvement in the 2007 protest.
67. I have also considered whether the applicant would face a real chance of serious harm in connection with his father's disappearance in 2005. The applicant has been broadly consistent since his entry interview that his father was abducted/held by the Burmese Army between 2005 and 2007 and forced to [work]. He has also been detailed about the steps he and his family took to identify the whereabouts of his father, and the information they have received which indicates he is now deceased.
68. Officially, there is no military conscription and all service personnel are considered volunteers in Burma. However, according to DFAT, credible sources indicate that some personnel are pressed into service to avoid possible criminal convictions or to escape poverty. There are reports of the forced labour of adults and children, particularly in conflict-affected areas, though the numbers have considerably decreased. DFAT also states that Myanmar has taken significant steps to eliminate forced labour, including by establishing a complaints mechanism and joint action plan with the International Labour Organization. However, there remain credible reports that the Burmese Army (Tatmadaw) and other ethnic armed organisations

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<sup>16</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>17</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

continue to force civilians, including children, to work as porters, guides, messengers and domestic servants particularly in conflict zones.<sup>18</sup>

69. Given the country information before me, and in view of the applicant's consistent evidence, I accept that in 2005 the applicant's father was forced to labour for the Tatmadaw. I accept that he has not been seen since and his family hold grave fears that he has died or been killed. I accept that his father can be presumed dead given the time that has passed.
70. The applicant claimed that he fears the same thing may happen to him. The applicant is not from a conflict zone. His evidence was that [details of City 1], and he lived in a small township [a distance from] Rangoon (Yangon) that has yet to face any issues. I accept there has been widespread conflict in Myanmar in the past, but the political landscape has changed considerably since the applicant left the country.<sup>19</sup> While there remains evidence of significant security concerns in parts of Myanmar, notably in Rakhine State, I am not satisfied that the security situation in his home area in [City 1] is one that would put him at a real chance or risk of forced labour or other serious harm for any of the reasons claimed.
71. I am not satisfied that the applicant himself faces any real chance or risk of being forcibly conscripted or otherwise forced to labour for the Burmese Army or any other forces, nor do I consider there is any real chance of the applicant being seriously harmed in connection with his father's past forced labour and disappearance, or on the basis of any other profile he may hold.

#### **Refugee: conclusion**

72. In summary, I accept he may face some discrimination on the basis of his religious and ethnic background, but I am not satisfied it would constitute serious harm. I am also satisfied there is no real chance of the applicant facing serious harm on the basis of his religion, ethnicity, statelessness or because he lacks documentation. I am further satisfied there is no real chance of the applicant being seriously harmed for reasons of his actual or imputed political opinion, or past or future political profile, including his involvement in the 2007 protest. Finally, I am satisfied there is no real chance of the applicant being seriously harmed in terms of conscription or forced labour for the Burmese Army or any other forces, as am I satisfied there is no real chance of the applicant being seriously harmed in connection with his father's past forced labour and disappearance, or any related profile.
73. 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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74. 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.

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<sup>18</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

<sup>19</sup> DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28; Htet Khaung Linn, "Myanmar to embark on a new chapter as parliament convenes", Myanmar Now, 29 January 2016, CX6A26A6E649.

## Real risk of significant harm

75. 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.

76. I have accepted the applicant may face low or moderate levels of official or societal discrimination on the basis of his religious and ethnic profile. I have also found that any discrimination he may face on the basis of this profile would not amount to serious harm. As noted above, the information before me indicates that discrimination is at low and moderate levels, may involve positive discrimination (e.g. giving preference to the Bamar and Buddhist majorities), would not involve physical harm, that he would not be denied the ability to practise his faith, that he would have some protections from discrimination as a citizen, and any discrimination would not prevent the applicant from finding work, accommodation or access to services, or involve serious physical or other harassment.

77. While I accept that if the applicant were exposed to low or moderate levels of societal or official discrimination it would be challenging and frustrating for him, I do not accept it would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. Having regard to the applicant's circumstances and the prevailing country information, I also do not accept that such discrimination would involve pain or suffering that is cruel or inhuman in nature, or severe pain or suffering or would be intended to cause extreme humiliation, even in a cumulative sense. It follows that I do not accept that any discrimination he may experience would constitute significant harm.

78. Beyond the issue of discrimination, I have found above there is no real chance of the applicant facing serious harm on the basis of his religion, ethnicity, statelessness or because he lacks documentation. I have also found there is no real chance of the applicant being seriously harmed for reasons of his actual or imputed political opinion, or past or future political profile, including his involvement in the 2007 protest. Finally, I have found there is no real chance of the applicant being seriously harmed in terms of conscription or forced to labour for the Burmese Army or any other forces, as am I satisfied there is no real chance of the applicant being seriously harmed in connection with his father's past forced labour and disappearance, or on the basis of any other related profile. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Myanmar, the applicant will face a real risk of significant harm.

## Complementary protection: conclusion

79. 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**

...

**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.