



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA17/02237

Date and time of decision: 26 October 2017 16:14:00
Denny Hughes, Reviewer

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

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

Visa application

1. The referred applicant (the applicant) claims to be a stateless Muslim from Myanmar. He applied for a protection visa [in] August 2016. A delegate of the Minister refused to grant the visa [in] March 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's representative provided one submission to the IAA dated 16 March 2017. The submission included a 5 page legal submission from the representative, a two page statutory declaration from the applicant, and a letter of support from [Organisation 1], dated [in] March 2017.
4. To the extent that the submission and the statutory declaration 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.
5. The declaration contains some minor points of clarification in relation to the applicant's claims. I am also satisfied this is not new information. In the event that I am wrong, I consider this is credible personal information that was not previously known, and had it been known, may have affected the consideration of the applicant's claims. The applicant was not represented during the interview, and aspects of the delegate's findings were not canvassed during the interview itself. I consider in those circumstances, some clarification of his claims, facts which are also consistent with his earlier claims, is understandable and necessary. I am satisfied there are exceptional circumstances to justify consideration of this new information, if indeed it is new information.
6. In terms of the statutory declaration from [Organisation 1], I am satisfied this is new credible personal information that was not previously known, and may have affected the consideration of the applicant's claims. While the description of the methodology employed in the letter is general, I consider it provides a level of support for his identity and ethnic background. On balance, I consider there are exceptional circumstances to justify consideration of the new information.
7. The representative has contended in the submission that the IAA should invite the applicant to an interview, due to unreasonable procedure at the visa interview, or if the IAA has concerns about the applicant's credibility. I am satisfied that the submissions engage with the concerns the applicant may have had with the delegate's findings or procedure, and responds to the issue of the applicant's credibility. I have weighed those considerations in my assessment, but I am not satisfied that an interview is necessary or required.

Refugee assessment

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. In the record of his bio-interview, dated [in] September 2012, the applicant claimed that he was from Arakan Province in Burma. He claimed to be a Rohingya Muslim. He said he was stateless and has no identity documents. In the record of his arrival/entry interview, dated [in] November 2012, the applicant spoke through a Rohingya interpreter. He again claimed to be a stateless Rohingya Muslim from Arakan State. The applicant also spoke through a Rohingya interpreter at the visa interview in February 2017. The interpreter and applicant confirmed they had no difficulty understanding each other.
11. The applicant has been unable to provide documentary evidence of his identity from Myanmar. He has provided a copy of his UNHCR card, issued in 2012, which indicates his country of origin is Myanmar. The applicant spoke through a Rohingya interpreter in his visa interview before the delegate. He did not appear to have any difficulty communicating in the language. The applicant appeared to have knowledge of his home area of Myanmar, including local geography.
12. While the applicant claims to be from Myanmar, one of the issues before me is whether he is stateless or ethnically Rohingya as he claims, which I consider further below. Regardless of the outcome of that assessment, I am satisfied on the basis of his consistent oral evidence that Myanmar is the applicant’s receiving country for the purpose of this review.
13. At the visa interview, the applicant confirmed he was from [Village 1], near Sittwe in Rakhine State. The delegate asked him if it was known by any other names. The applicant said there was not. The delegate asked him what the Rohingya name is for his village. The applicant indicated that it was [name of Village 1]. The delegate put to him that country information states that [Village 1] is also known as [another name].¹ He was asked if he heard of [the other name]. He confirmed he had not.

¹[Source deleted.]

14. The applicant was asked a range of questions about his village and its surrounds. He was able to answer the delegate's questions freely. He was able to orientate his village to the ocean, and the Sittwe Airport. He provided names of nearby villages, and the famous Pagoda (Lawkananda), the mosque and the local beach (Point Beach). When questioned, he was unable to name any local university.
15. The delegate expressed some concern about the fact that he did not know any of the local universities, and was unaware of the alternative [name] for his area. The delegate concluded that it was likely that the applicant prepared himself regarding the geographical knowledge of Sittwe in advance for the purpose of strengthening his visa application.
16. The applicant completed school until year [grade], and on the country information before me, it appears he would have been prevented from attending university given his claimed ethnic background. In that context, I consider his lack of familiarity with tertiary schools in his home area is unremarkable.
17. In the submission, and in the statutory declaration, the applicant claimed he had very little positive interaction with Burmese non-Rohingya people in his area therefore he was not familiar with a word used by 'old Burmese people' to describe an area near where he lived. The representative further noted, and this is reflected in the statutory declaration, that this may have been an issue of pronunciation. In his statutory declaration, the applicant stated that he did not know the [alternative name] but he did recall hearing the word '[name]' (emphasis mine) and, very rarely, old Burmese people referring to the village by that name. The delegate mentioned the name '[other name of Village 1]' briefly during the visa interview. It is unclear whether the delegate used the correct pronunciation of the Burmese name for this area. Moreover, it was interpreted in the Rohingya language. I consider there was a considerable margin for error in this regard, and I find the applicant's explanation persuasive. I do not give any weight to the fact that the applicant was unfamiliar with the Burmese name for his village.
18. Other than his lack of knowledge about local universities, and the [alternative name], there was very little to indicate that the applicant was not familiar with [Village 1] or the greater Sittwe area. He freely responded to the delegate's questions about the local geography. I found his evidence persuasive, and I am satisfied the applicant is from [Village 1] in Rakhine State as he claims.
19. At the visa interview, the applicant was asked whether he had a Burmese name. He confirmed he did not. The delegate put to him that as he claimed to have attended school, the usual practice was to register with a Burmese name. The applicant again stated that he did not have a Burmese name.
20. The delegate found that most Rohingya generally keep two names; one a Muslim name and the other a Burmese name. The delegate concluded that as the applicant did not have a Burmese name, this indicated that he did not face discrimination in Myanmar and therefore did not choose to have a Burmese name. On that basis, he concluded that he was not satisfied the applicant's ethnicity was Rohingya or that he faced discrimination because of being a Rohingya.
21. In his statement to IAA, the applicant reiterated that not all Rohingya people in Rakhine state have a Burmese name. He states that he knows many Rohingya people who do not have a Burmese name in Arakan/Rakhine State. Citing the same country information as the delegate, the representative contends that while most Rohingya people have a Burmese name within

their full name, country information suggests that there are those who do not have Burmese names.

22. While I acknowledge the country information relied on by the delegate about naming traditions among the Rohingya people,² I agree with the submission that information is not absolute in its terms. In that context, I consider it plausible that the applicant was only given a Rohingya name.³ I also do not agree with the delegate's conclusion that this confirms he did not face discrimination or proves he is not a Rohingya.
23. The applicant claimed not to have a household register (family list), which is a very common form of official identification in Myanmar. During the interview, he said that his family had such a list when he was young, but there was a cyclone and water came (flood) and their things were lost. The delegate indicated the applicant should seek a copy or confirmation of the status of his household register from his parents after the interview. No such copy was provided, but the applicant confirmed through his mother that it had been lost during a flood.
24. According to information before me, persons of Rohingya ethnicity could obtain birth certificates for children from 1955 to 2005, and household lists from 1955 to 2005.⁴ Advice from DFAT is that 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' detention at the police station, during which time the person must prove they belong to a household and/or have the head of the household come to register them on their household list. It is unclear what would happen if a person were not claimed by a household head, and DFAT indicated it did not have any information on how often or how consistently penalties for incorrect registration are applied. While 'spot checks' to monitor people's movements still take place, in recent years these have occurred less frequently than in the past. The delegate referred to the same information, as well as a 2004 report from Amnesty International that notes that 'inclusion on a family list is crucial to the Rohingya's ability to prove residency.'⁵
25. On the basis of the information about the importance of having a family list in Myanmar, the delegate was not satisfied that the applicant's family members could continue living in Myanmar without a family registration list. He was therefore not satisfied that the applicant was telling the truth.
26. In the submission, the representative argues that the delegate selectively references the sources in the decision to suggest it is the rarest occurrence to be Rohingya and not have a household register list. She also expressed concern that the delegate did not give the applicant an opportunity to respond to the finding that his family did not experience problems due to the absence of a household list.
27. The representative highlights that the TSU report relied on by the delegate also indicates that 30 percent of 259 respondents to a survey conducted did not have household lists. I also note the survey was undertaken principally from Sittwe, where the applicant claims to originate from.⁶ The representative also notes the barriers to obtaining documentation, such as

² The Stateless Rohingya, "Language and Culture: Rohingya Religion and Belief", 1 January 2014, CIS28966.

³ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

⁴ T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016, CIS38A80121535.

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

⁶ T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016, CIS38A80121535.

transportation, discrimination and expense. She contends this is consistent with the applicant's claims that his family were unable to have a household register reissued after the original was lost or destroyed in a flood, and 'many poor Rohingya people' in his area were without a household list. I note that when the risks in not having a register were put to the applicant during this visa interview, he agreed and said that is why many people are put in jail.

28. In his statutory declaration, the applicant reiterated that he and his family have faced harm from local Burmese people on many occasions and that he was too young to really know why. He states it could have been because they did not have a household list.
29. Given the country information before me indicates Rohingya were able to obtain household registers in the past, and the legal consequences of not holding such lists, I am of the view that the claimed absence of a household register could sometimes be an indicator that a person may be seeking to conceal information about their identity and background. I am satisfied this is not the case here. The applicant contends that his family held a register in the past, which is consistent with the country information, but that it was lost in a flood following a storm. I note the applicant lived near the beach, so that of itself is plausible. I consider there is clear information about the difficulties associated with updating a household register, and I expect the same is true for persons, including Rohingya, who seek to acquire a replacement household register. I accept that the majority of persons living in Myanmar possess such a document, but I consider his claims to have had one, and lost it, to be plausible and not inconsistent with country information before me. That information indicates that around 30 percent of people surveyed in his home area did not have a household register. Given the barriers faced by certain groups in acquiring official documentation, this is not surprising. Weighing the information before me, I am satisfied that his family had, but no longer holds, a household register, and that the difficulties his family faced in the past may have been connected to the absence of such documentation.
30. In terms of his past claims, the applicant indicated that when he was around 11 or 12, he was arrested by the military on his way home. He was taken to the military camp and tied up for [hours]. His mother later came and he was released. He also claimed in general, life was difficult for them. In his written statement, he referred to his father being taken and forced to labour for the Burmese Military. He claimed he was also harassed on the street by Burmese and non-Muslims. They would yell obscenities and tell him that he did not belong in the country. The applicant has been consistent in these claims, first raising them during the arrival/entry interview process. His claims are also supported by country information before me about the incidence of forced labour, and official and societal discrimination and harassment of ethnic Rohingya and Muslims in the country, in particular in Rakhine State.⁷
31. The applicant was asked if he can speak Rakhine/Arakanese. The delegate asked the applicant to say the phrase 'what is your name?'. The applicant then spoke a phrase. The interpreter said that he himself spoke Arakanese. The delegate asked whether the applicant spoke Arakanese. The interpreter said that he thought the applicant must have 'listened from someone' and he did not think the applicant could properly speak Arakanese. The delegate asked him how he learned Arakanese, he said he learned it when he was young in a camp. I consider the applicant's limited and imperfect Arakanese language ability provides some further indication to me that he is not Arakanese, but is from Rakhine State. It is difficult to see how he would otherwise obtain some rudimentary knowledge of this specific language.

⁷ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

32. The delegate asked the applicant in what way was he different from people from Chittagong, Bangladesh, who speak Rohingya. He said the language is different, and the accent is different. He confirmed he had not been to Bangladesh, and he had no relatives living in Bangladesh.
33. In the decision, the delegate assessed that the applicant's features were not consistent with those of a person of Rohingya ethnicity, and concluded that the applicant's facial features were more consistent with those of a person from the Karen ethnic group or a Buddhist Arakanese.⁸ The applicant was not given an opportunity to comment on this issue at the visa interview. In the submission to the IAA, the applicant explained that he does not have any family or friends who are of the Karen ethnic group. The evidence before me is that identity in Myanmar is complex, involving elements of race/nationality/ethnicity, religion, language and geographic location. Different members of the same family may identify as belonging to different races, and people's officially-recognised race or religion may be different to how they self-identify. Marriages between different ethnic groups are common, particularly between people who are of different ethnicity but share a religion.⁹ In that context, I consider that basic physical markers of identity may be helpful in assessing ethnic identity, but are not necessarily determinative. In my assessment, there are a range of more specific factors which support the applicant's claims to be Rohingya, and not Karen or Arakanese, beyond his ethnic appearance. In this regard, I give some weight to the supporting letter from [Organisation 1] that state the applicant is a Rohingya from Rakhine State.
34. I consider there are a range of other factors which indicate to me that the applicant is a Rohingya Muslim from Rakhine State. He appeared to speak Rohingya fluently throughout the interview. The interpreter confirmed this and showed no obvious difficulties in speaking with the applicant, nor did the applicant regularly seek clarification from the interpreter. He spoke freely and with some detail about his home area [and] Sittwe in Rakhine State. I also consider his limited Arakanese confirms both that he is not Arakanese, and that he has spent some time in Rakhine State. The applicant has been general, but consistent in his claims that he and his family have faced harassment and mistreatment in Myanmar in the past on the basis of their ethnicity and religion. His explanations for why he does not possess documentation were reasonable and supported by the country information. While I appreciate that the applicant's claims present an incomplete picture, and this concerned the delegate, I consider his claims are nevertheless consistent, plausible and supported by the country information before me. In view of all the information before me, I am satisfied that the applicant is a Rohingya Muslim from Rakhine State in Myanmar.
35. Having accepted the applicant is a Rohingya from Rakhine State, I have considered whether the applicant has Myanmar citizenship or whether he is stateless as he claims.
36. The delegate asked the applicant whether he ever held citizenship in Myanmar. He said he had not. The delegate put to him that some Rohingya are citizens of Myanmar. The applicant confirmed this was also his understanding, but he did not know how they obtained citizenship. The applicant said that in Rakhine there are no Rohingya that are citizens of Burma.
37. There is support for this in the country information. According to the TSU report, the Rohingya are the second largest population group in the Rakhine State, but they do not have basic citizenship rights.¹⁰ DFAT confirms that the Myanmar Government recognises eight major

⁸ Harry Ignatius Marshall, "The Karen People of Burma: A study in Anthropology and Ethnology", White Lotus, 1 January 1997, CIS15759

⁹ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED850AD28.

¹⁰ T. Gibson, H. James & L. Falvey, "Rohingyas - Insecurity and Citizenship in Myanmar", TSU Press, 1 August 2016, CIS38A80121535.

ethnic groups as part of 135 'national races'. The law grants full citizenship to members of these 135 officially-recognised national races. The Muslim population who identify as Rohingya are not among the 135 recognised ethnic groups; nor are people of Indian, Chinese, Anglo-Burmese or Nepali descent. 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.¹¹

38. I have accepted the applicant is a Rohingya from Rakhine Province. While I acknowledge that some Rohingya have been able to obtain citizenship or other identification cards outside of Rakhine, I am satisfied the applicant and his family do not have citizenship of the country. I accept they may have held a household register in the past. However, as I accept they are Rohingya, and have no other current documentation, I am satisfied they are barred from applying for citizenship under the current citizenship law. In that context, I am satisfied that the applicant is a stateless non-citizen as he claims, as are his other family members.
39. As the applicant is stateless, it is necessary to consider whether Myanmar is his country of former habitual residence. I note the applicant left for [Country 1] in 2006, when he was around [age] years old. He lived there for approximately six years. While he had registered with the UNHCR, he had no visa and had no official residency status in the country. He also had no permanent employment or abode. While the applicant did live in [Country 1] for a not insignificant period, I am not satisfied he was admitted to the country with a view to continued residence, nor did he have any intention to stay there other than in a temporary sense. While a separate question, I am also satisfied the applicant has no right to enter and reside in [Country 1].
40. In contrast, the applicant lived in Myanmar for a period of [number] years, and his family continue to do so. In that sense, his familial and other ties to the country are significant. It does not appear he worked in the country, but I give this factor little weight given his age when he left. While he was not considered a citizen under the law, the applicant nevertheless had some status in the country. It was possible to obtain a household registration or other identification document that allowed him to stay in the country, albeit with very limited rights.¹² Weighing everything before me, I am satisfied the applicant only has one country of former habitual residence, namely Myanmar.
41. I am satisfied that applicant is a stateless (non-citizen) Rohingya Muslim from Myanmar. The following paragraphs summarise the security situation for a person with such a profile.
42. According to DFAT, the vast majority of Rohingya are Sunni Muslim, and almost all live in Rakhine State (formerly known as Arakan State). Official estimates of the size of the Rohingya population are not available as this group is not recognised as citizens and was excluded from the 2014 census. However, the census used mapping data to estimate the size of the population not counted in Rakhine state. This mapping process indicated that approximately 1.1 million people were 'not counted because they were not allowed to self-identify using a name that is not recognised by the government'. This estimate is broadly in line with most credible estimates of the Rohingya population in Rakhine state, which has a total population of around 3.2 million.¹³

¹¹ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹² DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹³ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

43. Rakhine is the second-poorest state in Myanmar, with a universal poverty rate of 78 per cent. The majority of those that identify as Rohingya reside in the northern part of Rakhine State in the area that encompasses the townships of Maungdaw and Buthidaung. According to DFAT those that identify as Rohingya make up around 85-95 per cent of the population in these townships. There are smaller communities of Rohingya in many other townships in Rakhine State, including in *Sittwe*, Pauktaw and Myebon (emphasis mine). Ethnic Rakhine (also known as Arakanese), who are mostly Buddhist, form the majority in all parts of Rakhine except northern Rakhine State.¹⁴
44. 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 systemic 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 between Muslims and Buddhists, DFAT assesses that high levels of religious and ethnic tensions remain, and there is a high risk of further violence. This is exacerbated by the recent emergence of an armed Muslim group in Rakhine, with alleged links to international jihadist groups. According to DFAT, violence in Rakhine State has potential to inflame existing religious tensions between Muslim and Buddhist communities in other parts of the country.¹⁵
45. Following the widespread communal violence in Rakhine State in 2012, local authorities and the Ministry of Home Affairs moved some communities into camps and implemented severe movement restrictions on the population. This disproportionately affected Rohingya, and restrictions remained in place at the time of DFAT's report (January 2017). In northern Rakhine State, where Rohingya make up a large majority of the population, the Border Guard Police (BGP) maintain checkpoints that restrict movement, in some cases within village tracts within a township. In other parts of the state such as Sittwe and Myebon, where they make up a minority of the population, those that identify as Rohingya tend to still be confined to camps for internally displaced people (IDPs) or in separate 'Muslim enclaves' such as Aung Mingalar in Sittwe (the capital of Rakhine State).¹⁶
46. Travel within Rakhine State, and Myanmar in general, is severely restricted for Rohingya. The restrictions on movement for Rohingya prevent access to livelihoods and essential services. Movement restrictions provide opportunities for authorities to extract informal payments, particularly in northern Rakhine State. Checkpoints, usually manned by BGP officials, are set up to check whether Rohingya have travel approval. Passing through these checkpoints requires Rohingya to pay bribes, even if they have the appropriate travel documentation (which itself also requires informal payments to obtain). It is estimated that there are nearly 200 checkpoints in northern Rakhine State alone. According to DFAT, Rohingya faced systematic levels of extortion in central and northern Rakhine State.¹⁷
47. DFAT assesses that the restrictions on movement for Rohingya have reduced the opportunity for communal violence between Rakhine Buddhists and Rohingya Muslims. Nonetheless, tensions remain and DFAT considers further outbreaks of violence are possible. In January 2014 credible but unverified reports suggested that up to 48 Rohingya were killed in mob violence in Maungdaw, northern Rakhine State. Later that year, communal tensions in Sittwe

¹⁴ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹⁵ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹⁶ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹⁷ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

led to Rakhine Buddhists targeting UN offices and international NGOs, causing property damage and affecting the delivery of humanitarian assistance in Rakhine State.¹⁸

48. Since attacks in October 2016 and subsequent security operations in northern Rakhine State, there have been consistent but largely unconfirmed allegations of systematic human rights abuses against Rohingya by security forces. Allegations include torture, indiscriminate killings, burning of houses and mass rapes.¹⁹
49. Very basic levels of healthcare are provided in the IDP camps. The Sittwe hospital does not allow Rohingya access to the general medical services provided to the rest of the population. Access to the hospital for Rohingya is limited to emergency cases, and this group are treated in a separate ward at the hospital, which has a limited number of beds and lower-standard facilities compared to the rest of the hospital.²⁰
50. Having regard to the situation for stateless (non-citizen) Rohingya Muslims in Rakhine State, I am satisfied that there is a real chance that he will face serious harm amounting to persecution if he returned to Myanmar. On a basic level, as a non-citizen the applicant would be unable to access government services including state funded health care and education, and would be ineligible for government employment. I am satisfied the discrimination and restrictions on movement for the applicant as a Rohingya Muslim would seriously impact his ability to obtain employment, and that he would be vulnerable to extortion and harassment. I also consider that the applicant would face severe restrictions on his movements, and if he returned to his home area near Sittwe, he may be forced to live in an IDP camp or other 'Muslim enclave'.
51. Beyond these already serious considerations, I consider the security situation for Rohingya in Rakhine remains a paramount concern. According to DFAT, while movement restrictions imposed on Rohingya have reduced the opportunities for societal violence between Muslims and Buddhists, DFAT assesses that high levels of religious and ethnic tensions remain, and there is a high risk of further violence in the future.²¹ In the context of his home area near Sittwe, where the Rohingya population live as a minority in a majority Rakhine Buddhist area, I consider there is a very real chance that the applicant would face serious harm on the basis of his religion, ethnicity and lack of citizenship.
52. While I accept there is a real chance of the applicant being seriously harmed in his home area, s.5J(1)(c) of the Act requires that the real chance of persecution relates to all areas of the receiving country. The country information before me indicates that the situation for Muslims outside of Rakhine State, including Rohingya, is less severe. DFAT advises that there are a number of Rohingya people living outside of Rakhine State, particularly in the capital Yangon. 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. Typically, Rohingya in Yangon are registered as 'Burmese Muslims'. Burmese Muslims hold national ID cards and residency documents, which gives them a legal right to a passport. Rohingya who maintain a low profile outside of Rakhine State face a similar level of discrimination to that faced by other Muslims or people of South Asian appearance in Myanmar, although they are not subject to local orders as other Rohingya in northern Rakhine

¹⁸ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

¹⁹ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

²⁰ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

²¹ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

State. DFAT assesses that those Rohingya outside Rakhine State experience moderate levels of societal discrimination on a day-to-day basis.²²

53. In terms of his religion, I accept anti-Muslim sentiment in Myanmar is widespread and entrenched, especially outside of major cities. However, while societal violence between religious groups does occur, it is not a daily occurrence, nor does it occur in every village or town with a Muslim population. DFAT assesses that Muslims outside of Rakhine state experience moderate levels of societal discrimination and low levels of official discrimination. DFAT further assesses that Muslims outside of Rakhine state face a low risk of societal violence on a day-to-day basis.²³
54. If the applicant returned to Myanmar, I accept he may face social or official discrimination in areas outside of Rakhine State, such as in Yangon. I accept that experiencing discrimination would be difficult and a frustration, but on the information before me 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 consider there is no real chance that he would face discrimination amounting to serious harm elsewhere in Myanmar. In terms of physical or other harm from violence between Muslim and Buddhist groups outside of Rakhine, I consider the prospect of the applicant being seriously harmed on the basis of his cumulative religious or ethnic profile is also remote.
55. While I find there is a real chance of the applicant being seriously harmed in Rakhine State, I am not satisfied the chance of persecution relates to all areas of the receiving country, and s.5J(1)(c) is not met.
56. In terms of his illegal departure, the information before me indicates that the applicant potentially left illegally, notwithstanding that he is not technically a citizen. According to DFAT, returnees to Myanmar who departed the country illegally are technically subject to up to five years imprisonment for having illegally crossed a border. DFAT advice is that this provision has not been enforced in recent years. As one relevant example, in May 2015 a group of failed Rohingya Muslim migrants – predominantly from Bangladesh, but some originating from Myanmar – were rescued at sea. Myanmar authorities agreed to allow those Rohingya who had originated from Myanmar to be returned to Rakhine State, after verifying their place of origin using household registration lists and by contacting relatives.²⁴ Other advice indicates that movements Rohingya returnees are restricted to their township if they do not have the required identity documents. According to that same advice, the act of having applied for asylum overseas does not, in itself, result in harmful or differential treatment upon return to Myanmar.²⁵
57. I consider this country information is directly applicable to the applicant. His family remain in Rakhine State in Myanmar, and should he be allowed to return, I consider the authorities would determine the applicant is an undocumented Rohingya from Rakhine State, after contacting local authorities and his relatives. While I accept he may be restricted in his movements outside of Rakhine State, I am satisfied that he would not face a real chance of

²² DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

²³ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

²⁴ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

²⁵ DFAT, "Burma: Country Information Request MMRCI150717155751716 – Returnees to Burma", 2 September 2015, CXBD6A0DE13017.

being seriously harmed on the basis that he left the country illegally or sought asylum in Australia.

Refugee: conclusion

58. I find there is no real chance of the applicant being seriously harmed on the basis that he left the country illegally or sought asylum. While I am satisfied there is a real chance of him being seriously harmed in Rakhine State on the basis of his ethnic, religious and stateless profile, I am not satisfied that real chance of harm relates to all areas of the receiving country.
59. Accordingly, 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

60. 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

61. 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.
62. I have found above that the applicant is from Rakhine State, and that this is his home area. I have also found above that there is a real chance that the applicant would face serious harm, which would include beatings or other threats to his life or liberty, for reasons of his religion, ethnicity and/or lack of citizenship. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am satisfied there is a real risk the applicant would face significant harm if he returns to live in his home area of Rakhine State.

Qualifications to the real risk threshold

63. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:
- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
 - the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or

- the real risk is one faced by the population of the country generally and is not faced by the person personally.
64. Section 36(2B)(a) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm.
65. In my assessment above, I have found there is not a real chance the applicant would suffer serious harm outside of Rakhine State, for example in Yangon. For the same reasons, I am satisfied there is not a real risk that the applicant would face significant harm outside of his home area. As a consequence, I have assessed whether it would be reasonable for the applicant to relocate to an area of the country where he would not face significant harm.
66. The applicant left Myanmar when he was around [age] years of age. He did not travel elsewhere when he was living there. He has no work experience living in the country. His family and other connections are all in Rakhine State. Nevertheless, I also consider the applicant has demonstrated resourcefulness and initiative in travelling to [Country 1], living there and finding work.
67. While I consider he has the personal characteristics to find work elsewhere, and some work [skills], a factor here is that the applicant claims he is not fluent in Burmese. This would pose some barrier to finding work in the country. I have accepted above that he would face a level of societal discrimination elsewhere in Myanmar. In that context, I consider his limited language skills could exacerbate the difficulties he may face in finding employment.
68. I have found the applicant is undocumented. As a Rohingya, I accept he would not be able to obtain documentation, or citizenship through formal mechanisms. I give weight to DFAT advice that some Rohingya have successfully relocated to other parts of Myanmar and procured identity documentation, typically by manipulating official processes (i.e. either purchasing fraudulent documentation or by obtaining genuine documents supported by fraudulent information). DFAT assesses that Rohingya with sufficient resources are typically able to bribe officials to travel and to access identity documentation, however the vast majority of Rohingya in Rakhine State do not have sufficient resources to pursue these options.²⁶ Looking to the applicant's circumstances, I am not satisfied he has the ability or resources to seek to obtain such documentation in the ways suggested, whether directly or through his family.
69. I consider that the applicant's status and lack of documentation is a serious barrier to whether he could relocate within the country. I have found above that the applicant would be assessed and returned to Rakhine State as part of official processing of his return to Myanmar from Australia. The information indicates that severe movement restrictions remain in place, and that as a non-citizen Rohingya in Rakhine, his movements would be restricted to his township if he does not have the required identity documents. The applicant could seek to leave the area informally, but the country information indicates the restrictions are severe and I am not satisfied he would have any reasonable prospects of leaving Rakhine State, especially if tensions continue. Even if he were to seek to leave the area informally, I consider this would put him at risk of harassment and extortion within the country, and his lack of experience in moving within the country, his lack of documentation, his ethnic background, and his limited Burmese language skills, would put him at serious risk of being exploited, harmed and/or returned to Rakhine State if he were identified or found at checkpoints elsewhere in the country.

²⁶ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

70. Considering all the information before me, and the applicant's individual circumstances, I am not satisfied the applicant could reasonably relocate to an area of the country where there would not be a real risk that he will suffer significant harm. I consider that the applicant would either be prevented from doing so by the authorities, or that attempting to do so would put him at a further real risk of significant harm.
71. I note that DFAT assesses that Rohingya are unlikely to have access to effective state protection.²⁷ Moreover, as the harm he fears comes from the authorities, the Army and the Burmese Buddhist majority, I am not satisfied the applicant would be able to obtain effective state protection against the persecution he fears in Rakhine and throughout in Myanmar.
72. I consider the risks to the applicant are present because of his specific minority profile as a stateless, Rohingya Muslim. As such, I find the risk is not a real risk faced by the population of the country generally, and I am satisfied this is a risk faced by the person personally.
73. In view of the above, I am satisfied that none of the qualifications in s.36(2B) of the Act apply, and I find there is a real risk the applicant will suffer significant harm if he returns to live in Myanmar.

Complementary protection: conclusion

74. I find there are 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.

Decision

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

- there are substantial grounds for believing that, as a necessary and foreseeable consequence of the referred applicant being removed from Australia to a receiving country, there is a real risk that the referred applicant will suffer significant harm.

²⁷ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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