



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA19/07544

MYANMAR
IAA reference: IAA19/07546

MYANMAR
IAA reference: IAA19/07547

MYANMAR
IAA reference: IAA19/07545

Date and time of decision: 9 January 2020 16:04:00
K Allen, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicants (the applicants) are a family unit of husband (Applicant 1), wife (Applicant 2) and their minor sons (Applicants 3 and 4). The applicants claim to be Muslim citizens of Myanmar. They arrived in Australia [in] July 2013. On 15 June 2017 they lodged a combined application for Safe Haven Enterprise Visas (SHEVs).
2. On 25 November 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the visas on the basis that the applicants were not owed protection.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. Applicant 1 made a submission to the IAA on 16 December 2019. It contained argument about matters which were already before the IAA including in relation to his religion, fear of Buddhist extremists and return procedures for Muslims and people without evidence of citizenship. This is not new information and I have had regard to it in making this decision.
5. In his submission, Applicant 1 expanded on his claim that the Myanmar police asked him about his brother after his brother departed the country and he made a number of new claims which he did not raise at the primary stage. He made a new claim that he was asked to report weekly and later fortnightly to [Town 1] police station. He made the new claim that at the end of 2010 someone from the government extorted money from his business and that when he complained to the police he was detained for a day and released after paying a bribe. He made the new claim that after he moved to [Country 1] and after his family moved to Pyin Oo Lwin City, his house in [Town 1] was bulldozed for construction. He claimed that police in [Town 1] continued to look for him. He claimed that news from Myanmar made him suffer terrible pain in his heart as he felt anxiety and fear for his family. He made the new claim that he fears that he will be forced to return to [Town 1] if he goes back to Myanmar and he will be jailed for escaping from the police. Further he claimed that he will need to rent and the 969 group will prevent people from renting property to Muslims. He has made the new claim that he has no idea if the passports which he and his family used to depart the country were real or fake.
6. The applicant has not explained why he did not make these additional claims at the primary stage nor has he satisfied me that these claims could not have been made at the primary stage. In particular he has not pointed to any exceptional circumstances which meant that these claims only be made now. I have considered whether the new claims arise on the material which was already before me and I do not consider that they do so as they go well beyond those claims. I have had regard to the fact that the applicant was represented and that he and his representative provided multiple submissions and statements of claims to the Department and in fact already provided a replacement statement of claims once it became apparent that information in the applicant's original claims had been fabricated. The fact that these claims were not made at the primary stage and only raised after the applicants' visas were refused by the Department also leads me to question the credibility of this new information. I consider that mistreatment by the police, the imposition of reporting obligations, detention and the taking of bribes, the fact that the applicant might be wanted by the police and the fear that their passports may not have been real, are all matters of serious concern and I consider that if

they were true, the applicant or his representative would have raised them when asked about his experiences in Myanmar and his concerns about returning to Myanmar, particularly given other concerns he raised. The applicant has not provided any supporting documentation such as a summons or warrant and he has not claimed that his family, who remained in Myanmar after his departure in 2011, suffered any harm or were questioned by police about any of these matters. Given the opportunities that the applicant has had to make his claims in full with the assistance of a representative, the lack of explanation for the delay and the nature of the claims and my concerns as to the applicant's credibility, I am not satisfied that there are exceptional circumstances to justify considering the new information.

Applicants' claims for protection

7. Applicant 1 made claims for protection. Applicants 2, 3 and 4 relied on their membership of Applicant 1's family unit.
8. Applicant 1's claims can be summarised as follows:
 - He was born in [Town 2] in the Shan state of Myanmar. He is of Bamar ethnicity and a Shan Muslim. His wife is of Bamar and Kachin ethnicity as are his two children.
 - His father and brother were politically active in Burma during military rule and were pro-democracy. When his father retired from his work as a [Occupation 1], he became [Occupation 2] of the National League for Democracy (NLD) in [Town 1] and remained in this position until his death 2006.
 - His father's [business] had been burnt down and his family were subjected to ongoing questioning and threats for many years because of his father's political involvement. His brother fled to Australia in 2010.
 - The local authorities would pressure him about his father and ask about his brother and as a result was forced to relocate to Pyin Oo Lwin City in 2010.
 - In 2011 he went to ask for money from a person who owed him for some [items] and that person refused to pay him because he was Muslim. On his way home someone hit his head from behind and he ran home. He does not know who it was that hit him but considers that it could have been someone from either the authorities or the 969 group.
 - On another occasion in 2011 he was walking down the street and he accidentally knocked into someone and said sorry. This person turned around and showed him a knife. He said to him something like "would you like to die because I know you're a Muslim". This happened about a week after the previous incident. This man referred to him as a 'Kalar', which is a derogatory and racist word to describe Muslims in Burma.
 - He feared that the situation for Muslims in Myanmar was getting worse and extremist groups such as the 969 group were speaking out against Muslims.
 - He left Myanmar in 2011 for [Country 1] on [a temporary] visa. His wife and children remained in their home in Pyin Oo Lwin. He did not return to Myanmar before travelling to Australia with his wife and children in 2013.
 - Even though he left Myanmar legally on his own passport he fears he will be arrested and imprisoned upon arrival in Myanmar because he would be identified as someone who has left and sought asylum overseas.
 - It is extremely difficult to obtain updated identity documents from the Myanmar authorities due to his Muslim faith. He no longer has his passport and fears that the

Burmese authorities may believe he is Rohingya and or stateless and harm him on this basis and lock him and his family up in prison for five years.

- Overall he fears harm as a Sunni Muslim from Myanmar; and on the basis of his imputed political opinion, due to his father and brother's past involvement with the NLD; and as a Burmese Muslim.

Factual findings

Identity

9. Applicant 1 claims that he was born in [Town 2] in the Shan state of Myanmar. He is of Bamar ethnicity and a Shan Muslim. His wife is of Bamar and Kachin ethnicity as are his two children. As a child he moved to [Town 1] and later [Town 3] in Shan province for his education. He then attended university in Mandalay where he obtained a Bachelor of [Subject 1] degree before running his own businesses selling [things]. His mother and [sibling] remain living in Myanmar where his [sibling] runs a [business]. The applicant stated that they live in mid-Myanmar but did not advise the specific location. He stated that he and his wife and children moved to Pyin Oo Lwin City in 2010 where the children attended school.
10. I consider that the applicant provided a comprehensive account of his early childhood and education around Shan province and in Mandalay and provided a copy of his Bachelor of [Subject 1] qualification. In support of his claimed identity he provided a copy of his Government of the Union of Myanmar Immigration & National Registration Department Household Members List (household list) with translation with details of his house in [Town 1] updated in 2010. On that list he is listed as the family head and being of Bamar ethnicity and Muslim religion as are his mother [and siblings]. Applicants 2, 3 and 4 are listed as being of Bamar and Kachin ethnicity and Muslim religion. He also provided a copy of his Nikah Marriage Deed issued in 2000. At his SHEV interview he showed the delegate a Myanmar Birth Certificate in his name which was in Burmese. The interpreter was able to translate this document and it apparently confirmed the information that the applicant had provided to the Department. It stated his religion as Muslim. The applicant claimed he misplaced his National Registration Card and that his passport was destroyed in the jungle in [Country 2]. DFAT reports¹ that the Myanmar government recognises eight major ethnic groups including the Kachin and Bamar, as part of 135 'national races', and the law grants full citizenship to members of these races. Under the Citizenship Law, 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.
11. I am satisfied that the applicants' identities are as claimed. I accept that all the applicants were born in Myanmar and that they are citizens of Myanmar and that up until at least 2010 they resided in [Town 1] in Shan Province and that Applicant 1's mother and [sibling] still live somewhere in mid Myanmar. Based on the documentation provided I accept that Applicant 1 is of Bamar ethnicity and that Applicants 2, 3 and 4 are of mixed Bamar and Kachin ethnicity and that all the applicants are recorded in Myanmar as being of the Muslim faith. I accept that Myanmar is the receiving country.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.1

Political opinion

12. Applicant 1 claimed that his father and brother were politically active in Burma during military rule and were pro-democracy. When his father retired from his work as a [Occupation 1], he became [Occupation 2] of the NLD in [Town 1] and remained in that position until he passed away from an illness in 2006. He claims his brother became interested in the NLD through his father and fled to Australia in 2010. The applicant claimed that he personally is not interested in politics but he knows his brother was granted asylum in Australia because of his political activity. The applicant has not provided evidence in support of his family's association with the NLD, nor did he provide any real detail about his father and brother's political activities. However, I am willing to accept as plausible that they were supporters of the NLD and that his father held a role in the organisation.
13. Applicant 1 claims to fear harm from the authorities in Myanmar on the basis of a political opinion imputed to him because of his father and brother's past political activity. He claimed that after his brother fled to Australia, the local authorities would come and ask about his brother. He also claimed that the government of the time did not like his father because he was involved in NLD but they did not jail him because he was a [Occupation 1]. At interview he also mentioned that his father's [business] had been burnt down but he provided no further details about this claim and the link to his father's political activity was not clarified. I accept as plausible that Applicant 1's father's [business] was burnt but I do not consider that this is necessarily relevant to the applicant's claims.
14. In his SHEV interview Applicant 1 was asked about his political activity. He confirmed that he is not interested in politics or the NLD. He claimed that the police would come to his shop in approximately 2004 or 2005 to pressure him to stop his father's activity. He claimed that this pressure was too much and he sold his shop and moved away. His shop was sold in 2010 and he moved to Pyin Oo Lwin City. The applicants' representative has submitted that the applicant has had to relocate multiple times in Myanmar because of the persecution and discrimination Applicant 1 faced as a result of his father's political activities and his status as a Muslim in Myanmar.
15. Applicant 1's account of the pressure he faced as a consequence of his family's political activity lacked any compelling detail and I have significant doubts that it was part of his lived experience. Further, I consider that much of what he has claimed is implausible. Applicant 1 advised that his father died in 2006. While it is plausible that the applicant may have been visited by police in 2004 or 2005 who made enquiries about his father's political activity, I am unable to accept that Applicant 1 would have been exposed to pressure from police to stop his father's political activity between 2006 and 2010 after his father's death, when he claimed that such pressure forced him to sell his shop and relocate to Pyin Oo Lwin City in 2010. Further, the Department has advised that Applicant 1's brother arrived in Australia [in] April 2010 on a legally obtained Burmese passport. The applicants have not claimed that he was on any watch list or prevented from travelling because of his political profile. I do not accept that the Burmese authorities would not be aware of Applicant 1's brother's movements out of the country and, whilst they may have asked the applicant where his brother was at some stage, it would have been easily made known to them that he was not in Myanmar. Overall, I accept that the police may have made enquiries of the applicant about his father prior to 2006 and I accept that the applicant may have been asked his brother's whereabouts after his departure from Myanmar in 2010. However, I do not accept that the information before me supports that Applicant 1 or his wife and children were imputed with any political opinion prior to their departure from Myanmar or that they had to relocate a number of times to avoid persecution because of their connections to the NLD.

16. I also note that in November 2015, Myanmar held credible nationwide elections for the first time since 1960². More than 23 million people voted for more than 6,000 candidates from 91 political parties for the bicameral national parliament. In that election, the NLD won almost 80 per cent of the 75 per cent of seats not reserved for the military. The public, other parties and candidates, and international observers accepted the election result. The new government was in power by March 2016. DFAT reports³ that restrictions on freedom of speech and political commentary were lifted after a civilian government was established in 2011. Many former political prisoners and exiled activists are now politically active; around 115 NLD MPs elected in 2015 are former political prisoners. The government has a policy to release all political prisoners, and has pardoned scores of political prisoners since assuming power in 2016. Overall given my findings above, Applicant 1's lack of political interest, the fact that his father passed away 13 years ago and his brother has been in Australia for almost ten years, and the changed political landscape in Myanmar including the NLD now being in power, it follows that I do not accept that the applicants would be imputed with any adverse political opinion should they return to Myanmar.

Attacks

17. Applicant 1 claimed that he was threatened multiple times for being a Muslim living in Myanmar and this led to his decision to flee Myanmar. Since arriving in Australia and his SHEV interview the applicant fabricated a narrative with regards to not having a Myanmar passport and not having travelled to other countries prior to coming to Australia. He presented this narrative as truthful in his Arrival Interview, his SHEV application and a Statutory Declaration dated 19 May 2017. He was asked at his SHEV interview, on the 4 February 2019, whether there was any information in his application that was false or misleading, to which he replied, I don't give any misleading information. He was also reminded of the importance of telling the truth. He then denied ever having a passport. He said that the only travel he did outside of Myanmar was to [Country 3] on a day pass ticket to buy things for his shop and he did not need a passport.

18. In his initial SHEV interview the delegate put to Applicant 1 that he had also been to [Country 1] and [Country 2]. The delegate had photographs of the applicant visiting these countries. Initially the applicant did not confirm that information but on further questioning apologised and stated that he had been to [Country 1] having moved there for work in 2011. He continued to deny travelling to [Country 2] apart from his transit to Australia but eventually admitted that he had travelled to [named location] for a holiday with friends and while he was there he looked for work. Applicant 1's claims that he was harmed in Myanmar in 2013 as set out in his SHEV application no longer made sense. He was offered the chance to provide a new statement of claims and have a further SHEV interview. He provided a new statement of claims on 18 April 2019 and a submission from his representative dated 28 April 2019 and he was interviewed again in May 2019. He advised that he lived and worked in [Country 1] from 2011 until 2013 and he advised that the incidents described in his SHEV application as occurring in 2013 actually occurred in 2011. He also claimed to fear harm as a failed asylum seeker.

19. Applicant 1 claims he was advised by friends not to provide the correct information earlier as he felt that this information would negatively affect his visa application. However, the fact that the fabricated narrative was maintained over a long period places doubts on the credibility of the applicant's subsequent claims and makes it difficult to establish the truth due to the inconsistency of the information. Like the delegate, I have decided to disregard the claims

² DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 2.7

³ Ibid, 3.76

made up until the moment in his SHEV interview on 4 February 2019, when the applicant admitted that he had deliberately provided false information and I have had regard to the information provided after that point which he claims is the correct information.

20. Applicant 1 claimed that he was the victim of two incidents of harm in Myanmar in 2011 prior to his departure from the country. He claimed that in 2011 he went to ask for money from a person who owed him for some [items] and that person refused to pay him because he was Muslim. On his way home, someone hit his head from behind. However, he was carrying a backpack and it didn't hurt him too much. He is not sure what he was hit with, maybe a bamboo stick, or a wooden stick. He does not know that it was necessarily connected to the refusal to pay as he does not know the motivation behind the attack. He speculated that it could have been anyone, the Burmese authorities or the 969 group. He did not speculate that it was the person who owed him money. He claimed that the second incident occurred on another occasion in 2011. He claimed he was threatened and subject to racist abuse from a person in the street that he knocked into accidentally and that this occurred because he is a Muslim. Although I do have concerns about the applicant's overall credibility, I accept as plausible that the applicant was subject to these incidents of harm. I accept that a client may have refused to pay the applicant citing his Muslim religion as a reason. I accept that the applicant was hit on the head in the street but not injured. Based on the lack of any further information I do not accept that this was necessarily connected to the refusal to pay or that it occurred because it he was a Muslim. He was not injured in the attack, there was no indication that he was pursued and he was not contacted further subsequent to that assault. It would not appear that the attack was part of any plan to deliberately target the applicant for harm on the basis of his religion. I accept that the applicant angered a person in the street later in 2011 because he ran into them accidentally. I accept that the person may have threatened the applicant by showing him a knife and called him a derogatory term based on his Muslim appearance. I also note that the applicant was not otherwise harmed and has not indicated that he was pursued or otherwise known to the person. I consider that this was likely a one-off event which arose from the circumstances and not a pattern of intimidation or harassment.
21. Applicant 1 also claimed that the situation for Muslims in Myanmar was getting worse when he left Myanmar in 2011 and extremist groups such as the 969 group were speaking out against Muslims. He has provided vague and inconsistent information as to whether he was ever personally impacted by the 969 group. In their Arrival interviews the applicants claimed that in March 2013 extremist Buddhists would come round to their house at night and throw stones and bang their knives on the window. This was after the applicant had in fact moved to [Country 1] and this was not raised by the applicants in their revised SHEV application. In his SHEV application, Applicant 1 claimed that he thought it was possible that the 969 group or the authorities were behind the incident of 2011 when he was hit on the head but he did not know who hit him or why they hit him. In his second SHEV interview he advised that 969 were preaching against Muslims and causing problems in their villages. I accept that the 969 group are active in Myanmar. Based on Applicant 1's accounts, I do not accept that the applicants have personally ever been targeted by the 969 group or other extremist Buddhist groups. I have also had regard to the fact that Applicant 1's mother and [sibling] continue to live in Myanmar and his [sibling] is able to support them by [running a business]. While Applicant 1 has expressed concerns for their welfare he has not indicated that they have been harmed by the 969 group or anyone else. I have also had regard to the fact that Applicant 1's wife and sons lived in Myanmar from 2011 to 2013 while he was working in [Country 1] and his sons were able to attend a local school as described in his SHEV interview. This does not indicate that his family were targeted by or otherwise of any particular interest to Buddhist extremist groups or anyone else in Myanmar.

Departure

22. Applicant 1 clarified with the Department that he left Myanmar in 2011 as he feared for the future of his family and the danger in Myanmar. It was difficult for Muslims to live there. He stated that an agent helped him to organise a passport, a job in a [facility] and [a temporary visa] for [Country 1]. He went to [Country 1] in 2011 and never returned to Myanmar. He had no issues departing Myanmar but believes he had to pay money at the airport. He lived and worked in [Country 1] legally on his two year visa between 2011 and 2013 and he never returned to Myanmar. His wife and two sons remained in Pyin Oo Lwin and he sent money from [Country 1] to support them. He was also able to save enough money for their passage to Australia. He claimed his family kept a low profile out of fear but his sons attended school in Pyin Oo Lwin. He left [Country 1] in May 2013 and flew to [Country 2]. In 2013 his wife and sons organised passports and travelled to [Country 1] to meet him. The whole family went to [Country 2] and then by boat to Australia. Applicant 1 has submitted that he wants his family to be able to live in peace and for his children to get an education. He claims there is nowhere in Myanmar that is safe as he is easily recognised as a Muslim. He also claims that he and his family would not be issued with new identity documents or be able to renew their family list if he lived anywhere else in Myanmar outside of [Town 1]. Applicant 1 claims he will be arrested at the airport upon return to Myanmar for breaking immigration law on his departure and seeking asylum overseas. He fears that the Burmese authorities may believe he is Rohingya and he and his family will be locked up in prison for five years.
23. I accept that Applicant 1 departed Myanmar in 2011 and went to work in [Country 1] where he could earn enough money to pay for passage for his family out of Myanmar. I accept that all the applicants departed Myanmar on their own valid passports which they subsequently lost during their time in [Country 2]. As they departed legally, I consider the Myanmar authorities would have relevant records to show that they did not depart illegally, that they are citizens of Myanmar and that they have held Myanmar identity documents in the past. I do not accept that the applicants would have been able to obtain passports or obtain an education in Myanmar without holding evidence of their identity. I accept that, if the applicants return to Myanmar on a temporary travel certificate issued by the Myanmar Embassy in Australia, it may be apparent to the authorities in Myanmar that the applicants are returning to Myanmar after failing to seek asylum in Australia.

Refugee assessment

24. 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

25. 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.

26. I accept that all the applicants can be identified in Myanmar as citizens of Myanmar and Sunni Muslims and that this is apparent from their identity documents and it will be recorded in government records. I consider that the family members have sufficient documentation to support their claimed identities on their return to Myanmar including a household registration list with all their names, a copy of Applicant 1's birth certificate and a copy of Applicant 1 and 2's marriage certificate along with other documents such as Applicant 1's education records. I accept as plausible that the applicants have faced discrimination in the past because of their religion and I have accepted Applicant 1's claims that he was abused in the street and called 'kalar' because he appeared to be Muslim and that his business was affected by discrimination including when a person refused to pay for goods. I accept that Applicant 1's father and brother had a connection with the NLD before his father's death in 2006 but I do not accept that the applicants have any kind of political profile or that, given the passage of time and change in political circumstances in Myanmar, including the election of the NLD to power, they would be imputed with any political opinion or profile on their return. I accept that the applicants would be returning to Myanmar as failed asylum seekers and that this may be apparent to the immigration authorities on their arrival at the airport in Myanmar. I accept that the applicants all departed the country legally on their own valid passports and I consider that there would be a record of that departure. I do not accept that they would be regarded as Rohingya or stateless or that they would be prevented from renewing their identity documentation.

27. The applicants' representative has submitted that Applicant 1's unique set of circumstances should be given significant weight when deciding to grant his protection visa and has pointed to his age demographic and his family's deep political connections. Applicant 1 is [a certain] age and does not appear to have any restrictions on his ability to work or relocate as a result of his age. He has advised that he works in Australia. He has a young family and has stated that in Australia his sons are getting the best future and plan to access higher education. Given the opportunities he is seeking for his sons, and his previous willingness to relocate to [Country 1] to earn more money than he can earn in Myanmar, I do not accept that his age is a reason Applicant 1 would not otherwise have travelled to Australia to seek asylum. As noted above I do not consider that Applicant 1's family have had political connections in Myanmar for a significant number of years and I have not accepted that they hold or would be imputed to hold any adverse political profile. I have therefore had regard to the applicants' profile on their return to Myanmar as Muslim citizens of Myanmar and as 'failed asylum seekers'.

28. It is reported⁴ that at the time of the 2014 census, Muslims made up approximately four per cent of the population in Myanmar, and the majority lived in northern Rakhine State. Most Muslims in Myanmar are of the Sunni sect, and Islam is practiced widely around the country including in Yangon, Irrawaddy, Magwe, and Mandalay Divisions by some Bamar and ethnic Indians as well as ethnic Kaman and Rohingya. Aside from the Rohingya, most Muslims speak

⁴ DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.60

Burmese or the dominant local dialect in their place of residence, and/or their language of origin. This is not inconsistent with the applicants' claims to be Burmese Muslims from outside of Rakhine state.

29. Section 34 of Myanmar's Constitution entitles all Myanmar citizens to 'freedom of conscience and the right to freely profess and practice religion subject to public order, morality or health'. Section 361 of the Constitution 'recognises the special position of Buddhism' as the faith professed by the majority of citizens; this applies only to Theravada Buddhism. Section 362 of the Constitution further recognises Christianity, Islam, Hinduism and animism as 'the religions existing in the Union at the day of the coming into operation of this Constitution'. There are several other provisions in the Constitution that prohibit discrimination against citizens on the basis of religion, including section 352 which bans discrimination in the employment of public officials⁵.
30. Country information indicates that certain Muslims within Myanmar are at particular risk of persecution including both the Rohingya and other Muslims who are undocumented and unable to obtain identity documents⁶. There are a number of Muslims who are reported to have been stateless for generations due to a long-term systematic refusal to issue national identity cards to Muslims. To qualify for full citizenship, one must have parents who were citizens. A national identity card allows for the recipient to receive a passport and travel freely. The deputy head of the Yangon township immigration office was reported⁷ to have stated that immigration officials are supposed to examine a Muslim applicant's family origins before deciding on an ethnic designation, such as Bengali, Indian or Pakistani. "In this period, we do not always put only Bengali on their cards. If we do that, they never accept it and they will probably complain. We need to check their background and their documents to see who are they and what their ethnic heritage is," he said. The citizenship process is delayed if an applicant's parents are not full citizens. In such cases, the application has to be decided at state or regional level.
31. The applicants have indicated that Applicants 1 and 2 are Burmese citizens, held identity cards and were able to move around Myanmar freely and obtain passports to depart the country freely. The applicants have also indicated that Applicants 3 and 4 were registered on their household list, attended school in Myanmar, obtained passports and were able to depart the country freely. Accordingly, I consider that they would be able to renew their identity documents as government records would indicate that they are full citizens. DFAT reports⁸ that Muslims outside of Rakhine State can generally access a similar level of government services to other religious minorities, however local sources told DFAT that Muslims in Yangon and Mandalay often experience delays and are required to pay informal fees for routine government processes, such as updating household lists. As the periods of time and payments vary depending on the individual applicant and township officer processing requests, DFAT assesses that these incidents generally represent informal discrimination by mostly Bamar Buddhist public officials, rather than formal policy. While there may be some delay or the requirement to pay an informal fee, I do not consider that this kind of discrimination would necessarily prevent the applicants from renewing their documentation. Applicant 1 has been in employment in Australia and has not indicated that he would be unable to pay any fees for documentation. In all these circumstances I do not consider that the applicants fit the profile of stateless Muslims who would face a real chance persecution in Myanmar or that they have an

⁵ DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.47

⁶ Burma Human Rights Network, "Existence Denied" 26 June 2018, CIS7B839411488; DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206

⁷ Frontier Myanmar, "For Muslims across Myanmar, citizenship rights a legal fiction", 11 January 2018, CXBB8A1DA20591

⁸ DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.71

ethnicity or profile which would render them unable to demonstrate their full citizenship or renew their identity documents.

32. The US Commission on International Religious Freedom Report for 2017 - Burma⁹ found that outside of Rakhine state, non-Buddhist minorities, including Christians, Hindus, and Muslims, reported discrimination in employment. DFAT reports¹⁰ that Muslims are underrepresented in the public sector; there are no Muslim members of parliament, and Muslims have been excluded from a range of government jobs, including as public school teachers and health personnel. DFAT also reports that businesses owned by Muslims have reported issues in procuring government contracts without a Buddhist interlocutor. Applicant 1 has not claimed to have any interest in working in the public sector or running for office and has not claimed to have experienced such discrimination in the past. I have accepted that he did face some societal discrimination in the running of his business in Myanmar in particular when a client refused to pay for goods, but note that he was able to run a business to support his family when he lived in Myanmar and prior to moving to [Country 1] where he was able to earn sufficient money to both support his family and pay for their passage to Australia. I do accept that Applicant 1 may continue to face some discrimination in employment on his return because of his Muslim faith in particular when dealing with members of the public who do not want to do business with Muslims, but given his past experience running a business in Myanmar I do not accept that he would be prevented from earning a livelihood which would enable his family to subsist.
33. DFAT reports that students from religious minority groups, particularly Muslims, experience unequal access to secondary and tertiary education. This drop-off in enrolments at secondary and tertiary levels of education is reflected in the average number of years of education, which is around 4.7 years in Myanmar¹¹. This is not reflective of Applicant 1's experience. He claims that he obtained a Bachelor of [Subject 1] degree in Myanmar completing both his secondary and tertiary education. He also stated that his sons were enrolled in and attended school in Pyin Oo Lwin city prior to their departure from Myanmar. Given their status as citizens I do not consider that Applicants 3 and 4 would be prevented from accessing education in Myanmar.
34. The US Commission on International Religious Freedom Report for 2017 - Burma¹² found that outside of Rakhine state, non-Buddhist minorities, including Christians, Hindus, and Muslims, reported incidents in which authorities unduly restricted religious practice and travel, destroyed religious property and texts, denied or failed to approve permits for religious buildings and renovations. DFAT reports¹³ that in recent years, authorities have blocked the rebuilding of mosques and madrassas that have been either damaged, destroyed or sealed. Requests for new religious buildings were delayed and even when approved some decisions were reversed. Further anti-Muslim sentiment is prevalent in Myanmar, especially outside of major cities, and is circulated through social media, some state institutions and mainstream news websites¹⁴.
35. DFAT reports that the reduced tolerance for Islamic faith activities has been, at least in part, propagated by a rise in anti-Muslim sentiment at both the official and societal level. In its most

⁹ US Commission on International Religious Freedom, "International Religious Freedom Report for 2017 - Burma", 29 May 2018, OGD95BE927522

¹⁰ DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.61

¹¹ Ibid, 3.74

¹² US Commission on International Religious Freedom, "International Religious Freedom Report for 2017 - Burma", 29 May 2018, OGD95BE927522

¹³ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28, 3.62

¹⁴ Ibid, 3.64

extreme form, this has resulted in violent incidents against the Muslim community. In May 2018, local media reported that nationalist monks raised concerns with police of Rohingya hiding illegally in Mingala Taungnyunt Township, Yangon. The reports stated that when police investigations found no one to be living illegally in the neighbourhood, monks and Buddhist community members violently attacked the Muslim community, injuring at least two people. Police arrested eight individuals for their involvement. Several credible sources described a case in January 2018 of a young man being harassed and beaten in the street by plain clothed police in Yangon reportedly because of his Muslim appearance.

36. A prominent Buddhist nationalist monk, Ashin Wirathu, has led an anti-Muslim campaign since the 2012 violence in Rakhine State. Myanmar's highest Buddhist authority, the State Sangha Maha Nayaka Committee (or Ma Ha Na), imposed a one year preaching ban from March 2017 on Wirathu for spreading hate speech with the potential to incite violence. During the ban, Wirathu continued to post online videos and comments on social media, although Facebook removed his account in February 2018 for "consistently sharing content promoting hate". Wirathu was a leading member of the Ma Ba Tha. In May 2017, the Ma Ha Na also imposed a ban on Ma Ba Tha activities, and the group were ordered to disband and remove its anti-Muslim propaganda from across the country. In response to the ban, the group rebranded as the Buddha Dhamma Parahita Foundation. In July 2018, the Ma Ha Na again ordered the group to cease its activities. DFAT is not aware of any recent activities of the group.
37. The applicant has not indicated that he or his family, including his family members remaining in Myanmar, have been prevented from practising their faith in Myanmar or that they have not been able to access a mosque. I have not found that the applicants were ever subject to any violence of the kind outlined above because of their Muslim appearance and, given the limited reports of such violence outside of Rakhine State; I do not find that their chance of being targeted in such violence on their return is anything more than remote. I accept that the applicants may have been aware of hate speech against Muslims perpetrated by extremist Buddhists but I consider that the Myanmar government have taken action against extremists such that no recent incidents have been reported. Overall, while there are credible reports of authorities discriminating against some people from Muslim groups, DFAT's advice are that these incidents represent informal, societal discrimination by Bamar public officials and do not represent official government policy¹⁵. I consider that the applicants do face a real chance of encountering an informal, societal discrimination on their return to Myanmar, but I am not satisfied that if that does it occurs, that it amounts to serious harm as defined in s.5J of the Act. It does not amount to a threat to the person's life or liberty; significant physical harassment or ill-treatment; significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist or any other serious harm.
38. I have also considered country information¹⁶ provided by the applicant who states that in January 2018, clashes broke out between the military and the Kachin Independence Army (KIA) in several townships in Kachin State, with the military employing aerial bombing and heavy artillery shelling. More than 3,500 civilians attempting to flee the fighting were trapped, some for over two weeks, without access to adequate food or basic supplies. It was reported that government shelling and airstrikes killed at least 10 civilians and forced approximately 2,000 to flee into the jungle, where they were stranded for nearly a month without access to aid, in dire conditions. An estimated 106,000 civilians remain in long-term displacement camps in Kachin

¹⁵ DFAT, "DFAT Country Information Report - Myanmar", 18 April 2019, 20190418091206, 3.75

¹⁶ Human Rights Watch, "World Report 2019: Myanmar"

and northern Shan States, many near areas of active conflict. The applicants have not indicated that their family members remaining in Myanmar were impacted by the 2018 conflict in Kachin State or that they live in parts of northern Shan State which have been impacted by displacement. The applicants have not made submissions that they would need to live in Kachin State or areas impacted by the conflict and I do not consider that the applicants would need to move to any part of Myanmar affected by such conflict and note also that DFAT assesses¹⁷ that most people in Myanmar can typically relocate within Myanmar, subject to their individual financial circumstances. I do not accept that the applicants would face a real chance of any harm as a result of armed conflict or displacement in Myanmar.

39. I accept that it may be apparent to the authorities in Myanmar that the applicants are returning to Myanmar after failing to seek asylum due to the manner of their return on temporary travel documents as they have lost their passports. I have not accepted that they would be classed as leaving Myanmar illegally and therefore face any harm on that basis if returned to Myanmar. I consider that the authorities would have a record of their legal departure on their own valid passports. In 2013, the UK Home Office advised their staff¹⁸ that authorities at the Burmese Embassy in London keep records of those who leave Burma legally on properly acquired exit stamps, therefore it should be possible for the Burmese Embassy to check the details of those who have left Burma legally and issue a replacement passport if required. It is therefore also likely that the Myanmar Embassy in Australia would hold similar records and would be able provide the applicants with either replacement passports or a certificate in lieu of their passport which would enable them to travel to Myanmar. The applicants have not provided any evidence that they have attempted to obtain such documentation and been refused.
40. I have had regard to information from both the UK Home Office¹⁹ and DFAT in relation to return procedures and have had greater regard to the DFAT report which is more recent by a number of years and post-dates the change of government. DFAT reports²⁰ that it is aware of a small number of voluntary returnees entering Myanmar via international airports during 2017 and 2018, but has not received reports of questioning of or adverse treatment toward returnees by government officials following their return to Myanmar. DFAT states²¹ that it is not aware of any credible reports of mistreatment of failed Rohingya asylum seekers stemming specifically from their pursuits for asylum overseas. I have no reason to consider that analysis would not extend to other returnees to Myanmar who are nationals of the country and have other ethnic and religious profiles, including Muslims from Shan province. If there were such instances, I consider there would be recent reporting in relation to this.
41. I have found the applicants are not stateless or undocumented. Applicant 1 is Bamar and his wife and children are Bamar and Kachin and are not from a persecuted ethnic minority, I have found that they would have no adverse profile, and face no penalty, on the basis of their legal departure and/or claims for asylum in Australia. I consider that the applicants' only profile relates to their religion as Muslims, and I have found they would not face a real chance of serious harm for that reason. It follows that even when the applicants' claims are considered in a cumulative sense, and having regard to the totality of the information before me, I am not satisfied there is a real chance the applicants would face serious harm if they returned to live and work in Myanmar.

¹⁷ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28, 5.27

¹⁸ UK Home Office, "Operational Guidance Note – Burma", July 2013, CIS29321

¹⁹ Ibid.

²⁰ DFAT, "DFAT Country Information Report - Myanmar", 10 January 2017, CISED50AD28, 5.41

²¹ Ibid, 5.51

42. I am not satisfied that the applicants hold a well-founded fear of persecution.

Refugee: conclusion

43. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

44. Under s.36(2)(aa) of the Act, 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

45. 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.

46. I have found the applicants may face low to moderate levels of official and societal discrimination on the basis of their religion. I have also found that any discrimination they may face based on that profile would not amount to serious harm. I have found the applicants would not be prevented from finding work or accommodation, or be denied access to services such as education or prevented from making a livelihood enabling them to subsist because of their religion. I accept that if the applicants were exposed to low or moderate levels of official or societal discrimination, it would be challenging, and may cause them distress and frustration. However, when having regard to the applicants' particular circumstances, including their past experience living in Myanmar, their otherwise low profile, the fact that they still have close family members living and working in Myanmar, their status as citizens, their past access to and level of education and the country information considered above, I do not accept that such discrimination, should it occur, would amount significant harm as defined. I am not satisfied that it would amount to the arbitrary deprivation of life or the death penalty. I am also not satisfied that it would amount to being subject to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as set out in the Act. I am not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Myanmar there is a real risk they will suffer significant harm.

47. I have otherwise found that there is not a real chance that the applicants will face any harm on their return to Myanmar as a result of their other claimed background and experiences in both Myanmar and Australia, including their seeking of asylum. Real chance and real risk involve the

same standard²². On the same factual findings, I am similarly not satisfied that the applicants face a real risk of suffering any harm on any of the claimed grounds, including significant harm.

Complementary protection: conclusion

48. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

49. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse and dependent children.
50. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

²² *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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