



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR

IAA reference: IAA20/07727

Date and time of decision: 5 February 2020 10:36:00

M Brereton, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a stateless Rohingya who was born in Myanmar but lived in Bangladesh from the age of about [age]. He left Bangladesh in 2006 and travelled to [Country]. He departed [Country] [in] January 2013 and he arrived on Christmas Island [in] February 2013. On 11 May 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 13 November 2019, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed to fear harm in Myanmar as a stateless Rohingya, because of his religion and because he has no identity documents. He also claimed to fear being killed or subjected to forced labour in Rakhine State, Myanmar.
3. The delegate did not accept the applicant's claim as to ethnicity and statelessness and found that the applicant is most likely a citizen of Bangladesh. The delegate found that this undermined the fundamental basis of the applicant's claims and dismissed these in their entirety. The delegate was not satisfied that the applicant is a person to whom Australia owes protection obligations.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
5. On 14 January 2020, the applicant (through his current agent) provided a submission and new documents to the IAA. Parts of this submission refer to and make argument in respect of the information that was before the delegate and the delegate's findings and to that extent it is not new information. The new documents comprise some documents that were provided to the Minister before the delegate's decision and are not new information. The following documents are not in the review material and I am satisfied that they are new information:
 - A family attestation form and refugee card issued by the United Nations High Commissioner for Refugees (UNHCR) in Bangladesh that are said to relate to the applicant's mother and two of his siblings.
 - A UNHCR (Bangladesh) refugee card said to be the applicant's wife.
 - A UNHCR (Bangladesh) data sheet dated 2012 that appears to list the applicant, his wife and two children.
 - The applicant's ImmiCard (Australia).
 - A membership card for [Organisation 1] displaying the applicant's name and photograph, together with a statement in support from the chairman, dated [November] 2019.
 - A document and translation said to be proof of the applicant's marriage in Bangladesh.
 - Two documents and translations relating to the vaccination of children in Bangladesh, each identifying the father by the same name claimed by the applicant.
 - Statements (in English) said to be from the applicant's mother and wife, both dated 14 December 2019.

- A document from Myanmar and translation, said to be a testimonial supporting the applicant's claimed place of birth in Myanmar, dated [December] 2019.
 - An image of a handwritten statement in English said to be from members of the camp committee of a Rohingya [refugee camp], in support of the applicant's claimed identity and ethnicity. The image is dated [December] 2019.
6. Most of these documents post-date the delegate's decision, but the information in these documents refers to circumstances and information that pre-date the decision and which is personal information relating to the applicant and his family. I note from the review material that on 26 May 2017, the applicant was sent a letter pursuant to s.91W(1) of the Act requesting him to provide "... documentary evidence of your identity, nationality or citizenship for inspection by an officer of the Department." The applicant responded (through a *pro-bono* solicitor who was not otherwise representing or assisting the applicant) that he had no proof of his identity, nationality or citizenship. This response is not necessarily inconsistent with the documents now provided, as the official documents (other than the purported testimonial) do not refer to the applicant's own nationality or citizenship.
 7. At the interview with the delegate on 12 February 2019 (the interview) (at which the applicant was unrepresented), the delegate spent some time discussing usual Myanmar identity documents and asking the applicant about his place of birth in the district of [Location], Rakhine Province, Myanmar. The delegate also noted that the applicant had now provided a copy of a UNHCR family list for his wife and children in Bangladesh, dated 2016. The delegate questioned the applicant about his claimed history and why he himself was not registered on that family list. The applicant said that he had been on the list but the UNHCR had taken him off when he left Bangladesh to go to [Country]. He said that he had tried to obtain a copy of the list with his name on it but had been unable to do so. The delegate asked if it was okay to say that the applicant was registered with the UNHCR in Bangladesh and the applicant said yes, but he did not know when he had been registered and he believed that his registration had been removed when he left Bangladesh.
 8. The delegate asked if there was any evidence of the marriage and the applicant said no, because the marriage had taken place in a refugee camp. He said it was a religious marriage. Although it is clear from the conduct of the interview that the delegate had concerns with aspects of the applicant's evidence, the delegate did not raise further doubts as to whether the applicant was married or had children, or ask the applicant to provide further information in support of his marriage claim.
 9. The applicant has not explained why the above documents could not have been provided earlier. He did provide some explanations of some of these issues during the interview but did not indicate that he would be able to obtain the information or documents now provided. At the end of the interview he indicated that he could email a copy of the 2016 UNHCR list and that he would ask his wife the year he was removed from this list. Later the same day the applicant emailed copies of the 2016 family list, his own UNHCR ([Country 1]) card, his daughter's UNHCR (Bangladesh) card, and a Food Card that appears to be in his wife's name. In the covering email he said that neither he nor his wife could recall the date that his name was removed from the data sheet.
 10. At the end of the interview the delegate also said that any additional information received would be considered but did not ask for any other specific documents.
 11. Although the documents now provided are not necessarily determinative of the issues before me, the delegate's refusal was ultimately based on credibility issues when considering the

totality of the applicant's evidence and the lack of supporting information. The new documents do go some way to addressing those credibility issues. Having regard to these factors I am satisfied that these documents contain credible personal information that, had it been known, may have affected the consideration of the applicant's claims. I am satisfied that there are exceptional circumstances to justify considering this information.

12. The delegate assessed the applicant's claims against Bangladesh. For the reasons given below, I have assessed the applicant's claims against Myanmar. I have obtained new information, being the most recent Australian Department of Foreign Affairs and Trade (DFAT) country information report for Myanmar.¹ This report was prepared for the purpose of assisting decision makers considering protection claims in Australia and draws on DFAT's on-the-ground knowledge and discussions with a range of sources in Myanmar. It takes into account relevant information from government and non-government sources, including but not limited to those produced by the United Nations (UN) Independent International Fact-Finding Mission; other relevant UN agencies including the Office of the United Nations High Commissioner for Human Rights and the UNHCR; the United States Department of State, recognised human rights organisations including Amnesty International; and reputable news organisations. I consider DFAT to be an authoritative source and note that this report is its most current assessment. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:

- He is a Rohingya Muslim who was born in the district of [Location], Rakhine Province, Myanmar. His family was subjected to discrimination and persecution and his father and grandfather were beaten. Once the police beat his grandfather and his grandfather died from his injuries about a month later.
- The family fled Myanmar when the applicant was about [age] years old, in around 1983. From 1983 until 1991 they resided unlawfully in [name] district, Bangladesh and then later relocated to a refugee camp in Bangladesh. They were not registered with the UNHCR at that time.
- He married his wife in a refugee camp. Rohingya are not treated well in Bangladesh and the applicant was not able to say with his wife, who is registered as a refugee with the UNHCR. He left Bangladesh and went to [Country 1] in 2006.
- He fears being imprisoned, killed, beaten, or subjected to forced labour by Rakhine people or government authorities because he is a Rohingya and because he does not have any identity or travel documents.
- He will be unable to practise his religion freely and would face restriction of movement and denial of access to healthcare, housing and employment.

Factual findings

14. The applicant has consistently claimed to be a Rohingya who was born in Myanmar in around [year] but fled with his family to Bangladesh when aged about [age]. He claims to have no

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

identity documents other than a copy of a UNHCR card that was issued to him in 2011, when he was in [Country]. The review material contains correspondence between the Department of Immigration (the Department) and UNHCR [Country] that indicates, and I accept, that the copy is a copy of a genuine card issued in the applicant's claimed name and carrying what appears to be a photograph of him. The card states that he is a stateless Rohingya from Myanmar. There is no evidence, including in the UNHCR response, to indicate whether this finding was based on "as reported" information from the applicant or whether there was other evidence that informed the UNCHR finding.

15. The applicant claims to have been born in a village in [Location], Rakhine Province, Myanmar. The names said to be the applicant's former village have been transcribed into a variety of spellings in the material before [me]. The names are phonetic renderings into English and I have not given any weight to the variations in spelling. At the interview, the applicant said that the name of the village translates to "[deleted]" although the letter from the [Organisation 1] names the village as "deleted" and the testimonial also refers to it as "[deleted]". The delegate referred to country information listing the names of villages in Rakhine state² but there are no villages listed by the above names or any close approximations of those names. The information does not refer to specific wards or districts in [Location] township beyond identifying some township "areas". Although the information does not contain the place name(s) indicated by the applicant, I am not satisfied that the information is an exhaustive list of all township areas and I do not consider that the lack of a name on this list or the confusion as to what number ward it is indicates that the applicant has falsely claimed that this village is in Rakhine Province, or that the applicant's claimed birth place does not exist.
16. During the interview the applicant was asked about his family's documents from Myanmar. He said that they had no such documents and as he was born at home, he had no birth certificate. He said that he had never seen a Household Registration List (HRL) or other documents from Myanmar and his mother had told him that if the family had held such documents, they would not have had to flee Myanmar. When the delegate referred to country information that the HRL is the main form of documentation for Rohingyas in Rakhine³, the applicant said that "maybe" his family had one before they left but he does not think they have one now. He said that he did not ask his family about Myanmar documentation until after he had come to Australia. In answer to further questions he said that the family had a document but he did not ever see it.
17. The testimonial provided to the IAA is dated [December] 2019. The document appears to be an image of a handwritten document that, according to the translation, has two illegible stamps and a signature. The translation states that the applicant was a resident in the claimed township with his family until [November] 1982. Inspections were done annually and upon one such inspection it was found that the family had left [in] December 1983 and had fled towards Bangladesh. This information is consistent with the applicant's claims and country information about Rohingya documents (considered further below) but this is not an original document and the stamps are illegible. I am not able to determine the authenticity of this document and have not given it any weight.
18. According to Amnesty International⁴, the household list is the main form of documentation for Rohingya living in Rakhine State. However, the Myanmar authorities there have "... engaged in an active policy of depriving Rohingya of vital identity and residency documentation. ... [I]n

² "List of Rohingya Villages in Arakan", 22 March 2012, CIS961F9402861

³ Amnesty International, "Caged Without a Roof - Apartheid in Myanmar's Rakhine State" 21 November 2017, CISED50AD7585.

⁴ *ibid.*

northern Rakhine State, Rohingya who are not present during mandatory annual “household inspections” risk being deleted from official residency lists. Without proof of residence it is extremely difficult to acquire any form of citizenship in the future, and for those who have left Myanmar, whether they were driven out by violence or left in search of education and livelihood opportunities, it means it is virtually impossible to return.”

19. I note the apparent inconsistency between the comment that his family had no documents and the comment that they had a HRL when they left (but no longer have one). Even if the family did have a HRL the information above supports the applicant’s explanation that “perhaps” the family destroyed the HRL after they fled because they believed they would be unable to return to Myanmar. I also take into account his age at the time that he left Myanmar (about [age] years old) and it is plausible that as a young man growing up in Bangladesh, he did not ask his family about Myanmar documentation.
20. The applicant has been assisted by Rohingya interpreters during interviews with the Department. According to the United Kingdom Home Office (UKHO), “... the language of the Rohingya and the local Bangladeshi population in the border area of Burma and Bangladesh was very similar and that “distinguishing the Rohingya from the local population in the Chittagong area is very difficult.” A 2011 Danish report noted: “According to UNHCR (Bangladesh), the Rohingya language is not a written language and the Rohingya people are in general not very literate. Their Rohingya language is very similar to the Chittagonian dialect of Bangla spoken in the area. There are few words which may differ in the two languages depending on how close to the Bangladesh border the Rohingya were residing in. Given that many Rohingya have been residing in Bangladesh for many years, it becomes difficult to distinguish a Rohingya from a Bangladeshi at times. On occasion, a local person might be able to distinguish the Rohingya language from the language spoken by local Bangladeshis.”⁵
21. The delegate referred to some instances of difficulties with the interpreter but having listened to the audio of the interview, I consider that some of the difficulties appear to relate to comprehension rather than language. I also note that the interpreter did not make any comments to suggest that the applicant was speaking anything other than Rohingya. Even though Rohingya and Chittagonian may have some similarities, I am not satisfied that the audio of the interview casts doubt on the applicant’s claim that he speaks the Rohingya language.
22. The applicant claims to have lived in the Chittagong area of Bangladesh and given the information above, I am not satisfied that using Rohingya interpreters, of itself, supports or contradicts the applicant’s claimed ethnicity. In his SHEV application he provided a letter purporting to be from [Organisation 2] of Australia that states the association has checked his language and other details, although it does not expand on what information the applicant gave or how it was checked. The statement from [Organisation 1] chairman now provided also refers to the applicant speaking Rohingya. While such letters may sometimes appear to lack personal knowledge, the [Organisation 1] letter refers to the applicant’s personal circumstances (such as the date he left Myanmar, supporting his family in a Bangladesh refugee camp), his being well-known to [Organisation 1] since 2013 and his being involved with the Rohingya community in Australia as an area leader. I do not consider these documents corroborate the applicant’s claims, but the reference to the Rohingya language in both may point more to the applicant being a Myanmar Rohingya than a Bangladeshi.

⁵ United Kingdom Home Office (UKHO), “Country Policy and Information Note Burma: Rohingya (including Rohingya in Bangladesh)”, 1 March 2019, 20190521142657.

23. The applicant claims to be married to a Rohingya refugee in Bangladesh ([Ms A]) and to have two children. He has provided a copy of [Ms A]'s UNHCR refugee card and vaccination documents that indicate he is the father of two children, [Child 1] and [Child 2]. He has also provided a UNHCR refugee card for [Child 1] and a UNHCR data sheet that records [Ms A], [Child 1] and [Child 2] as residents in a Bangladeshi refugee camp in 2012. The applicant's name appears on this data sheet as the husband of [Ms A], but he is not listed as being in residence or having an individual identity number. This is consistent with the explanation he gave to the delegate during the interview. The applicant has also provided a document and translation that purports to be the marriage contract between him and [Ms A] in 1998, and a statement said to be from [Ms A] confirming the marriage.
24. There is information before me⁶ that there have been reports of some fraud with regard to some of the UNHCR paper documents, with some Bangladeshi citizens attempting to present themselves as stateless Rohingyas (for the purpose of achieving a migration outcome by way of making an application for refugee status) by fraudulently inserting a photograph of themselves onto such documents. Such documents are thus known to be vulnerable to fraud. However, the applicant has also provided what presents as being valid issued UNHCR refugee cards which list [Ms A] and [Child 1] as having Myanmar nationality. The information before me does not indicate that there has been a trend in these UNHCR cards being affected by fraud.
25. I am satisfied from the information now before me that the applicant is married to [Ms A], has two children and that [Ms A] and the children reside in Bangladesh as UNHCR registered refugees.
26. The applicant has provided a UNHCR family attestation form said to refer to his mother and two siblings, and a copy of a UNHCR refugee card said to have been issued to his mother. The names and approximate birth dates of the mother and the two siblings are generally consistent with the names and dates that the applicant provided in his SHEV application. The existence of the UNHCR documents appears inconsistent with the applicant's claim that the family never registered with the UNHCR in Bangladesh. The family attestation is undated and the copy of the mother's UNHCR card is of poor quality (but it appears to have been issued in 2019). It is not possible to determine when the mother and siblings were first registered with the UNHCR in Bangladesh but in any event, the applicant claims that he left Bangladesh in 2006 to travel to [Country]. While I share the delegate's concerns about aspects of the applicant's evidence relating to his own registration with UNHCR in Bangladesh, even if he had been registered there at some point, he left Bangladesh in 2006. This is consistent with his explanation for why his name does not appear on the family documentation and supports his assertion that his not registered there.
27. I also note from this information that the applicant's mother and siblings have been registered as refugees from Myanmar. As noted earlier, the UNHCR information does not indicate what checks or assessments have been undertaken, nor what information the holders of the cards have provided. I have not given the mother's and sibling's registered nationality any weight in my consideration.
28. Despite my concerns about aspects of the applicant's evidence, the key issue is the applicant's ethnicity and nationality. It is difficult to make findings in the absence of any identity documents, but the absence of such documents is consistent with the applicant's claims that his family fled Myanmar in 1983 and did not obtain a new HRL. It is also consistent with the information that Rohingyas who left Myanmar were removed from HRL by the Myanmar

⁶ Danish Immigration Service (DIS), "Rohingya refugees in Bangladesh and Thailand", 1 January 2011, CISD9559B11859.

authorities. While some of his evidence about his family's origins, life in Bangladesh and Rohingya customs is lacking in detail, I note that he left Myanmar at the age of [age] and claims to have lived as an undocumented refugee in Bangladesh for many years. It is not surprising that his knowledge is in many areas limited and based on what he has been told by others and I have not given this significant weight.

29. Ultimately, there is no determinative evidence before me that the applicant is a citizen of Myanmar or Bangladesh, or that he would be entitled to citizenship of either country. I cannot make a finding as to his citizenship or right to citizenship with any degree of confidence and I have therefore proceeded to consider his claims on the basis that he is stateless.
30. It is then necessary to determine which country or countries of former habitual residence to assess his claims against. I accept the applicant's claims that he is a Rohingya who was born in Myanmar and lived there until the age of [age]. He claims, and I accept, that he lived in Bangladesh for [number] years and that his wife and children remain there. I am satisfied that it is possible to consider both as countries of former habitual residence. However, for the purposes of ss.5H and 36(2)(a), a stateless applicant need only satisfy the refugee or complementary protection criteria in relation to one such country. I am satisfied that Myanmar is a receiving country for the purposes of this review.

Refugee assessment

31. 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

32. 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.
33. The applicant has made specific claims to fear harm in Myanmar as a Rohingya, and from the people and government in Rakhine State (where his family originated from). According to

DFAT⁷, the vast majority of Rohingya are Sunni Muslim, and live in Rakhine State. Rohingya in northern Rakhine typically do not speak Burmese, only Rohingya and sometimes Rakhine languages. There are smaller communities of Rohingya in many other townships in Rakhine State, in some of which Rohingya interact with ethnic Rakhine (also known as Arakanese) and can speak Burmese and Rakhine languages, although interaction is limited by a number of factors. The UN Fact-Finding Mission reported that the majority of the Rohingya and Rakhine they interviewed described productive relationships between the two ethnic groups before the 2012 violence, including business interactions and friendships.

34. The security situation in Rakhine State deteriorated rapidly after two outbreaks of violence in 2012 which affected ethnic Rakhine (mostly Buddhists) and minority Muslim communities (both the population that identify as Rohingya and the Kaman) across 12 townships. The UN Fact-Finding Mission reported that the security forces, sometimes in co-operation with Rakhine civilians, committed serious human rights violations against Rohingya and Kaman across Rakhine State between 2012 and 2013, including the burning of houses, looting of shops and extrajudicial and indiscriminate killings, including of women, children and the elderly. Violence decreased between 2014 and late 2016, although the situation was extremely fragile with significant impacts on the rights of communities.
35. Beginning on 9 October 2016, a Rohingya insurgent group began attacks on police and security forces and this led to a major “clearance operation” by the authorities. The presence of security forces increased and movement of the Rohingya population was tightly controlled through ongoing movement restrictions, curfews and checkpoints. There were widespread and systematic arson attacks against Rohingya villages with over 1,500 buildings destroyed between October and December 2016. The UN Fact-Finding Mission reported a range of serious human rights violations against the Rohingya population by the security forces during the 2016 security operations, including arbitrary arrests, ill-treatment and torture, forced disappearances and sexual violence. Around 87,000 Rohingya fled to Bangladesh.
36. In August 2017, Rohingya insurgents launched a second wave of attacks across northern Rakhine State. The security force response, launched within hours of the attack, was disproportionate, encompassing almost the total Rohingya population across Maungdaw, Buthidaung and Rathedaung Townships. Despite the geographic spread of the security operations, the strategy was consistent – soldiers, other security forces, Rakhine men, and in some cases, men from other ethnic minorities, attacked villages with gunfire and arson. The same violations used by security forces in 2016 were again employed against men, women and children, on a significantly larger scale, including targeted and indiscriminate shootings, extreme sexual violence and gang rapes, and widespread arson attacks. Mass killings, some cases involving hundreds of people, reportedly occurred in at least five villages. *Médecins Sans Frontières* (MSF) estimated at least 9,400 Rohingya died in the initial month of the conflict; the UN Fact-Finding Mission has described this as a conservative estimate. Satellite imagery corroborates first-hand accounts of the systematic and targeted destruction of Rohingya villages across the three townships. At least 392 villages (40% of all settlements in northern Rakhine) were partially or totally destroyed. By August 2018, close to 725,000 people, mostly Rohingya, had fled to Bangladesh. The UN Fact-Finding Mission reported a build-up of armed forces in Rakhine State in the months leading up to the 2017 security operations and an increase in anti-Rohingya rhetoric during this period, including by civilian leaders. 2018 saw another attack by insurgents and a more limited security force response, but armed clashes continued into 2019. As at February 2019, thousands of people were estimated to be

⁷ DFAT, “DFAT Country Information Report Myanmar”, 18 April 2019, 20190418091206.

displaced in Rakhine State and clashes between insurgents and the security forces continued. There continued to be reports of human rights violations including forced labour and arbitrary detention.

37. Prior to 2017, both Maungdaw and Buthidaung had significant Muslim majority populations (around 75-90%). Following the mass displacement of Rohingya to Bangladesh, population figures are no longer known. DFAT assesses that official and societal discrimination on the basis of ethnicity against Rohingya in Rakhine State is high, endemic and severe. They typically lack citizenship, face severe restrictions on their freedom of movement and are the subject of systemic extortion and harassment. These issues combine to restrict this community's access to livelihoods and to essential services, including in education and health. Rohingya have also been subjected to extreme violence by the security forces, and to a lesser extent, the ethnic Rakhine population. A United Nations Fact-Finding Mission reported episodes of violence between Buddhists and Muslims across the country in recent years, primarily in Rakhine State, and high levels of religious and ethnic tensions remain at the time of publication (2019). DFAT assesses there is a high risk of further violence for the remaining Rohingya in Rakhine State.
38. The applicant claims that he was taught Rohingya while in Bangladesh and that this is his primary language. He said that he was also taught to read some Burmese but does not know how to speak or write in that language. He said that he has a maternal aunt and some cousins who remain in Rakhine State. I am satisfied that if he returns to Rakhine State, he will be identified as, or imputed to be, a Rohingya. Given the current situation in the north of that state, including [Location], and in Rakhine State more broadly, I am satisfied that there is a real chance, now and for the foreseeable future, that the applicant will face a real chance of harm arising from his race. I am satisfied that this harm may include death, injury, or significant harassment or ill-treatment, would be inflicted on a systematic and discriminatory basis, and would constitute serious harm as contemplated by ss.5J(4)(b) and (5). I am satisfied that it will be inflicted for the essential and significant reason of the applicant's real or perceived race. I am satisfied that he has a well-founded fear of persecution in Rakhine State.
39. Section 5(1)(c) of the Act requires that the real chance of persecution relates to all areas of the receiving country. DFAT reports that there are a number of Rohingya living outside of Rakhine State, particularly in Yangon, but the size of the Rohingya population outside Rakhine State is unclear. This is due to both a lack of official statistics that recognise the Rohingya as an ethnic group, and also as some Rohingya in Yangon and other large cities in Myanmar reportedly conceal their ethnic identity, including through attempts to identify as Kaman or other Muslim groups. Rohingya outside Rakhine State generally have higher incomes and better access to resources than those in Rakhine State, and are typically able to obtain identity documentation that allows them to live and work without facing the high levels of discrimination otherwise experienced by Rohingya in their day-to-day life. Typically, Rohingya in Yangon are registered as "Burmese Muslims" or "Bamar Muslims". A person willing to record their ethnic group as a Burmese/Bamar Muslim is generally able to access either full, associate or naturalised citizenship (depending on their family history). DFAT assesses that Rohingya who live outside of Rakhine State experience moderate levels of societal and official discrimination on a day-to-day basis. While they are officially denied citizenship rights, Rohingya who choose to identify as Kaman or other Muslim groups face a similar level of discrimination to that experienced by other Muslims.
40. The applicant is a practising Muslim whose speaks Rohingyan but little Burmese and no other Myanmar languages. While the applicant may be able to register as a Burmese or Bamar Muslim, this would involve him concealing his true race and ethnicity, which would be an impermissible modification of behaviour as contemplated by s.5J(3) of the Act. The applicant

has no identified family or other connections in any area of Myanmar outside Rakhine State and if there are any official records of his family in Myanmar, they will indicate residence in Rakhine State up until around 1983. Myanmar and Bangladesh have signed an agreement that Myanmar will receive former residents of Rakhine State who left for Bangladesh after the violent attacks of October 2016 and August 2017, if they can prove their former residency of Rakhine State, but given the date that the applicant's family left I am not satisfied that he will be covered by this agreement and the government-assisted repatriation that it includes. DFAT has reported that some returnees have been detained until they have agreed to return to their home areas, although it appears that these incidents may have involved persons with other adverse profiles. Nevertheless, having regard to the levels of discrimination and mistreatment facing Rohingyans and the applicant's origin and lack of family outside Rakhine State, I am satisfied that there is more than a remote chance that he would be relocated to Rakhine State should he return to Myanmar. Even if he was able to remain outside Rakhine State, he has no family, friends or community support, does not speak Burmese well and has no experience of working or living in Myanmar. I am satisfied that this profile will add to his risk profile as a Rohingya and that there is more than a remote chance that he will suffer harm amounting to serious harm as a Rohingya in other areas of Myanmar.

41. I am satisfied that the applicant has a well-founded fear of persecution within the meaning of s.5J with regard to Myanmar. Given this, and as the applicant is stateless, it is not necessary for me to consider whether he has a well-founded fear of persecution in Bangladesh.

Refugee: conclusion

42. The applicant meets the requirements of the definition of refugee in s.5H(1).

Third country protection

43. Section 36(3) of the Act (as set out in the attachment to this decision) provides that, subject to certain qualifications, Australia is taken not to have protection obligations to an applicant who has a right to enter and reside in any country apart from Australia and has not taken all possible steps to avail themselves of that right.

Application of s.36(3) to this case

44. As is apparent from the DFAT report and other information before me⁸, over recent years Bangladesh has seen the irregular arrival of large numbers of Rohingya from Myanmar. This does not, however, mean that Rohingya (who are not nationals of Bangladesh) have a right to enter and reside in Bangladesh. As has been noted above, the applicant was formerly a habitual resident of Bangladesh for almost three decades. While it remains unclear whether he was at any time registered as a refugee with UNHCR there, there is no information before me that he was ever registered in any other way with the government of Bangladesh or that he has any right to enter or reside in Bangladesh. Even if he had been registered by the UNHCR, such registration does not confer a right to enter and reside in Bangladesh upon the applicant.
45. After departing Bangladesh, and before arriving in Australia, the applicant lived in [Country] and was registered with the UNHCR there. He said that he did not have a passport and had no

⁸ Danish Immigration Service (DIS), "Rohingya refugees in Bangladesh and Thailand", 1 May 2011, CIS20659; Human Rights Watch/Asia, "Burmese refugees in Bangladesh: still no durable solution", 1 May 2000, CIS12716.

travel documents permitting him to enter. There is no information before me to indicate that he now has a right to enter and reside in [Country].

46. The applicant is not a national of Bangladesh or [Country] and it is not apparent that he has a right to enter and reside in either of these countries, or any other country.

47. Section 36(3) does not apply to the applicant.

Decision

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

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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