



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

MYANMAR
IAA reference: IAA21/08858

MYANMAR
IAA reference: IAA21/08861

MYANMAR
IAA reference: IAA21/08860

MYANMAR
IAA reference: IAA21/08862

MYANMAR
IAA reference: IAA21/08859

Date and time of decision: 9 March 2021 14:11:00
J Jennings, Reviewer

Decision

In respect of Applicants 3, 4 and 5 the IAA remits the decision for reconsideration with the direction that:

- the referred applicants are refugees within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of Applicants 1 and 2 the IAA remits the decision for reconsideration with the direction that:

- the referred applicants are members of the same family unit as Applicant 3 and satisfy the criteria in s.36(2)(b)(i) 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 applicants are a family group comprising Applicant 1 (IAA21/08858), his wife Applicant 2 (IAA21/08859), and their three children, sons Applicant 3 (IAA21/08860) and Applicant 4 (IAA21/8861), and daughter Applicant 5 (IAA21/8862).
2. On 23 May 2015 they lodged a combined application for a protection visa. Applicants 1 and 2 claimed to be stateless Muslims born in Myanmar (Burma) and that their children who were born abroad were also stateless. On 2 June 2016 a delegate of the Minister refused to grant the visas; the delegate did not accept the applicants were stateless and found they were citizens of Myanmar. The delegate was not satisfied that the applicants would face a real chance of serious harm or a real risk of significant harm in Myanmar.
3. On 21 July 2016 the IAA affirmed the decision not to grant the applicant a protection visa. On 27 January 2021 the Federal Court of Australia by consent quashed the decision of the IAA and directed the IAA to determine the matter according to law.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).

Submissions to the IAA

5. The IAA received submissions on behalf of the applicants dated 18 July 2016 and 23 February 2021. The 2021 submission advised that the applicants no longer rely on the 2016 submission and these and all annexures are withdrawn.
6. The 2021 submissions address the delegate's reasons and findings and discuss matters relevant to credibility and I have had regard to these.
7. In the representative's submission it is stated the mother of Applicant 1 is Muslim. In previous information he stated she was a Buddhist. No information has been provided to explain why Applicant 1 previously described his mother as a Buddhist if she was Muslim, or if she converted to Islam after her marriage. Furthermore the comprehensive information in his statement of claims reinforces her religion as being Buddhist; in this the applicant very specifically noted her Buddhist religion, that she was flexible about religion, and that his parents practised their religion separately without any problems between them. The information in the IAA submission does not indicate this is a recent change which may explain the discrepancy, rather it points to a history of her being Muslim. I have concerns as to the veracity of this information and I am not satisfied it is credible. It sits in stark contrast to the comprehensive description in the statement of claims of the applicant's mother as a Buddhist and there is no explanation as to the discrepancy and none is apparent to me. I am not satisfied that this is personal credible information, or that it could not have been given to the delegate. I am not satisfied that s.473DD(b) is met and am therefore prohibited from considering this information. While not strictly necessary, having taken the above matters into account, I am also not satisfied there are exceptional circumstances to justify the IAA considering it.

8. I note the submission requests that the IAA exercise its discretion under s.473DC and invite the applicants for an interview. In view of my findings below I have decided not to exercise my discretion in this regard.

Applicants' statements

9. The submissions included further statements made by all applicants except Applicant 3, who is still a minor.
10. Statements made by Applicants 4 and 5 largely recount or explain information already before the delegate in regard to claims already made. I am satisfied that this is not new information.
11. Statements from Applicants 1 and 2 seek to correct information previously given in regard to the place of birth and citizenship of Applicant 2, the ejection of the applicants from [Country 1] to [Country 2] in [Year 7] and regarding the birth and registration of Applicant 3. None of this information is new, it was advanced by the applicants at various times but then later amended or withdrawn. The applicants have outlined in their submissions the information they now claim is the correct version of their circumstances.
12. New information contained in these statements relates to recent attempts to contact family members in Myanmar and concerns regarding the military coup. These events have occurred since the delegate's decision and the attempts to contact family and the stated fears are personal and is information that may have affected the consideration on their claims. I am satisfied this information meets s.473DD(b). The recent military coup is a significant event and I am satisfied exceptional circumstances exist that justify the IAA considering this new information.

New country information

13. The 2021 submission to the IAA seeks to introduce new country information and notes the recent military coup in Myanmar and restrictions due to the Covid-19 pandemic and comments these recent actions significantly alter the circumstances the applicants face in Myanmar. In this regard the submission was accompanied by information providing more contemporary information on the situation in Myanmar. This information post-dates the delegate's decision and on that basis meets s.473DD(b)(i), although as general country information which does not contain personal information it does not meet s.473DD(b)(ii). In assessing whether exceptional circumstances exist that justify the IAA considering this new information I have had regard to the probative value of each in addressing the claims made by the applicants.
14. I have considered the factors relevant to s.473DD(b) and taking those factors into account I am satisfied that there are exceptional circumstances to justify considering the below new information.
 - Department of Foreign Affairs and Trade (DFAT), "Country Information Report, Myanmar", 18 April 2019.

This report was published after the delegate's decision and the delegate relied on the then current 2015 DFAT report which the 2019 report has updated. It has been prepared specifically for the purpose of protection status determinations.
 - The New York Times, "Myanmar's Coup, Explained".

The article contains a factual explanation of the military coup in Myanmar on 1 February 2021.

- [Source] “[Article title]”.

This article directly addresses the situation for people in [Country 1] who may be deported to Myanmar.

- Brookings, “Myanmar’s response to the Covid-19 pandemic”.

This is a factual and informative article outlining pandemic measures in Myanmar including the impact on already limited resources. This in part is relevant to claims that as Muslims the applicants will have difficulty accessing health care in Myanmar.

15. In regard to the below information I have considered the factors relevant to s.473DD(b) and taking those factors into account I am not satisfied that any exceptional circumstances exist that justify the IAA considering this information and I have not had regard to it.

- Smart Traveller travel advice.

Such advice is issued by DFAT and has been written for a specific audience, being Australians potentially travelling to Myanmar, and provides guidance on how they should ensure their safety in the light of the recent coup, as well as providing information on general aspects of safety in Myanmar. Information regarding the coup is before me in other information provided with the submission and I am not satisfied that this document adds significant probative value to that information.

- Al Jazeera, “Serious blow to democracy: World condemns Myanmar military coup”; ABC News, “UK sanctions Myanmar generals for 'violating the right to life' after military coup”.

These articles essentially report the reactions and condemnations from the international community to the coup. They provide little insight into the coup itself or how the coup has impacted on the circumstances for people in Myanmar. I am not satisfied this is of probative value in supporting the applicants’ claims.

- The Guardian, “Myanmar coup: witnesses describe killing of protesters as unrest continues”; BBC News, “Myanmar coup: Internet shutdown as crowds protest against military”.

These articles detail the upspring of protest in response to the coup and the military crackdown on such protests. From these articles it is evident that the military are quashing protest action and limiting the ability to share information over the internet. While these events point to the strength and ruthlessness of military rule in Myanmar this is information already before me in other information provided with the submission and in information that was before the delegate and I am not satisfied that these reports add significantly to that information.

- The Conversation, “COVID coup: how Myanmar’s military used the pandemic to justify and enable its power grab”.

This article is largely a comment piece exploring how the military may be using pandemic measures as part of their bid for control. As already noted there is information already before me in other information provided with the submission and in information that was before the delegate attesting to the ruthlessness of military power and rule in Myanmar.

Information obtained by the IAA

16. The delegate’s decision was made more than four years ago and I have obtained new country information that updates information before the delegate and new information specific to the circumstances of Applicants 3, 4 and 5 as persons born outside of Myanmar who would need

to establish their right to citizenship in Myanmar. I consider that there are exceptional circumstances to justify considering this new information, which is as follows:

- Burma Human Rights Network, “Persecution on Muslims in Burma”, 2017
- Burma Human Rights Network, “Existence Denied”, 2018
- Sebastian Strangio, Foreign Affairs, “The Myanmar Mirage - Why the West Got Burma Wrong”, May/June 2020

Applicants’ claims for protection

17. Applicants 1 and 2 advanced protection claims in the protection visa application and submitted statements of claims. Applicants 3, 4 and 5 did not submit protection claims with the application but their parents advanced fears of harm to their children in Myanmar as stateless Muslims and Applicants 4 and 5 have provided statements to the IAA.
18. The applicants’ claims can be summarised as follows:

Applicant 1

- The applicant was born in the Shan State of Myanmar. His father was a citizen of [Country 3] and Muslim who moved to Myanmar as a child. His mother was born in Myanmar.
- The applicant is Muslim.
- The applicant was not recognised as a citizen of Myanmar and had no identity documents; he is stateless.
- In Myanmar he had no rights to access free education, health care or other benefits available to citizens.
- The applicant married Applicant 2 in Myanmar in [Year 2]; she is also stateless.
- The applicant’s family were one of only seven Muslim families living in their village and the applicant and family members faced harassment and abuse because of their Muslim/[Country 3] background. The family’s farming land was confiscated.
- There was ongoing conflict in their area between the military and the Khun Sa militia. One of the applicant’s brothers went missing in [Year 1] after being taken by the Khun Sa militia.
- The applicant was also abused and mistreated by the military and was regularly taken to provide forced labour. The applicant referred to ongoing conflict in Shan State.
- On one occasion in [Year 2] when he had been taken the applicant escaped from the military by hitting a soldier on the back of the head. After this he and Applicant 2 decided to leave Myanmar and they travelled to [Country 1] in [Year 3] via [Country 2].
- Applicants 1 and 2 lived in [Country 1]. Their three children were born outside Myanmar. Copies of their birth certificates and medical records have been provided.
- His mother remains in Myanmar with one of the applicant’s brothers.
- In [Year 7] he and his family were ejected from [Country 1] to [Country 2]. They returned to [Country 1] after a period in [Country 2].
- In [Year 8] the applicant and his family were registered by the UNHCR in [Country 1] as refugees and copies of their registration cards have been provided.

- In 2012 the applicants left [Country 1] and travelled to Australia.
- The applicant fears that should he return to Myanmar he would face harm because he attacked a soldier and escaped from the military in [Year 2].
- He also fears harm as a Muslim/[Country 3]. He is stateless, has no documents and will be denied access to basic rights.

Applicant 2

- Applicant 2 was born in Rakhine State, Myanmar. Her parents are Rohingya and had no identity documents. She is stateless.
- She is Muslim.
- She is concerned that should she return to Myanmar she will be harmed as a Muslim and a woman; Muslim women are vulnerable to abuse and sexual assault in Myanmar from the military, rebel groups and Buddhists and are not protected by the authorities.
- As she has no documents and no legal rights she would face arrest and mistreatment in Myanmar.

Applicants 3, 4 and 5

- The applicants are Muslim and undocumented and will not be able to access services in Myanmar.
- As Muslims they will be denied benefits available to citizens and subject to harm from the military and militia groups.

Factual findings

Credibility

19. The 2021 submission addressed credibility at some length and I have had regard to the assertions made in the submission in my assessment. However I do not accept uncritically the assertions as to the parent applicants' "serious concerns as to the previous advice and representations made by their previous representatives" and I have made individual findings below as to credibility in regard to separate claims.
20. I acknowledge that where an applicant has been required to give more than one account or narrative of events or circumstances separated by periods of time care needs to be taken in weighing and assessing the probative value of various accounts and I accept that small inconsistencies in detail would not necessarily cast doubt on the veracity of an applicant's claims. I also accept the difficulty for an applicant to prove statelessness or the absence of documentation. However I would still expect the applicants' accounts to be largely consistent in respect of basic details and with documentation they have provided

Background all applicants

21. Applicants 1 and 2 have consistently claimed to have been born in Myanmar and to have travelled to [Country 1] in [Year 3]. They each speak Burmese which is consistent with having been born and grown up in Myanmar. They have provided evidence of their residence in [Country 1]. I accept that the applicants were born in Myanmar and that they left Myanmar in [Year 3] to live in [Country 1].

22. Birth certificates have been provided for the child applicants showing Applicants 1 and/or 2 as their parents; I have discussed the birth certificate for Applicant 3 further below. The UNHCR cards for the applicants indicate they were accepted by the UNHCR as a family group. I accept Applicants 3, 4 and 5 are the children of Applicants 1 and 2.
23. Applicants 2, 4 and 5 have consistently presented the same names and dates of birth in their protection visa application and other dealings with the department and these are consistent with identity documents provided, albeit with some spelling variation which I find to be minor.¹ I accept their names and dates of birth as provided.
24. Documents provided for Applicant 3 variously state his date of birth as [Day 1, Month 1, Year 7] and [Day 3, Month 1, Year 7]. The birth certificate states his date of birth as [Day 1, Month 1, Year 7] and a number of medical records relating to, and contemporaneous with, his birth support this date as his date of birth. The UNHCR card for Applicant 3 states the later date and seemingly the information on this card was relied on when his date of birth was recorded at the arrival entry interviews, when his protection visa application was completed, and by the delegate in his decision. I consider the [Day 1, Month 1, Year 7] date to be the likely correct date of birth.
25. In the material before me the name for Applicant 1 is recorded variously, and these variations go beyond spelling variations. For clarity I will refer to these as follows:
 - [Name 1] – the mononym he provided at the arrival entry interview conducted on 19 November 2012 and in the protection visa application.
 - A nickname he provided at the arrival entry interview which he stated his mother used.
 - [Name 2] – a name which is recorded as part of the father’s full name along with [Name 1] on some [Country 1] birth registration documents.
 - [Name 3] – recorded as part of the full name along with [Name 1] on the UNHCR card.
 - [Name 4] – the name recorded as the father’s name on the birth registration for Applicant 3.
26. I have discussed these names and the applicant’s identity further below.

Religion all applicants

27. Applicants 1 and 2 have consistently claimed to be Muslim and at the protection visa interview they each explained how they practise their faith. I accept that Applicants 1 and 2 are Muslim. Applicants 3, 4 and 5 each declared their religion as Muslim in the protection visa application and noting their parents are Muslim I accept they are each Muslim.

Registration of birth of child applicants

28. The matter of the children’s birth certificates and the manner of the registration of their births and the implications of this in the matter of the identity of Applicant 1 was discussed in some detail at the protection visa interview. I have noted the later explanation provided by the applicants in their post-interview submissions.

¹ In her protection visa application form Applicant 5 is stated to have been born in [Year 5], but this date is not otherwise presented in any other dealings with the department and her birth certificate clearly shows she was born in [Year 4]. I consider the protection visa application date to be a simple error.

29. The birth certificates for Applicants 4 and 5 include [Name 2] as part of the father's name. Applicant 1 did not provide [Name 2] as part of his name in his protection visa application or previously to the department. The applicant explained that [Name 2] reflects his father's heritage and that he did not previously provide this because he used the name on the UNHCR card (the card does not include the name [Name 2]) which was the only identification document he possessed on arrival in Australia. If Applicant 1 had actually given the same name on the UNHCR card to immigration officers and in his protection visa application this may go some way to explain why he did not declare [Name 2] as part of his name earlier. But he did not; the name on the UNHCR card included [Name 3] as part of his name, but this was not included in the name Applicant 1 provided to the department which was the simple [Name 1] version. The applicant's explanation is undermined by the inconsistency between his explanation and the UNHCR document. It is also undermined by his declaration of a nickname when asked if he was known by any other names; it is not apparent why he would provide this nickname when asked about other names but not provide [Name 2]. If [Name 2] was of such significance that he had this recorded on these documents it is not apparent why he would not later declare it when asked his name, and any other names he is known by.
30. Overall I am concerned by the explanation Applicant 1 has given for the inclusion of [Name 2] on the birth certificates for Applicants 4 and 5 but there are sufficient other identifying features on these birth certificates to support my finding above and to accept Applicant 1 is their father and Applicant 2 is their mother. I accept that Applicants 4 and 5 were born in [Country 1].
31. There are significant issues regarding the registration of the birth of Applicant 3 and the related claims made by the parent applicants which I consider go not only to the circumstances of the birth and registration of Applicant 3 but are also pertinent to the assessment of the identity and citizenship of Applicant 1, most notably being that the father's name is recorded as [Name 4] on the birth certificate. [Name 4] is acknowledged by the applicants to be a Burmese name, and across information they have provided, particularly for relatives, they have demonstrated that in Myanmar Muslims will often also have a Burmese name; Applicant 2 noted the need to use her Burmese name to attend school. They claim [Name 4] is a relative.
32. Applicants 1 and 2 have provided significantly divergent accounts, both from each other and from their own accounts, of the circumstances of the birth of Applicant 3 and the registration of his birth and the relevance of [Name 4] on the certificate.
33. I have already noted the variation in the date of birth for Applicant 3, but I consider this has resulted from an error made by the UNHCR in recording his date of birth on his UNHCR card and I do not make any adverse findings in this regard.
34. The information now given to the IAA is that Applicant 3 was born in [Country 2] as the family had been effectively ejected from [Country 1] and the [Country 1] birth certificate was later obtained by irregular means in [Country 1] after their return three months after the birth. This is largely the account provided by Applicant 1 at the protection visa interview when he was asked about the name on the birth certificate.
35. This claim is significantly undermined by documentary information provided by the applicants which I am satisfied shows Applicant 3 was born in [Country 1]. The review material includes a number of medical reports and documents and at the protection visa interview Applicant 2 confirmed these were documents relating to her pregnancies and the birth of the child applicants. These documents include a number of ante-natal reports dating from [Month 2, Year 6] and progressively up to [Month 1, Year 7]; a report of the birth of Applicant 3 on [Day 1, Month 1, Year 7] which includes details as to the time of birth, his weight at birth and that

the birth was breach; and progressive post-natal reports showing observations conducted for some days after the birth, including up to [Day 2, Month 1, Year 7]. These reports have been issued by various [Country 1] hospitals or clinics and many are endorsed with the stamps of the details of various doctors which show these to be [Country 1] doctors and/or doctors in [Administrative division] ([Country 1]). Even acknowledging the later date of birth which is recorded on some documents there is substantial evidence before me to demonstrate Applicant 3 was born in [Country 1]. This evidence is from various sources, spans a significant period of time and documents the birth of Applicant 3 in [Country 1]. The evidence is detailed; while it is not translated into English it includes medical notes and clinical observations taken in [Country 1] at a time the applicants now claim to have been in [Country 2]. I give this information significant weight. I am not satisfied the claim Applicant 3 was born in [Country 2] is true and I find Applicant 3 was born in [Country 1]

36. This information also undermines the claims the applicants were ejected to [Country 2] and the account now given as to how the birth of Applicant 3 was registered.
37. The applicants' accounts of the birth of Applicant 3 have evolved significantly over time and I am concerned that the claims regarding deportation to [Country 2] were not advanced until the delegate made reference to [Name 4] as the father on the birth certificate. At this point Applicant 1 advanced the claim [Name 4] was a witness, he then changed the place of birth to [Country 2], and further stated he was assisted by a [Country 1] [Ethnicity] to whom he was considering giving the child for adoption.
38. This account was contradicted by Applicant 2 in her protection visa interview, furthermore she agreed with the delegate when he asked if [Name 4] was Applicant 1. There may be some plausibility in the explanation that Applicant 2 was fearful of the consequences for her son when the delegate noted the name on the birth certificate ([Name 4]) was not the same as that of Applicant 1, the child's father, and therefore stated the name on the birth certificate ([Name 4]) was also the name of Applicant 1. But I am significantly concerned that, if the current account is true, the applicants resiled from significant aspects of this account in post-interview submissions; rather than advance this account as the genuine one the post-interview submission put forward explanation as to why the applicants gave "differing accounts" and did not "speak openly" about this matter.
39. I note the correction in submissions that Applicant 1 is not literate in [Country 1 language] as stated by the delegate; in the protection visa application the applicant declared only the ability to speak [Country 1 language], not to be literate. In the circumstances I accept as plausible that he was accompanied by a relative who could read [Country 1 language] when he registered the birth. But I am not satisfied this relative's name was incorrectly recorded on the birth certificate. I do not accept that the birth certificate was obtained by irregular means.
40. In the post-interview submission Applicant 1 stated [Name 4] was incorrectly recorded by the [Country 1] authorities as the father on the birth certificate. He stated the passport number on the certificate belongs to [Name 4] who was not a Muslim and was therefore able to obtain a Myanmar passport. But on this certificate the father is stated to be a Muslim, contrary to the claim [Name 4] is not Muslim. While the 2021 IAA submission seeks to explain that [Name 4] has converted to Islam since his marriage I have some concern as to the veracity of this claim and noting I have found the applicants have not been genuine in the claim Applicant 3 was born in [Country 2] I am concerned that it has been advanced not because it is true, but because it seeks to be compatible with the narrative they have provided and seeks to support the account [Name 4] is a third person and not Applicant 1. I also note that [Name 4]'s recorded age would have been the same age as Applicant 1 at the time, which in itself may not be

significant but in the light of my other concerns adds to my concerns that [Name 4] may be Applicant 1 and not a relative.

Applicant 1 name and ethnicity

41. Applicant 1 has presented [Name 1] as his name in his protection visa application and while there are variations to this that include [Name 2] and [Name 3] version overall these are not inconsistent. [Name 1] is in part a Muslim name and I accept this was the applicant's name in Myanmar and that this is his identity.
42. However, I have already noted the use of Burmese names in Myanmar and I am cognisant of the possibility the applicant would also have a Burmese name. Although the applicant denies [Name 4] registered as the father on the birth certificate for Applicant 3 is his name I have rejected his explanation and I find that [Name 4] is his Burmese name.
43. The applicant has consistently claimed to have been born in Shan State. In his protection visa application the applicant's ethnicity was recorded as Shan/Muslim. I note his comments in his 2021 statement to the IAA that "there is no such thing as Shan ethnicity" but country information advises that Shan is one of the recognised ethnic groups in Myanmar.²
44. In this 2021 statement he referred to the Burmese ethnicity (Bamar) of his mother and the [Country 3] background of his father and described his ethnicity as Burmese-[Country 3]. It is not clear how his [Country 3] background may impact acceptance of the applicant as being of either Shan or Bamar ethnicity. But I note the disdain with which [Country 4 people] are regarded in Myanmar and have been excluded from recognition in the 'national races' and I accept as plausible comments the applicant has made about his [Country 3] background causing him to be imputed and derided as [a Country 4 person].³ In this context I am willing to accept that there may be a negative impact on the applicant being accepted as Shan or Bamar.

Applicant 2 name, ethnicity and place of birth

45. The applicant has consistently given her name across her arrival entry interview and protection visa application, however her account as to her place of birth and her ethnicity has varied.
46. The arrival entry interview report records that when interviewed on 29 November 2012 the applicant stated she was born in a village in Rakhine State and that both parents were Rohingya and that she moved to Mon State as a child. This differs from the information provided in the protection visa application which is that she was born in Mon State and is of Mon ethnicity. When this inconsistency was put to her at the protection visa interview by the delegate the applicant stated she had never said at the arrival entry interview that she was born in Rakhine State.
47. In the 2021 submission to the IAA it is now stated the original version is the correct one and that she was born in Rakhine State to Rohingya parents. This submission goes on to assert Applicant 2 is "not capable of wilfully concocting a false narrative for visa purposes" and the submission criticises the previous representation for the "gravity of the error in detailing [the applicant's] place of birth and ethnicity as Mon on the protection visa application form which has contributed to the adverse credibility findings against her". It is not apparent from this explanation why at the protection visa interview the applicant denied having given that information at the arrival entry interview. I note the comments as to her lack of sophistication

² Department of Foreign Affairs and Trade (DFAT), "Country Information Report Myanmar", 9 June 2015

³ *ibid*

and illiteracy and I accept she may have been nervous at the protection visa interview but if this is the true account I find it very difficult to accept that at the protection visa interview she did not simply say to the delegate that the information regarding being born in Mon State was incorrect, rather she challenged the validity of the information the delegate was putting to her from the arrival entry interview and denied having said that.

48. I also have difficulty accepting the explanation that the details in the protection visa application as to her place of birth and ethnicity were the result of “serious oversights and errors” by her previous representative. It is not simply that Mon State was stated as her place of birth in the protection visa application forms which may possibly account for some error in understanding/translation/transcribing but also the town in Mon State was identified and the same information was given as the place of birth for her parents and siblings. The information provided for her residential history gives no detail for any residence in Rakhine State, but rather indicates she lived in Mon State from birth until moving to Shan State. The information in this form is that she commenced school in Mon State at age four years. Furthermore, the information about birth in Mon State is included to a substantial degree in the statement of claims. This statement describes the birth of both her parents in Tathung City in Mon State and her own birth in the same city; the statement makes no reference to birth in Rakhine State or later moving to Mon State.
49. I also find it very difficult to accept her ethnicity was not recorded as Rohingya on the protection visa application form nor mentioned in the statement of claims. In the statement of claims the applicant made reference to fearing harm as a woman and a Muslim and I find it difficult to accept she did not reference Rohingya ethnicity as a concern if she is Rohingya as now claimed. Noting the widespread reporting of abuse to the Rohingya I simply do not accept that such a significant claim would not have been recorded at the time her protection visa application was completed or recorded as her ethnicity in the application form. Furthermore, she was asked a direct question at the protection visa interview as to her ethnicity and she did not declare Rohingya ethnicity in response.
50. The 2021 IAA submission contends that the arrival entry interview account that the applicant was born in Rakhine State and is ethnic Rohingya should have been accepted previously and is the correct account. However, I am not satisfied that it is the correct account. Although this account was first provided by the applicant at the arrival entry interview soon after her arrival in Australia, I find it to be of significant concern she did not consistently maintain this claim in her protection visa application or protection visa interview and I do not accept the explanation provided for not doing so. That her declaration to be ethnic Rohingya was made at the early stage of the arrival entry interview does not overcome my concerns.
51. I note the concern the past representative’s “errors” have contributed to adverse credibility findings. But on the basis of her own responses at the protection visa interview denying she gave information which she clearly gave at the arrival entry interview and which is information she now attests is true, together with her willingness to give information on other matters which she has later withdrawn, I have significant concerns as to the reliability of her accounts.
52. I am not persuaded she has reverted to the Rakhine State/Rohingya claim in her 2021 statement because it is genuine but rather that she has done so in an attempt to enhance her protection claims in the light of negative decisions by the delegate and the IAA. I note and consider it significant that the parent applicants put forward corrections or clarification of other information in post-interview submissions but did not seek to correct the significant Rohingya ethnicity claim. That the applicant did not seek to correct this information earlier, and that she denied it at the protection visa interview leads me to a finding it is not genuine.

53. I do not accept the applicant was born in Rakhine State. I do not accept the applicant's parents were Rohingya or that the applicant is ethnic Rohingya. I find she was born in Mon State. As she was born in Mon State I find her ethnicity to be Mon.

Citizenship and identity documentation in Myanmar

54. Citizenship in Myanmar is a complex system based on 'national races' or ethnic groups that can date their presence in Myanmar since 1823. 135 groups are recognised under the Citizenship Law but there are notable exceptions, including Rohingya and people of [Country 4] descent among other minority groups not recognised. Citizenship is tiered and those who cannot claim citizenship on the basis of ethnicity may still be able to claim associate or naturalised forms of citizenship. The initial citizenship laws put in place in 1948 at the time of the country's independence were substantially overhauled in 1982, and while the new Act provided for the continuation of citizenship for those already citizens under the previous legislation in effect it led to many people, mostly the Rohingya ethnic group, becoming effectively stateless. People were required to reapply for citizenship as a result of the changes to the legislation in 1982 and the process required them to provide documentation to prove their status. Those successful were provided a Citizenship Scrutiny Card; those who could not prove their status to the satisfaction of the authorities, who were often arbitrary in their decisions, were issued Temporary Residence Cards. Country information informs that minority groups to whom the authorities were hostile, largely the Rohingya, were unsuccessful in having their status recognised and were not issued Citizenship Scrutiny Cards. The lack of status continues to result in severe restrictions in accessing services, restriction on movement and accessing everyday services.⁴
55. Progressive changes to identity documentation and unsuccessful roll-out of registration programs, together with increasing hostility to minority groups, has seen an evolutionary diminution of the ability of minority groups to access identity documentation and/or citizenship. The authorities have shown increasing reluctance to provide documents or acknowledge the citizenship status of some groups resulting in them being excluded from the full benefits of citizenship and this has been compounded by administrative decisions over time to withdraw the original National Registrations Cards/Foreign Registration Cards and then later the Temporary Residence Cards.
56. The consequence of the administrative and legislative changes, which are in part seemingly enacted to deny citizenship and documentation to marginalised groups, is that for those whose citizenship status is not recognised the only form of documentation is Household Registration. Household Registration is managed at Ward or Village level in Myanmar and the designated Ward Tract Administrators throughout Myanmar are required to compile and register births and deaths and move people to and from household lists. Household lists are issued and updated by the Ministry of Immigration and Population and the Ministry of Home Affairs. Householders must present a copy of their list to authorities upon request; there are penalties for failing to do so or for being absent at the time of any inspections by authorities.
57. It is not apparent why Applicants 1 and/or 2 do not have Household Registration and claim never to have had this or other of the identity documents in circulation in Myanmar while they lived there. They both claim none of their parents or siblings had such documents. Claims not to have been able to access the newer identity documents following the 1982 changes may be

⁴ International Crisis Group, "The Politics of Rakhine State", Asia Report N°261, 22 October 2014, CIS2F827D91411; Robert H Taylor, "Refighting Old Battles, Compounding Misconceptions: The Politics of Ethnicity in Myanmar Today", Institute of Southeast Asian Studies, 02 March 2015, CISEC96CF1342; DFAT, "Country Information Report Myanmar", 9 June 2015; DFAT Country Information Report, Myanmar, 18 April 2019

plausible; but that is not their claim, they claim they and their family never had such documents and I find this difficult to accept. The information before me is that even the Rohingya, who are the most marginalised of the minority groups in Myanmar, were issued Household Registration papers. Although there are reports of some people not being recorded on household lists the indications are that these lists have been generally maintained, even for the most marginalised, as they are used as a means to control the population. I note that in some parts of Myanmar, mostly Rakhine State, lists have not been updated since 2012 but the indications are that in the time the applicants were in Myanmar they were maintained.

58. I also find it difficult to accept if she never had any identity documents Applicant 2 was able to move around Myanmar, including travelling from Mon State to Shan State, to buy and sell [product]. Movement by ordinary citizens has been severely restricted and I simply do not accept she was able to move about in this manner without one of the government issued identity documents.
59. I also note the claim the couple were married in Myanmar and that they have a marriage certificate which remains in Myanmar. The country information advises that marriage of minority members, mostly Rohingya, is regulated and permission is required from the authorities to marry, indicating a need to engage with the authorities and provide identity documentation of some form. The couple stated they were issued a marriage certificate and the existence of such lends weight to a finding they were not undocumented as claimed.
60. I have significant doubts as to the claims that neither Applicant 1 nor 2, nor any of their immediate family, did not have and never had any government issued identity documents. I accept that as Muslims they may have encountered problems in obtaining documents, particularly after 1982, but I do not accept they would not have been registered on their family's Household List. I find their claim not to be seriously damages the credibility of their account of their circumstances. I accept that many people in Myanmar lost access to the newer documents from 1982; but that is not their claim, they claim never to have documents, a claim which I am not satisfied is supported by the country information.
61. I take into account the difficulty, beyond their own evidence, in proving an absence of documentation. But I am concerned that overall the applicants' evidence is in part inconsistent with country information and as already noted I have found both Applicants 1 and 2 have been willing to provide information in support of their claims in general which I have not accepted is genuine.
62. I do not accept that Applicants 1 and 2 were undocumented in Myanmar. I am concerned that they have claimed to be undocumented to support their claim to be stateless. But as noted earlier, even the largely effectively stateless Rohingya are recorded on Household Lists (noting the lack of updates since 2012) and country information advises many of those who have been disenfranchised by the 1982 changes and the updates to the identity card administrative processes have retained old cards as a form of identification, although it provides no access to benefits.
63. I do not accept the claims that Applicant 1 and 2 were undocumented in Myanmar.

Citizenship finding and country of reference Applicant 1

64. I have not accepted that the applicant was undocumented in Myanmar and DFAT advises it is rare for a person resident in the country not to be registered.⁵ The applicant has maintained

⁵ DFAT, "Country Information Report Myanmar", 9 June 2015

his claim to be undocumented and stateless but the information discussed above in regard to citizenship indicates the applicant may be a citizen of Myanmar by virtue of either Shan or Bamar ethnicity.

65. In the context of recognition of ethnicity in Myanmar's complex citizenship laws the birth in [Country 3] of his father may complicate a citizenship assessment and may detract from the authorities accepting him as being of Shan or Bamar ethnicity. While he may have a line of descent from his mother to claim citizenship it is not apparent that his father would have the requisite associate or naturalised citizenship required for him to do so.
66. These factors would support his claim that he is not a citizen of Myanmar.
67. I have considered the matter of the children's birth certificates and the country information before the delegate about documentation required to register births in [Country 1] but I do not consider that this is conclusive.⁶ The information points to the need for the parent/s to provide their passports to register a birth. However, despite this apparent 'requirement' I note that the birth certificates for Applicants 4 and 5 have no document details recorded for a passport or other identity document for either parent. As such I cannot be satisfied that a passport is a requirement for the registration of the births of the many irregular migrants/asylum seekers resident in [Country 1].
68. The birth certificate for Applicant 3 records a passport number for the father. I have not accepted the applicant's account as to the registration of the birth of Applicant 3 and I consider [Name 4] on that certificate is the Burmese name for Applicant 1. A number of documents are required to be submitted in order to register a birth in [Country 1], including the medical/pregnancy booklet. A copy of the medical/pregnancy booklet has been provided for Applicant 3 and this clearly states [Name 1] of Applicant 1 and it is difficult to accept the registration would be undertaken in a different name unless the authorities were satisfied [Name 4] and [Name 1] were the same person and the father. It follows that the passport number on the birth certificate has been recorded from a passport issued to the applicant. This information leans toward a finding the applicant is a citizen of Myanmar.
69. The indications are that a non-citizen in Myanmar would have had one of the various identity cards issued over time or household registration and providing such a document would substantially support his claims. But he has not done so. My finding is that even as a person denied citizenship the applicant would have been provided some form of identity document detailing his status and that he has not provided this, and claims never to have been issued such documents, leads to concerns he is seeking to conceal his status in order to support his claim to be stateless and not a citizen of Myanmar.
70. I have had regard to the applicant's account of his circumstances and he has failed to satisfy me that he is undocumented and stateless. I have already discussed the matter of documentation and my concerns as to the lack of documentation in his case and I conclude that the applicant is seeking to conceal his status and has deliberately withheld identity documents. I conclude that he has done so to conceal he is a citizen of Myanmar.
71. I find the applicant is a citizen of Myanmar and that Myanmar is the receiving country for the purpose of this review.

⁶ Angloinfo, "Registration of the Birth", 01 January 2015, CXBD6A0DE17207

Citizenship finding and country of reference Applicant 2

72. I have not accepted that the applicant was undocumented in Myanmar and similar to Applicant 1 I have concerns as to her failure to provide documentation that the country information advises non-citizens hold and which would be a significant factor in supporting her claims to be stateless.
73. I have not accepted the applicant is Rohingya.
74. I have found that the applicant was born in Mon State and is ethnic Mon. Mon are one of the 'national races' recognised under the Citizenship Law. The applicant's parents were born in Myanmar and there is no indication her line of descent does not go back the requisite period of time required of the citizenship laws. These factors lend weight to a finding the applicant is a citizen of Myanmar.
75. For the same reasons as I have discussed above in regard to Applicant 1, my concerns as to the lack of documentation for Applicant 2 lead me to conclude that the applicant is seeking to conceal her status and has deliberately withheld identity documents. I conclude that she has done so to conceal she is a citizen of Myanmar.
76. I find the applicant is a citizen of Myanmar and that Myanmar is the receiving country for the purpose of this review.

Citizenship finding and country of reference Applicants 3, 4 and 5

77. I have found the parent applicants are citizens of Myanmar. As children of at least one parent who is a citizen the applicants would be naturalised citizens at a minimum.⁷
78. I find the applicants are citizens of Myanmar and that Myanmar is the receiving country for the purpose of this review.
79. However I have concerns as to their ability to establish their citizenship status and obtain identity documentation that would allow them to access the full benefits of a citizen of Myanmar. These matters are discussed further below in my findings under Refugee Assessment.

Claims of harm in Myanmar

80. Applicant 1's claim that he and his family were abused as Muslims and because of their [Country 3] background is consistent with the country information reporting the general disdain with which Muslims and those of [Country 4]/[Country 3] descent are viewed by the authorities and the general population and the high level of mistrust of people with this profile. Claims made by Applicant 2 to have been abused as a Muslim are similarly consistent with country information. I accept the claims that Applicants 1 and 2 have experienced abuse on the basis of their Muslim religion and additionally for Applicant 1 on the basis of his [Country 3] background.

⁷ International Crisis Group, "The Politics of Rakhine State", Asia Report N°261, 22 October 2014, CIS2F827D91411; Robert H Taylor, "Refighting Old Battles, Compounding Misconceptions: The Politics of Ethnicity in Myanmar Today", Institute of Southeast Asian Studies, 02 March 2015, CISEC96CF1342; DFAT, "Country Information Report Myanmar", 9 June 2015; DFAT "Country Information Report, Myanmar", 18 April 2019

81. The country information indicates the long term, systemic and ingrained abuse of Muslims and those of [Country 4]/[Country 3] descent in Myanmar which is compounded by ongoing conflict between militia groups and the military. While international reporting tends to focus on the plight of the Rohingya minority and the conflict in Rakhine State there is substantial and credible reporting of abuse of non-Rohingya Muslims across Myanmar and of the conflict in Shan State.⁸ This abuse and mistreatment includes land confiscation and forced labour and I accept the claim that Applicant 1 was required to undergo forced labour and that the family land was confiscated. Forced recruitment by militia groups is also reported and I accept one of the brothers of Applicant 1 was recruited and has since disappeared.
82. I have some concerns about the applicant's account of his escape from the military in [Year 2] and the claimed attack on the soldier. The applicant's account is that after more than one month working in mountainous terrain as a porter, during which time he was physically abused and not fed, he escaped from military control by "taking off" through the jungle and "running blind", eventually making his way to his sister's home after three days. I have significant difficulty accepting his account that he was provided food and money by villagers unknown to him on his journey in light of his account of the mistrust, abuse and mistreatment he otherwise experienced as a Muslim of [Country 3] descent. Overall I find his account to be implausible. I accept he was recruited as forced labour in [Year 2] and was mistreated by the military. But I do not accept he escaped by attacking a soldier and running away through the jungle or that the military came to the family home "every day" to ask about him.

Residence in [Country 1] and deportation to [Country 2]

83. I have found that Applicants 1 and 2 left Myanmar in [Year 3] and went to [Country 1] and I have found that Applicants 3, 4 and 5 were born in [Country 1].
84. I accept the applicants were registered as refugees by the UNHCR in [Country 1]. I accept they came to Australia from [Country 1] in 2012.
85. At the protection visa interview Applicant 1 advanced the claim he was deported to [Country 2] in the context of his account of the registration of the birth of Applicant 3. His account and that of Applicant 2 has varied significantly across the protection visa interview, post-interview submission and the 2021 IAA submission and includes versions of all members of the family being deported (Applicant 1), no members being deported (Applicant 2), only Applicant 1 being deported, or in the 2021 IAA submission all members being effectively ejected from [Country 1].
86. In earlier submissions the applicant stated that he thought he had told his lawyer about this deportation; however I note that not only is there no mention of the claimed deportation in the statement of claims, it is not mentioned in his travel history, nor in his address history both of which indicate continuous residency in [Country 1]. I also note that the protection visa application form includes a specific question asking if the applicant has ever been deported from or asked to leave a country to which Applicant 1 responded "no". I find it difficult to accept that the information about the claimed deportation would have been omitted at each of these multiple points if true. That it was not included casts doubt on the veracity of this claim. I am also concerned that when asked at the arrival entry interview about their past travel history and address history the applicants did not mention any presence in [Country 2] in or around [Year 7]. The repeated failure to mention the claimed deportation or residence in [Country 2]

⁸ DFAT, "Country Information Report Myanmar", 9 June 2015; DFAT, "Country Information Report, Myanmar" 18 April 2019

when asked direct and relevant questions earlier about travel/residence/deportation leads me to doubt this claim is genuine.

87. The claim of deportation to [Country 2] was first raised by Applicant 1 at the protection visa interview. Despite many previous questions as to travel or removal from any country in the arrival entry interviews for the parent applicants or in the protection visa applications for all applicants the applicants did not advance this claim. Considered together with my findings above that Applicant 3 was born in [Country 1] I do not accept that any of the applicants were deported to [Country 2] or ejected from [Country 1].

Refugee assessment

88. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee. 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

89. 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.

Applicants 1 and 2

90. I have not accepted that the applicants are stateless or would not have access to Household Registration or other documents of identity in Myanmar.
91. I have not accepted Applicant 1 escaped from the military and hit a soldier.
92. I have accepted Applicant 1 was taken to perform forced labour but I note he was in his [Age decade 1] at the time and I am not satisfied that the chance he would be similarly taken now he is in his [Age decade 2] is more than remote.
93. I note the concerns expressed as to ongoing conflict in Shan State but I am not satisfied that there is more than a remote chance the applicants would experience harm as a result of

ongoing conflict between the military and rebel militia groups in Shan State, should they return there. Following the 2011 ceasefire breakdown the conflict between the military and rebel militias intensified. The conflict was centred largely in the north of the state, and those in the conflict zone were adversely affected with many thousands of people being displaced. But I note Applicants 1 and 2 have not indicated the conflict affected the area where the family of Applicant 1 continued to reside. Nor is there any indication in submissions that this area or his family were adversely affected by the further outbreak of conflict in April 2018.⁹

94. I have accepted the applicants are Muslim and that Applicant 2 is a woman. I accept that Muslims are a minority group in Myanmar and subject to abuse, harassment and discrimination. I accept that laws and practices are in place that effectively discriminate against Muslims. I note the establishment of 'Muslim free' villages, restrictions on Madrasas and the rebuilding of mosques and the influence of ultra-nationalist Buddhist movements.¹⁰ However despite these issues their families have continued to reside and work in Myanmar, despite the claimed confiscation of the farming land of the family of Applicant 1. I am not satisfied that the discrimination Applicants 1 and 2 would face should they return to Myanmar would amount to serious harm.
95. Country information reports horrific incidents of violence against Rohingya women in Rakhine State and women are reported to be more at risk of violence in conflict zones.¹¹ I note the applicants' concern however I have not accepted Applicant 2 is Rohingya and noting the reports that such violence is largely localised to conflict zones I am not satisfied that there is more than a remote chance Applicant 2 would experience violence or other serious harm as a woman.

Applicants 3, 4 and 5

96. I have found Applicants 3, 4 and 5 were each born in [Country 1]. While I have found they have a notional path to citizenship in Myanmar I am concerned that they may not be able to establish their citizenship, obtain identity documents or access the benefits available to citizens of Myanmar.
97. I have not accepted their parents were undocumented in Myanmar and as such I conclude there would be record of their parents' existence. I also note the children have birth certificates to assist in establishing their identity should they return to Myanmar. But the applicants were not born in Myanmar and due to their absence their parents have not been in a position to have them added to any Family Household registration. This would present a significant hurdle in the establishment of their identity and right to citizenship.
98. I have already addressed the complex citizenship law in Myanmar and noted that progressive changes to laws and administrative practices have been used by the authorities widely hostile to marginalised groups to prevent minorities accessing citizenship and documents and the benefits that flow from citizenship. International reporting is somewhat focussed on the marginalised Rohingya group but other minority groups, including Muslims in general and those of [Country 4] background, are similarly marginalised. I note that independent commentary indicates that many in these marginalised minority groups remain entitled to citizenship but that the authorities have little compunction in enacting policies that deny their citizenship or access to it.¹² In instances where documents are provided members of minority groups are often required to register as Bamar, denying their right to identify as a member of

⁹ DFAT, "Country Information Report, Myanmar", 18 April 2019

¹⁰ Burma Human Rights Network, "Persecution on Muslims in Burma", 2017

¹¹ DFAT, "Country Information Report, Myanmar", 18 April 2019

¹² Burma Human Rights Network, "Persecution on Muslims in Burma", 2017

their ethnic group.¹³ The Burma Human Rights Network commented that past violence, although eased (as at the time of the report), provided a catalyst for a “more subtle form” of persecution of Muslims and that persecution has continued in an institutionalised manner, with the government refusing to register Muslims and thereby block access to services such as education and health care.¹⁴ Harm from any block on access to health services would be compounded by the Covid 19 pandemic.¹⁵

99. The delegate’s decision was made in the context of free elections held in 2015 and the proclamations of incoming National League for Democracy leader Aung San Suu Kyi who repeatedly stated that “everyone” in the country would be given proper protection in accordance with the law.¹⁶ But despite the optimism of the 2015 election there has been no improvement in the application of the law, or the conditions for marginalised groups. Furthermore in speaking at The Hague in 2019 Suu Kyi downplayed the mistreatment of the Rohingya as a necessary response to the threat posed by Rohingya militants, a response which attracted international criticism and which Amnesty International categorised as “deliberate, deceitful and dangerous.”¹⁷ As highlighted by the 2017 onslaught on the Rohingya and the dismissal of this as a human rights issue it is evident the 2015 elections have not seen an improvement in the plight of minorities and the 2021 military coup will likely consolidate the overwhelming power of the military regime and the ongoing repression of minorities, including Muslims.
100. DFAT relies largely on reporting by the Burma Human Rights Network in its discussion as to the matter of documentation for non-Rohingya Muslims and I have had regard to the source documents and the network’s extensive reporting. In the context of long term migrant workers in [Country 2] the Burma Human Rights Network examined in detail the experience of Muslims attempting to obtain documentation from the Myanmar authorities.¹⁸ Of those persons who reported having identity papers in the past most reported the Myanmar authorities had seized these or refused to extend their validity, thereby preventing them being issued new documents. The Burma Human Rights Network reported an outright refusal by authorities to register or issue identity cards to many of the Muslims applicants and an independent [Country 2] lawyer assisting the Myanmar migrants in Thailand reported witnessing a double standard from the Myanmar authorities processing document requests for Muslims and that when confronted Myanmar immigration authorities responded that this was “beyond their power.” It is evident the discrimination against Muslims in accessing documents and citizenship is systemic and designed to deny them the basic rights of a citizen.
101. In the light of the information before me I cannot be satisfied Applicants 3, 4 and 5 would be able to establish their citizenship and/or identity in Myanmar, despite the indications as to their entitlement to do so. In the context of this obstacle it is not evident if the applicants could enter Myanmar and I note that even refugees returning to Myanmar from abroad under formal assisted voluntary return agreements undergo ‘national verification’, which can take up to a year, before being issued an identity card which allows them to exercise rights and access services in Myanmar.¹⁹ This information indicates that even for those who will eventually be

¹³ DFAT, “Country Information Report, Myanmar”, 18 April 2019

¹⁴ Burma Human Rights Network, “Persecution on Muslims in Burma”, 2017

¹⁵ Brookings, “Myanmar’s response to the Covid-19 pandemic”, 1 December 2020

¹⁶ The Straits Times, “Myanmar’s Suu Kyi says don’t ‘exaggerate’ Rohingya plight”, 5 November 2015, CXBD6A0DE15895

¹⁷ Sebastian Strangio, Review Essay, Foreign Affairs, “The Myanmar Mirage - Why the West Got Burma Wrong”, May/June 2020

¹⁸ Burma Human Rights Network, “Existence Denied”, 2018; Burma Human Rights Network, “Persecution on Muslims in Burma”, 2017

¹⁹ DFAT, “Country Information Report, Myanmar”, 18 April 2019

provided documentation, a category I am concerned the applicants will not fall into, there is a potential absence of identity documentation for an extended period that would leave them vulnerable to harm.

102. I am concerned that in Myanmar Applicants 3, 4 and 5 would be undocumented, unlike their parents, leading to a real chance they would experience serious harm. Successive DFAT reports advise persons found to be unregistered in Myanmar are penalised by detention at a police station up to a maximum of seven days during which time the person must prove they belong to a household and have the head of the household come to register them on their household list. DFAT advise it is unclear what would happen if a person were not claimed by a household head and does not have any information on how often or how consistently penalties for incorrect registration are applied.²⁰ The Burma Human Rights Network similarly reports undocumented/unregistered Muslims in Myanmar are at risk of detention, and while in detention at risk of harm.²¹ In considering whether the applicants may face mistreatment if detained in this manner I have considered reporting on detention conditions in Myanmar's prisons which are reported as being harsh and involving shackling, torture and physical punishment.²²
103. I find that there is real chance the applicants could be detained for reason of being undocumented/unregistered and that in this process that there is a real chance they would experience significant physical ill-treatment.
104. I also take into account that being undocumented/unregistered they will be effectively restricted in accessing basic services and that there is a real chance such would threaten their capacity to subsist.
105. I am satisfied that in Myanmar there is a real chance the applicants would experience persecution that involves serious harm and that such harm would be the result of systematic and discriminatory conduct on the basis of their Muslim religion, which is a characteristic that is fundamental to their identities, together with their undocumented/unregistered status.

Refugee: conclusion

Applicants 1 and 2

106. 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).

Applicants 3, 4 and 5

107. The applicants meet the requirements of the definition of refugee in s.5H(1). The applicants meet s.36(2)(a).

Complementary protection assessment

108. 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

²⁰ DFAT, "Country Information Report Myanmar", 9 June 2015; DFAT, "Country Information Report, Myanmar", 18 April 2019

²¹ Burma Human Rights Network, "Persecution on Muslims in Burma", 2017

²² DFAT, "Country Information Report, Myanmar", 18 April 2019

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

109. 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.

110. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

111. I have found Applicants 1 and 2 do not meet the requirements of the definition of refugee in s.5H(1) and will address their claims under the provisions for complementary protection.

112. I have found that the discrimination Applicants 1 and 2 would face should they return to Myanmar would not amount to serious harm. Nor am I satisfied that this would amount to significant harm. The indications are that their family members who are also Muslim remain living in Myanmar and there is no indication that they have come to significant harm for reason of any discrimination they may have faced and I consider this to be indicative of what the applicants would experience should they return to Myanmar. I am not satisfied that there is a real risk the applicants would experience significant harm in Myanmar on this basis.

113. I have otherwise found there is not a real chance that Applicants 1 and 2 face harm on any of the bases claimed. Noting that the "real risk" test for complementary protection is the same standard as the "real chance" test, and based on the same information, and for the reasons set out above, I am also satisfied that there is not a real risk that they would face significant harm for these reasons.

Third country protection

114. Section 36(3) of the Act 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

115. I have accepted the claim all the applicants were accepted and registered as refugees in [Country 1]. However I am not satisfied that they have the right to re-enter and reside in [Country 1] on that or on any other basis.

116. Section 36(3) does not apply to the applicants.

Member of same family unit

117. 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 relevantly defined in r.1.12(4) of the Migration Regulations 1994 to include a 'dependent child' which in turn is defined as including a child who has not turned 18.
118. Applicants 1 and 2 are the parents of Applicant 3. Applicant 3 is 15 years of age and a minor living in the care of both parents. I am satisfied that Applicants 1 and 2 are members of the same family unit as Applicant 3.
119. As Applicant 3 is a person mentioned in s.36(2)(a), Applicants 1 and 2 meet s.36(2)(b)(i).

Decision

120. In respect of Applicants 3, 4 and 5 the IAA remits the decision for reconsideration with the direction that:
- the referred applicants are refugees within the meaning of s.5H(1) of the *Migration Act 1958*.
 - s.36(3) of the *Migration Act 1958* does not apply to the referred applicants.
121. In respect of Applicants 1 and 2 the IAA remits the decision for reconsideration with the direction that:
- Applicants 1 and 2 are members of the same family unit as Applicant 3 and satisfy the criteria in s.36(2)(b)(i) 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.