

1606601 (Refugee) [2016] AATA 4488 (14 September 2016)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1606601
<b>COUNTRY OF REFERENCE:</b>	Stateless
<b>MEMBER:</b>	Christopher Smolicz
<b>DATE:</b>	14 September 2016
<b>PLACE OF DECISION:</b>	Adelaide
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 14 September 2016 at 9:21am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be stateless applied for the visa [in] November 2012 and the delegate refused to grant the visa [in] March 2014.
3. On 27 March 2014 the applicant applied to the Refugee Review Tribunal (RRT) to review the delegate's decision. He appeared before the Tribunal, differently constituted, on 22 June 2015 to give oral evidence (first Tribunal hearing).
4. On 2 November 2015 the Tribunal affirmed the Department's decision not to grant the applicant a Protection visa.<sup>1</sup> The applicant sought judicial review of the decision to the Federal Circuit Court of Australia (FCCA).
5. [In] May 2016 the FCCA quashed the Tribunal's decision. The court found that the first Tribunal fell into jurisdictional error by failing to consider the applicant's claims based on his Rohingya ethnicity. The matter is now before the Tribunal pursuant to the order of the FCCA.
6. The applicant appeared before the Tribunal on 1 September 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages.
7. The applicant was represented in relation to the review by his registered migration agent. The Tribunal was provided with transcripts of the Departmental protection interview conducted [in] July 2013 and a transcript of the first Tribunal hearing held on 22 June 2015.

### CONSIDERATION OF CLAIMS AND EVIDENCE

8. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
9. Section 36(2)(a) provides that 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 under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:  

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

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<sup>1</sup> AAT decision file ref.1405919

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
12. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

### *Background*

13. The applicant claims to be a stateless person born on [date] in [Bangladesh]. His father was born in Burma (Myanmar) and is of Rohingya ethnicity and his mother was born in Bangladesh. He does not have Bangladeshi citizenship and does not have a right to reside in Bangladesh or Myanmar. He has never held any formal identification documents in Bangladesh.
14. In 2006 he illegally departed Bangladesh for Malaysia transiting through [country] and [Country 1]. From 2006 the applicant resided illegally in Malaysia where he worked [illegally]. [In] April 2012 the applicant arrived [in Australia] as an Irregular Maritime Arrival. According to the delegate's decision the applicant was screened out on the basis of his response at the entry interview that he was seeking protection for non-Convention reasons. [In] August 2014 the applicant subsequently put forward new claims based on his imputed political opinion.
15. When he arrived in Australia he was unable to provide any form of identification. He subsequently provided a letter his mother had obtained from [an official] of [an] Union Council in Bangladesh. The letter states that his father was not a resident of the [name] Union and he is a Myanmar national.
16. Since arriving in Australia the applicant has provided a number of explanations why he fled Bangladesh. The applicant's claims are set out in detail in the first Tribunal's decision from paragraphs 27 to 30 and were not accepted by the delegate or the first Tribunal.
17. The applicant's claims can be summarised as follows.
18. The applicant claimed he would face persecution on the basis of his statelessness, which relates to a claim on the basis of nationality and ethnicity. He claims he has no right to reside in Bangladesh, despite having been born there in circumstances where his mother is likely a Bengali national. He claims his father's nationality was that of Myanmar of Rohingya ethnicity. The applicant claims he has no right to reside in Myanmar, as citizenship there would be unavailable to him because of his father's ethnicity and religion.
19. The delegate observed that in his bio-data interview [in] April 2012 the applicant claimed to be a Bangladeshi national. During his entry interview [in] May 2012, the applicant claimed to

be stateless but said that his mother was Bangladeshi. In his statement made 22 November 2012 he claimed to be stateless, but said that his mother was Bangladeshi and his father was a Rohingya from Myanmar. In his statement made on 18 December 2012 he referred to a document that his mother obtained that reportedly said that because his father is a Myanmar national, so is he. The first Tribunal noted that the document appears to be based on information provided, possibly by his mother, and as such is of limited objective evidentiary value. The first Tribunal noted that the document makes no statement and draws no conclusion about the applicant's nationality. Rather, it asserts that his father was a Myanmar national. It also makes no reference to his mother's nationality.

20. The delegate found on the basis of changes to the Bengali citizenship laws in 2009, he would be entitled to Bengali citizenship through his mother. The delegate considered the country of reference to be Bangladesh.
21. The applicant also claimed to be a former supporter of the Bangladesh Communist Party who had fallen out with the party. He claims he was detained and tortured by party members and fears returning to Bangladesh on account of his connection with the Communist Party. He also claims to fear a rival Bangladeshi family who were in dispute with his family.
22. The delegate had regard to the applicant's claims relating to his involvement with the communist party in Bangladesh, the delegate noted that the applicant gave contradictory responses about the name of the Communist party to which he belonged. She also noted that he was evasive in explaining his role and activities with the party.
23. With respect to his claims relating to the [Family A]/[name] family the delegate noted past inconsistencies between different versions of the claims put forward by the applicant. The [Family A] family were also, according to the applicant, involved with the Bangladesh National Party (BNP). In the former account, the applicant claimed to have defended his father, who was being attacked by a member of the [Family A] family. In the course of the applicant's defence of his father, the applicant hit a [Family A] family member.
24. The Tribunal has had regard to the applicant's evidence taken from the Departmental interview and at the first Tribunal hearing and also has concerns about the credibility of the applicant's claims based on his imputed political opinion and conflict with the [Family A] family.
25. In making this decision, however, the Tribunal has only found it necessary to focus on whether the applicant is of Rohingya ethnicity, stateless and faces a real chance of serious harm in his countries of former habitual residence. The Tribunal found this aspect of the applicant's claims consistent and credible.
26. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

#### *Country of reference*

27. The Tribunal questioned the applicant about his ethnicity and nationality. The Tribunal found the applicant to be forthright and unequivocal in his responses to Tribunal questions at the hearing. In the Tribunal's assessment, the applicant was speaking from a lived experience when he spoke about his early childhood and his family's experiences in Bangladesh, his travel to Malaysia, and reasons for fleeing Bangladesh.
28. The applicant said that his father is of Rohingya ethnicity and was born in Myanmar. He came to Bangladesh as a refugee and lived in a refugee camp in Cox's Bazar. He does not

know the name of the camp or the dates. He eventually escaped from the camp. His father had since died.

29. His mother was born in Bangladesh. His parents took part in a local Muslim marriage ceremony. He does not know when his parents married or if the marriage was legally recognised. He has no documents to support their wedding.
30. The applicant said he was born in Bangladesh. He said it was impossible for a person of Rohingya ethnicity to get close to a government department and try to obtain any official documents. He received no education and is embarrassed because he cannot read or write. His goal in life is to obtain an education.
31. He has never held a passport or any formal documents. He has never travelled to Myanmar because he would face persecution as a person of Rohingya ethnicity.
32. The Tribunal questioned the applicant about his Rohingya language ability. The applicant said that the Rohingya language was similar to Bangladeshi and was able to provide the Tribunal with an example. He said he understands Rohingya but finds speaking Rohingya difficult.
33. The Tribunal noted that the applicant was of mixed Rohingya and Bangladeshi ethnicity and asked the applicant which ethnic group he identified with. The applicant said that he did not want to identify as a Rohingya and wanted to identify as a Bangladeshi because he was born in Bangladesh. The Tribunal found the applicant's response demonstrated his desire to be treated equally and avoid discrimination by being accepted into Bangladeshi society.
34. The applicant said he experienced difficulties in Bangladesh because he did not have any papers. From a young age he was thought to hide his Rohingya ethnicity and he only spoke Bangladeshi. He said that if the police found out you were a Rohingya they would cause you problems. He tried to mingle with Bangladeshi people and avoid attention so that he would not come to the attention of the police.
35. He eventually escaped from Bangladesh and travelled to [Country 1] by boat. He was beaten in [Country 1] by smugglers and stayed there for about three months. He was smuggled into Malaysia in [a] car. He had never heard of Australia and was simply escaping from Bangladesh seeking a better life where he could obtain an education and employment. He worked illegally in Malaysia with other Rohingya [people]. If he got caught by the police he would have to pay a bribe. He travelled to Australia because that's what other people were doing in Malaysia.
36. The Tribunal notes the delegate's concerns arising from his bio-data interview where the applicant was reported to claim he was a "Bangladeshi national". The Tribunal notes the interview was conducted about two weeks after he arrived in Australia. The Tribunal notes that the applicant has never had any travel documents and accepts that he would not understand what is meant by the term "national". For example, it is unclear if the applicant was questioned about where he had originally travelled from or where he was born or his ethnicity. The Tribunal finds that these are not clear issues given the applicant's history. The Tribunal finds the applicant's answers need to be assessed in the context of a person who has had no education and was brought up to hide his Rohingya ethnicity from an early age. The Tribunal finds that the applicant may well have said that he was born in Bangladesh and that he wanted a better education and better life in Australia. The Tribunal finds that such a response is not necessarily inconsistent with the applicant having suffered persecution based on race.

37. At the hearing the Tribunal enquired about the possibility of taking evidence from the applicant's mother in Bangladesh. The Tribunal was advised that due to the mother's remote location and lack of telephone communication this could not be arranged at a hearing without prior notice. In post hearing submissions the Tribunal was provided with a statement from the applicant's [mother]. The statement was obtained through a third party telephone number with the assistance of an interpreter. The applicant's mother states that she was born in Bangladesh and her father was Rohingya. She grew up in Chittagong area of Bangladesh and her family were poor and uneducated. She met her [husband] in Cox's Bazar. [Her husband] was not a Bangladesh citizen and was born in Burma. She does not know when they married but it would have been [over 40] years ago. The marriage was arranged by her father. The marriage was never officially recognised. [Her husband] tried to obtain Bangladesh citizenship so that their children would have an education but was unsuccessful. In Bangladesh all people of Rohingya ethnicity are kept poor, denied education and ridiculed by the local population. When the applicant was growing up he was considered Rohingya.
38. Although the statement is unsigned the Tribunal accepts the agent's submissions that it is an accurate account of the mother's telephone interview conducted by the agent. The Tribunal was provided with the third party's mobile number and the mother's consent to speak to her in order to verify her evidence. The Tribunal has accepted the applicant's mother's evidence as credible and consistent with the applicant's claims about his family background and ethnicity.
39. In the Tribunal's assessment the applicant presented as a highly emotional, shy and timid person. Although his evidence was general in part, the Tribunal found him to be forthright and credible in speaking about his past and his reasons for seeking protection.
40. Numerous Federal Court cases refer to the care decision makers must take in assessing credibility. Similarly, Professor Hathaway refers to decisions of the Immigration Appeal Board in Canada, and states in part:

*Even where the statement is material, and is not believed, a person may, nonetheless, be a refugee. "Lies do not prove the converse." Where a claimant is lying, and the lie is material to his case, the [determination authority] must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in support of credibility.*<sup>2</sup>

41. On the basis of the additional evidence provided subsequent to the delegate's decision the Tribunal is satisfied that the applicant was born in Bangladesh. That his father was a Rohingya born in Myanmar. New evidence provided to the Tribunal states that although the applicant's mother was born in Bangladesh her father was also a Rohingya. The Tribunal accepts the applicant is from the Rohingya ethnic group (race) in assessing his claims.
42. The independent country information detailed in the annexure to this decision indicates that Rohingyas are not recognised as citizens in Burma / Myanmar. As a person considered as a non-national there is no evidence before the Tribunal that the applicant presently has a right to enter and reside in Burma / Myanmar.
43. While there is some information regarding attempts to regularize the status of some Rohingyas in Myanmar, there seems to be no provisions yet for Rohingyas outside of Myanmar to enter and reside there. The information before the Tribunal also does not indicate that the Myanmar authorities would facilitate the applicant's entry to Myanmar. On

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<sup>2</sup> Hathaway, J., *The Law of Refugee Status*, Butterworths, Canada, 1991, p.86.

the evidence before it the Tribunal is not satisfied that the applicant has a right to enter and reside in Myanmar.

44. For the following reasons the Tribunal also finds that the the applicant has no legal right to enter and reside in Bangladesh.
45. The delegate had regard to the amendments to the Bangladesh *Citizenship Act* 1951 that came in effect on 31 December 2008, and found on the basis of changes to the Bengali citizenship laws that a child born of a Bangladeshi citizen mother becomes a Bangladeshi citizen by descent.
46. The delegate concluded that a child of a stateless man who is married to a Bangladeshi citizen women can apply for citizenship in Bangladesh. In light of the county information the delegate did not accept the applicant was stateless and considered the country of reference to be Bangladesh.
47. The Tribunal has had regard to more recent country information and proposed amendments to the Bangladesh citizenship laws and has reached a different conclusion to that of the delegate.
48. The Tribunal also finds that Bangladesh citizenship laws are complex, contradictory and need to be viewed against the backdrop of historic animosity and tension which exists between the Rohingya and the majority Bangladesh population.
49. Despite the 2009 amendments to the *Citizenship Act* 1951, the UNHCR reported in 2011 on a practical difficulty of proof of birth in Bangladesh: non-registration of the birth of children to a refugee parent in Bangladesh. The Tribunal finds this information is consistent with the applicant's claims:

Rohingya refugees in Bangladesh are affected by a number of issues related to documentation. ... [including] the non-registration of refugee children with a Bangladeshi father or mother, despite the fact that the Bangladesh Citizenship Act since 2009 allows both Bangladeshi men and women to pass on citizenship. Because of this gap in the implementation of existing national laws, UNHCR keeps track of such children by entering their data into ProGres, as there would otherwise be no record of their existence. Unregistered refugees are unable to register their newborn children.<sup>3</sup>

50. The Tribunal notes that United States (US) government agencies have reported that birth in the territory of Bangladesh automatically conferred citizenship only on those born before 26 March 1971<sup>4</sup> and does not confer citizenship on stateless Rohingya.<sup>5</sup>

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<sup>3</sup> United Nations High Commissioner for Refugees. Policy Development and Evaluation Service (PDES) 2011, *States of denial. A review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh* (PDES/2011/13) , December, page 14 paragraphs 46-47 <<http://www.unhcr.org/4ee754c19.html><CISNET CISD9559B11879>. The national ID card was introduced from summer 2011, to be implemented over 5 years, a replacement of the 2008 voter registration card used as unofficial identification, and expected to affect '200,000 unregistered Rohingya refugees, who are not eligible for the ID card': [UN Office for the Coordination of Humanitarian Affairs] IRIN 2011, 'BANGLADESH: New ID card policy could hit Rohingya asylum-seekers', *IRIN* website, 29 March <<http://www.irinnews.org/report/92302/bangladesh-new-id-card-policy-could-hit-rohingya-asylum-seekers>> [accessed 14 November 2014] <CISNET CX261733>.

<sup>4</sup> 'Birth within the territory of Bangladesh does not automatically confer citizenship. Only persons born before March 26, 1971 would be deemed Bangladesh citizens by birth.': United States Office of Personnel Management Investigations Service 2001, *Citizenship Laws of the World*, (IS-1) March, page 28, on *Dual and Multiple Citizenship* website <<http://www.multiplecitizenship.com/documents/IS-01.pdf>> <CISNET CIS14049>, which extracts the Bangladesh section at <[http://www.multiplecitizenship.com/wscl/ws\\_BANGLADESH.html](http://www.multiplecitizenship.com/wscl/ws_BANGLADESH.html)>. A United States-based private company promoting dual citizenship thus lists among the ways of acquiring citizenship, by birth in the territory of Bangladesh, but only to parents whose identity and/or nationality are unknown, and so

51. The Tribunal has also had regard to the Department of Immigration and Border Protection's most recent *In-country Synopsis 2011-2015 Rohingya* which states:

There has been no change to the status of citizenship for Rohingya in Bangladesh. Rohingya in Bangladesh are legally stateless and unable to derive citizenship from birth in the country, marriage with local citizens, or any other means. (*emphasis added*)

...

Sources indicate that laws in Bangladesh do not provide Rohingya with a means to gain any form of citizenship. Bangladesh is not a party to the 1951 Refugee Convention or its 1967 Protocol, and is not a party to the 1954 and 1961 Statelessness Conventions.

The USDOS reported in 2016 that 'Rohingya in Bangladesh are legally stateless':

"They cannot derive citizenship from birth in the country, marriage with local citizens, or any other means."

According to the USDOS, citizenship in Bangladesh can only be gained through 'ancestry':

"Individuals become citizens if their fathers or grandfathers were born in the territories that are now part of the country. If a person qualifies for citizenship through ancestry, the father or grandfather must have been a permanent resident of these territories in or after 1971. Birth registration is required to obtain a national identity card or passport."<sup>6</sup>

52. DFAT reported in 2016 that 'Rohingya in Bangladesh are not eligible for citizenship, including through marriage'.<sup>7</sup>
53. The Tribunal has also had regard to a number of recent independent media reports which confirm amendments to the Bangladesh Citizenship Act 1951. The reports confirm that the Bangladesh government has introduced the *Bangladesh Citizenship Bill* 2016. The Bill has been approved by Cabinet and is meant to supersede the Citizenship Act 1951 and the Bangladesh Citizenship (Temporary Provisions) Order 1972.<sup>8</sup>
54. Reports confirm that the Bill proposes to replace the existing law regarding citizenship by birth with the provision that a person can only gain citizenship by being born in Bangladesh if *both* their parents are Bangladesh nationals. (The applicant's representative was able to provide the Tribunal with a copy of the Bill from the Bangladesh Embassy website with key aspects annotated and translated into English.)
55. The Tribunal notes that it has been reported that provisions within the proposed Bill will adversely impact on the human rights of Bangladeshi citizens who are married to foreigners. Bangladeshi officials have been reported to suggest that the Bill has been introduced by the

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assumed to be Bangladeshi [which is really, by descent]: 'Dual Citizenship Bangladesh' n.d. [2014?], *Dual Citizenship made easy* website [document created 11/05/2014]

<<http://www.dualcitizenship.com/countries/bangladesh.html>> [accessed 7 November 2014].

<sup>5</sup> United States [US] Department of State. Bureau of Democracy, Human Rights and Labor 2014, *Country Reports on Human Rights Practices for 2013 - Bangladesh*, 27 February, Section 2[d]

<<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>> <CISNET Library OG1F18C9014>.

<sup>6</sup> In-country synopsis 2011-2015 Rohingya effective 15 July 2016 pp 18-19

<sup>7</sup> DFAT 2016 Country Information Report , Bangladesh, 5 July, Section 3.12 p.11

<sup>8</sup> <http://en.ntvbd.com/bangladesh/16116/Cabinet-nods-changes-to-citizenship-law-widens-scope>  
<http://www.theindependentbd.com/printversion/details/41546>

<http://odhikar.org/citizenship-law-2016-need-for-thorough-scrutiny-drastic-revision/>

<http://archive.dhakatribune.com/bangladesh/2016/may/08/citizenship-bill-draft-termed-fantastic-absurd>



government to specifically prevent children born of Rohingya parents living legally or illegally in Bangladesh from gaining citizenship.<sup>9</sup>

56. The Tribunal also finds on the country information that the applicant has no legal right to enter and reside in Bangladesh or Malaysia.
57. However, refugee status will not be accorded to persons merely because they are stateless and unable to return to their country of former habitual residence. In *MIMA v Savvin* the Full Federal Court held that Article 1A(2) of the Convention is to be construed as including the requirement that a stateless person, being outside the country of his or her former habitual residence, have a well-founded fear of being persecuted for a Convention reason. Whilst a stateless claimant must demonstrate a well-founded fear of being persecuted, the second limb of Article 1A(2) does not require an inability to return to their country of former habitual residence to be linked to that fear: the claimant must be either unable to return (for any reason) or, owing to their well-founded fear, unwilling to return.
58. The Tribunal also notes that the applicant was born in Bangladesh and lived there until 2006. He subsequently travelled to Malaysia where he resided illegally for about six years. Although the applicant has never lived in Myanmar his father was born in Myanmar so was his maternal grandfather. Given the length of time and the nature of the applicant's residence and connection in these countries, the Tribunal considers that the applicant's countries of former habitual residence are Myanmar, Bangladesh and Malaysia.
59. Information from DFAT indicates that Rohingya in Myanmar face a high level of official discrimination; have been subjected to targeted communal violence including as recently as September 2014, and remain at high risk of further violence and societal discrimination, particularly in the Rakhine state.<sup>10</sup> DFAT refers to credible observers assessing the government's response to outbreaks of violence against Rohingya as deeply inadequate "with security services reportedly standing by as Rakhine mobs attacked Muslim villages, and at times, participating in attacks," in 2012. "Police forces have failed to prevent or effectively respond to several large-scale disturbances and rioting."<sup>11</sup> "Overall DFAT assesses that Rohingya in Myanmar are unlikely to have access to effective state protection."<sup>12</sup>
60. Having considered the evidence and country information the Tribunal is satisfied that the applicant faces a real chance of serious harm in Myanmar. The Tribunal finds that the essential and significant reason for the harm is his race / ethnicity (s.91R(1)(a); the serious harm involves systematic and discriminatory conduct as it would be deliberately and intentionally inflicted (s.91R(1)(c)). There is no effective state protection and relocation is not a safe or reasonable option for the applicant. For the reasons outlined above, the Tribunal is satisfied that the applicant has a well-founded fear of persecution in Myanmar, a country of his former habitual residence.
61. The Tribunal then considered the applicant's claims in relation to Bangladesh. The Tribunal accepts the applicant's evidence that he lived in Bangladesh since birth with no legal status and that he has no legal right to return to Bangladesh. Independent country information cited above indicates that it is not possible under Bangladesh law for the applicant, as a

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<sup>9</sup> <http://odhikar.org/citizenship-law-2016-need-for-thorough-scrutiny-drastic-revision/>  
<http://newagebd.net/59222/new-citizenship-law-in-the-offing/>

<sup>10</sup> Australian Government, Department of Foreign Affairs and Trade (DFAT) *Country Information Report, Burma (Myanmar)*, 9 June 2015.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

person of Rohingya ethnicity, born to non-Bangladeshi parents, to have lawfully acquired Bangladesh nationality.<sup>13</sup>

62. Having considered the evidence and country information the Tribunal accepts that the applicant is not a national of Bangladesh; however this was a country of former habitual residence from birth until he departed in 2006.
63. In assessing the applicant's claims of fearing persecution in Bangladesh, the Tribunal notes the information from DFAT which indicates that communal violence against Rohingya occurs<sup>14</sup>. Information from USDOS refers to the exploitation and abuse of Rohingya in Bangladesh. USDOS reports that Rohingya in Bangladesh are unable to work legally; have limited freedom of movement beyond the refugee camps; have minimal access to education for children and only inside the camps; and have limited access to basic medical care. In addition USDOS reports that Rohingya who are unregistered have no legal protection and were sometimes arrested because the government viewed them as illegal economic migrants.<sup>15</sup> In addition, independent reports refer to the Bangladesh government having returned Rohingya to Myanmar and is considering returning Rohingya in the future to Myanmar, a country where the applicant has a well-founded fear of persecution.
64. The European Commission on Humanitarian Aid and Civil Protection reports the following.

*Bangladesh is host to one of the most intractable refugee crises in the world: the Rohingyas. This ethnic, religious and linguistic minority is subject to exclusion and discrimination in their home country Myanmar/Burma, resulting in many of them seeking refuge in neighbouring Bangladesh for the last 30 years. The vast majority are not granted refugee status and are referred to as "undocumented Myanmar nationals" by the Government of Bangladesh. Without legal status they are unable to pursue education and formal employment opportunities, and remain vulnerable to exploitation and serious protection risks.*<sup>16</sup>
65. The UNHCR identifies three distinct groups of Rohingyas in Bangladesh: those in official UNHCR refugee camps (approximately 32,000); those in unofficial or 'makeshift' camps (50,000); and those in the general community (up to 500,000).
66. Given the vast numbers of Rohingya refugees, Bangladesh is seen as an unwilling host and has historically turned back boats carrying Rohingyas fleeing attack by members of the Buddhist majority in Myanmar's Rakhine state.<sup>17</sup>
67. After assessing the evidence the Tribunal is satisfied that the applicant faces a real chance of serious harm in Bangladesh, including the risk of refoulement to Myanmar, a country where the Tribunal has found he has a well-founded fear of persecution.
68. The Tribunal finds that the essential and significant reason for the harm the applicant faces in Bangladesh is his race / ethnicity (s.91R(1)(a)); the serious harm involves systematic and discriminatory conduct (s.91R(1)(c)). The Tribunal is satisfied that the applicant is unable to

<sup>13</sup> "Bangladesh - Country Reports on Human Rights Practices 2015", *US Department of State*, 13 April 2016

<sup>14</sup> "Bangladesh - Country Reports on Human Rights Practices 2015", *US Department of State*, 13 April 2016

<sup>15</sup> *Ibid.*

<sup>16</sup> "ECHO Factsheet: Bangladesh", *European Commission Humanitarian aid and Civil Protection (ECHO)*, 03 March 2016

<sup>17</sup> <http://latitude.blogs.nytimes.com/2012/06/19/bangladeshs-refusal-to-take-in-rohingyas-from-myanmar/>

access state protection in Bangladesh. For the reasons outlined above, the Tribunal is satisfied that the applicant has a well-founded fear of persecution in Bangladesh.

69. The Tribunal notes that the applicant lived unlawfully in Malaysia for approximately six years. Country information indicates that Malaysia does not resettle refugees, his rights in Malaysia would be limited and he would be vulnerable to exploitation, bribery and corruption with limited access to protection. Information from both United States Department of State and UNHCR referred to in the annexure to this decision indicates that Rohingya refugees in Malaysia are at risk of refoulement to Myanmar, a country where the applicant has been found by the Tribunal to have a well-founded fear of persecution. The Tribunal is satisfied that the applicant faces more than a remote chance of serious harm in Malaysia.
70. After assessing the evidence the Tribunal is satisfied that the applicant faces a real chance of serious harm on cumulative grounds in Malaysia, for reasons of his race / ethnicity (Rohingya). The applicant's race / ethnicity is the essential and significant reason for the harm feared and the serious harm involves systematic and discriminatory conduct. The Tribunal is satisfied the applicant has a well-founded fear of persecution in Malaysia (s.91R(1)).
71. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a).

#### **DECISION**

72. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Christopher Smolicz  
Member

## ANNEXURE

### Country Information

DIBP - In-country synopsis 2011-2015  
Rohingya

The UNHCR estimates that since 2014 approximately 94,000 refugees and migrants departed by sea from Bangladesh or Burma and more than 1,100 persons were estimated to have perished at sea since 2014. Amnesty International reported in 2015 that asylum seeker boats leaving Bangladesh consisted of Rohingya asylum seekers and Bangladeshi 'fleeing destitution'. In May 2015, over 5,000 individuals were stranded at sea after smugglers, traffickers and ship crews abandoned their vessels. As a result of the crisis, migrants 'unofficially disembarked', some were repatriated to their country of origin, while others remained in detention centres in Thailand or Malaysia.

UNHCR and Human Rights Watch reported in May 2015 that during the crisis, Bangladesh, Indonesia, Malaysia and Thailand governments (all of which are not signatories to the Refugee Convention) prevented asylum seeker boats landing onshore which effectively left boats adrift at sea for an extended period. Amnesty International reported that following international pressure, Malaysia and Indonesia allowed asylum seekers to land and agreed to accommodate asylum seekers temporarily.

Reports outline the circumstances that lead to the abandonment of dozens of asylum seeker boats in May 2015. A June 2015 Institute of Southeast Asian Studies journal article authored by Su-Ann Oh indicates that, smugglers would ferry asylum seekers ashore in Thailand to obtain payment for further legs of the journey if asylum seekers did not possess sufficient funds for the journey. Human Rights Watch reported in 2015 that human trafficking syndicates held asylum seekers in Thai jungle camps where they are 'extorted'. Those who are unable to make payments risked being tortured or killed. Su-Ann Oh reported that, those who are unable to make payment 'pledge their labour Rohingya interviewed following the crisis indicated that passengers were transferred 'multiple times, across many different boats', and that some paid small fees while others travelled for free.

Human Rights Watch reported in 2015 that human trafficking syndicates held asylum seekers in Thai jungle camps where they are 'extorted'. Those who are unable to make payments risked being tortured or killed. Su-Ann Oh reported that, those who are unable to make payment 'pledge their labour Alternatively, Su-Ann Oh reported that, those who are unable to make payment 'pledge their labour and the amount owed is deducted from their monthly salaries'. Due to reports of physical abuses in Thailand, Amnesty International concluded that it is likely some of the people on boats were 'being trafficked to situations of forced labour or other forms of exploitation'.<sup>1</sup>

In 2015, the USDOS outlined human trafficking of Burmese *en route* to Malaysia in 2015:

NGOs report an increase in the number of Burmese males transiting Thailand en route to Indonesia and Malaysia, where they are subsequently subjected to forced labor, primarily in the fishing industry. Some Burmese men in the Thai fishing industry are subjected to debt bondage, passport confiscation, or fraudulent recruitment; some are also subjected to physical abuse and forced to remain aboard vessels in international waters for years. Reports indicate some Rohingya asylum seekers transiting Thailand en route to Malaysia are sold into forced labor on Thai fishing boats, reportedly with the assistance of Thai civilian and military officials. Burmese women are transported to China and subjected to sex trafficking and domestic servitude through forced marriages to Chinese men; Burmese government officials are reportedly occasionally complicit in this form of trafficking.

Government officials are complicit in trafficking within Burma. Men, women, and children from ethnic areas, including the estimated 98,000 persons displaced by conflict in Kachin and northern Shan States and the estimated 146,000 displaced persons in Rakhine State, are particularly vulnerable to trafficking. Reports indicate some Rohingya women are subjected to sex trafficking in Rakhine State. Local traffickers use deceptive tactics to recruit men into forced labor on palm oil and rubber plantations or in jade and precious stone mines. Children are subjected to sex trafficking or to forced labor in teashops, the agricultural sector, and in

begging. Children and adults are subjected to domestic servitude. A small number of foreign child sex tourists exploit Burmese children.

Amnesty International and Human Rights Watch both reported that a crackdown on human trafficking by the government of Thailand resulted in the authorities closing down smuggling routes which in-turn led smugglers to abandon asylum seeker boats that were at sea:

On May 1, a Thai government raid on a jungle camp in Sadao district on the Thai-Malaysia border uncovered 26 bodies, sparking a larger Thai government crackdown on networks smuggling Rohingya and Bangladeshis in Thailand. Since then, Thai military and police officials have found more such camps and exhumed more bodies, and as camp guards have fled, more than 250 survivors have escaped the camps and been detained by the authorities. The crackdown effectively closed the smuggling route through Thailand, leaving boats in transit with Rohingya and Bangladeshis unable to land their human cargo. As a result, smugglers have sought to offload these people in Malaysia or Indonesia, or abandoned their boats and left them to drift. Thai authorities at the most senior levels have long known about these smuggling rings and turned a blind eye.

Reports indicate that following initial resistance, Thai, Malaysian and Indonesian authorities allowed passengers to come onshore. Amnesty International reported that Indonesia and Malaysia have indicated that they will only accommodate asylum seekers temporarily. In 2015 In May 2016 Amnesty International reported that Rohingya who were accommodated in Malaysia remain in Belantik detention centre.

## **Burma / Myanmar**

The Department of Foreign Affairs and Trade (DFAT) provided the following information in its report on Burma (Myanmar), dated 9 June 2015.

2.31 Over the past three years there have been several major outbreaks of sectarian violence in Burma in which Muslim minority communities (predominantly, but not exclusively Rohingya) have been most affected (see further details at 'Rohingya', below). Police forces have failed to prevent or effectively respond to several large-scale disturbances and rioting (see further details at 'State Protection', below)...

3.1 The Burmese government recognises eight major ethnic groups (the Kachin, Kayah, Karen, Chin, Mon, Bamar, Rakhine and Shan), divided into 135 "national races". Under the 1982 citizenship law, a group must have been present in Burma before 1823 for its members to be entitled to citizenship. This restricts the recognition of some groups. The 2008 constitution further recognises certain groups by allocating seats in state and region parliaments to members of these groups. Access to Government services is normally dependent on proof of citizenship (see 'Documentation', below). For those recognised as citizens, instances of official discrimination on the basis of ethnicity are not common.

3.2 Certain groups, including the Rohingya and people of Indian, Chinese, Anglo-Burmese and Nepali descent, are not among the 135 recognised ethnic groups.

### **Rohingya**

3.5 This section discusses the situation of the people who identify themselves as 'Rohingya', although it is acknowledged that there is a debate about the origins and historical validity of this term. Most Rohingya are Muslim. The majority of Rohingya in Burma live in Rakhine State (also called Arakan State), where Rohingya are estimated to number 1.1 million, out of a total state population of 3.6 million people. Rakhine State is the second poorest state in Burma.

3.6 Rohingya tend to reside in Northern Rakhine State. The majority of people in Mawlaik and Buthidaung townships are Rohingya. These two townships are referred to as Northern Rakhine State (NRS) and are the only Muslim-majority townships in Burma. There are Rohingya communities in many other townships in Rakhine State, including Pauktaw and Myebon. Ethnic Rakhine (also called Arakanese), who are mostly Buddhists, are the majority group in the rest of Rakhine State.

## Official discrimination

3.7 Most Rohingya in Burma are not Burmese citizens, and are also not citizens of neighbouring countries such as Bangladesh. Under the 1982 Citizenship law, many Rohingya are formally eligible for some form of citizenship. In some cases, government officials are unwilling to provide citizenship to Rohingya. In other cases, Rohingya reject the requirement that they be categorised as “Bengali” in order to acquire citizenship. Furthermore, many reject the categories of “naturalised” or “associate” citizenship as defined under the 1982 citizenship law. Rohingya consider these categories of citizenship as discriminatory, denying the existence of Rohingya in Burma before 1823 and legally reinforcing what they see as the inaccurate view that Rohingya are immigrants from Bangladesh. Furthermore, “naturalised” or “associate” citizenship offers diminished rights by comparison with full citizenship. For example the right to education – enrolment in courses for some professions, including medicine, law and engineering is restricted to full citizens only – and the right to stand for election – restricted to full citizen with full citizens for both parents. Provisions for the revocation of “naturalised” and “associate” citizenship – including for showing “disaffection or disloyalty to the State” also make these forms of citizenship less secure than full citizenship.

3.8 The government has conducted a limited ‘verification process’ of the citizenship status of Rohingya on a sporadic basis over the past two to three years, with the most recent process beginning with a pilot project in Myebon Township in mid-2014. As a result of this pilot project, in September 2014 the government granted citizenship to approximately 800 Muslims (of a reported 1000 applicants), including both ethnic Kaman and Rohingya. However, many more Rohingya rejected the requirement, imposed under this process, that they state their ethnicity as ‘Bengali’. They consider Bengali ethnicity would be an admission that they are illegal immigrants from Bangladesh. Some Rohingya, however, were willing to accept being classified as Bengali. In any case, at the time of writing, this avenue for applying for citizenship was not open to the majority of Rohingya.

3.9 Some Rohingya outside Rakhine state have been able to secure identity documentation by registering as another (normally Muslim) ethnicity. However this practice is neither legal nor widespread.

3.10 Exacerbating the effects of their status as non-citizens, Rohingya in Rakhine State also face risks of discrimination due to the Government’s response to widespread sectarian violence in Rakhine state in recent years (see ‘Societal discrimination, below, for background). Credible observers consider the government’s response to outbreaks of violence in 2012 was deeply inadequate, with security services reportedly standing by as Rakhine mobs attacked Muslim villages, and at times, participating in attacks.

3.11 At the time of writing, many of the people displaced by communal violence remained in temporary IDP camps. Displaced Rohingya and Rakhine people are located in separate camps (around 95 per cent of those in IDP camps are Rohingya). Basic services in Rohingya IDP camps, including education, health care and communications infrastructure, are often unavailable or inadequate. International assistance, including from the United Nations, NGOs and civil society (and which is provided to affected Rakhine communities as well), has provided Rohingya in IDP camps with some shelter, food and health care facilities. However, doctors reside outside IDP camps and their attendance depends on their admittance by local authorities. A reliance on ad hoc and volunteer teaching arrangements at makeshift camp schools generally results in substandard educational services, in some cases only madrasahs.

3.12 The access of Rohingya in camps to employment markets is highly restricted. Local authorities prevent Rohingya from exiting the camps on the basis that they cannot guarantee security for Rohingya IDPs outside the camps. Rohingya camp residents are not permitted to fish or otherwise participate in the local economy, again usually on the grounds that their security cannot be guaranteed outside the camps. Rakhine people accused of selling goods or providing services to Rohingya are also allegedly punished by community leaders and local officials.

3.13 These conditions are not reflective of those in IDP camps for non-Rohingya. In non-Rohingya camps shelter is normally adequate, government health clinics are normally available

on site, children normally attend schools, and livelihood programs are normally available for adult re-training. Rakhine people are permitted to enter and exit their camps freely and have access to government services and employment opportunities.

3.14 In addition to IDP camps, broader policies have been instituted in Rakhine State to separate Rohingya from people of other ethnicity, purportedly in an attempt to prevent ethnic tensions from escalating into violence. The removal of Rohingya from the economy has had a significant impact on the ability of Rohingya who have avoided internment to re-enter the workforce. Those who left due to the violence have often found their previous roles have been filled by Rakhine people and in some instances employers have been discouraged from re-hiring Rohingya by Buddhist nationalist groups.

3.15 Local authorities have not always facilitated humanitarian access to Rohingya communities. For example, in February 2014, Burma's Ministry of Home Affairs instructed Médecins Sans Frontières (MSF) – the sole provider of accessible medical care for many people in Rakhine State – to cease its operations in Burma. MSF was permitted to resume some activities in Rakhine State in June 2014, and operations were mobilised towards the end of 2014, but there remain Muslim communities in NRS with limited access to medical care.

3.16 There is a significant disparity between the educational opportunities available to Rohingya and those available to non-Rohingya residents of Rakhine State. Rakhine teachers have been prevented from entering Muslim enclaves, ostensibly for security reasons. Beyond primary school, few educational services are available for Rohingya. Due to security policies, Rohingya no longer have access to Sittwe University but can study by distance education.

3.17 Rohingya in Rakhine State, particularly Northern Rakhine State, also face other types of discrimination. These include: limitations on freedom of movement, including internal relocation (see more at 'Internal Relocation', below); requiring permission from local authorities to marry; inability to register the births of children born outside of registered marriages; and the order that Rohingya women in Northern Rakhine State can only have two children. Violation of these rules can lead to imprisonment.

3.18 Overall, taking into account their lack of access to citizenship and lower level of access to employment, and health and education services, DFAT assesses that Rohingya in Burma (whether residing in IDP camps or not) face a high level of official discrimination.

#### Societal discrimination

3.19 Burma has a long history of deadly communal violence between Buddhists and Muslims. Rising Burman Buddhist nationalism and the growing influence of the Buddhist '969' movement (see also 'Religion') have contributed to recent outbreaks of communal violence. Because there is little sympathy for the Rohingya among the broader Burmese community, leading politicians are often not inclined to seek long-term solutions or to take action to improve conditions in IDP camps.

3.20 Outbreaks of significant violence between Rakhine Buddhists and Muslim Rohingya in Rakhine State in June and October 2012 resulted in the displacement of 140,000 people, over 90 per cent of whom were Muslim Rohingya. Nearly 350 were killed and more than 3000 houses burned, predominantly in Rohingya villages. A Human Rights Watch report (All You Can Do Is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State, April 2013) argues that the violence was organised, incited and committed by local political operatives, Buddhist monks and ordinary Rakhines. The government dismissed the findings of the report as unfounded.

3.21 Rakhine Buddhist nationalists have also engaged in violent protests against perceived assistance to Rohingya communities. For example, Rakhine Buddhists have protested against the perceived corruption of local officials, accused of providing some Muslim Rakhine nationals citizenship papers; and against the presence of UN agencies and NGOs.

3.22 Further violence has broken out since 2012. For example, in January 2014 credible but unverified reports suggest that up to 48 Rohingya were killed in mob violence in Maungdaw, in Northern Rakhine State. In March 2014, violence targeting UN offices and international NGOs in Sittwe resulted in extensive damage to property and temporary relocation of international and local aid workers. This affected the delivery of aid to communities affected by sectarian violence. Rakhine Buddhists in Myebon township reportedly protested the granting of citizenship to approximately 800 Muslims in September 2014.

3.23 Most of the violence in Rakhine State has involved Rakhine Buddhists attacking Muslim Rohingya. However, some Rohingya communities have also been responsible for violent attacks on ethnic Rakhine groups. For example, in June 2012 a number of houses in Rakhine Buddhist communities in Northern Rakhine State were burned by ethnic Rohingya.

3.24 Overall, DFAT assesses that Rohingya in Rakhine state remain at a high risk of further violence and societal discrimination, although this can vary depending on location; Rohingya in Maungdaw appear to face a higher level of prejudice than those in Buthidaung, for instance.

3.25 There are also a number of Rohingya communities outside Rakhine State. Individuals from these communities do not generally publicize their ethnicity. The level of discrimination they face is similar to that faced by other Muslims or people of South Asian appearance living in Burma (see more below at 'Muslims'). Overall, DFAT assesses that Rohingya outside Rakhine State experience moderate levels of societal discrimination on a day-to-day basis...

#### State Protection

5.1 Burma's 2008 Constitution guarantees freedom from discrimination on the basis of "race, birth, religion, official position, status, culture, sex and wealth". However, in law there are few specific protections offered to citizens to shield them from discrimination and few avenues through which citizens can pursue redress against discrimination.

5.2 The key challenge to the provision of state protection in Burma is the weakness of the rule of law. The Government has publicly committed to improving the rule of law and has demonstrated that reforms to the institutions that apply and implement the law are a priority. However, avenues for a victim of violence to seek protection or redress in Burma remain unreliable.

5.3 The security services in particular continue to enjoy impunity. Charges against members of police or the Tatmadaw would need to be supported by the police themselves or a high profile public figure who could effectively press for action.

5.4 The availability of state protection depends on a range of circumstances and is not necessarily determined on the basis of religion or ethnicity. Nonetheless, given Burma's Bamar Buddhist majority dominates the public service and security services, and given widespread anti-Muslim sentiment in Burma, access to state protection may be more difficult for Muslims and for some Christians...

#### State Protection for Rohingya

5.24 Police complaint processes require official identity documents to lodge complaints. As non-citizens, Rohingya are often unable to make police complaints. Local administrators and police are generally drawn from the Rakhine Buddhist community. Credible sources suggest that the police in Rakhine State carry societal prejudices against Rohingya. They are unlikely to support protests or investigations into criminal cases on behalf of the Rohingya.

5.25 Police reportedly assist Rakhine nationalists through the provision of protest permits (for example to extremist nationalist monks) that are denied to pro-Rohingya activists. Reports of police standing by when faced with communal violence, particularly in cases of anti-Muslim violence, are widespread and credible. In some cases it is possible that local police may themselves have been involved in incidents of arson and assault. DFAT assesses that the police are generally unable to offer effective state protection to Rohingya against communal violence.



5.26 Access to legal representation and to the court system in Rakhine State is limited. Civil disputes are typically managed by local administrators and criminal matters must be supported by local police if they are to proceed.

5.27 There are few lawyers in Rakhine State willing to represent Rohingya. Lawyers from other states or regions seeking to represent Rohingya are often subject to death threats and in some cases have been assaulted by extremist groups in Rakhine State. In some cases, lawyers from outside Rakhine State have been threatened in their state of residence. Police in Rakhine State have reportedly done little to protect lawyers acting on behalf of Rohingya. For example, in 2012, Rohingya lawyer Dr Tun Aung was sentenced to 17 years' imprisonment for allegedly inciting a crowd to riot. He and independent witnesses claim he had sought to calm the crowd. In July 2014 he successfully had his sentence reduced to a total of three years, and he was released from prison in January 2015.

5.28 The state has also made limited attempts to control societal discrimination: for example, Rakhine nationalists have been prevented by the government from publishing 'pro-Rakhine literature'.

5.29 Overall, DFAT assesses that Rohingya are unlikely to have access to effective state protection.<sup>18</sup>

## Bangladesh

DFAT provided the following information in its Country Information report on Bangladesh dated 5 July 2016.

### Rohingyas

3.10 The term 'Rohingya' refers to a Sunni Muslim group of people who self-identify as having Rohingya ethnicity. According to the Danish Immigration Service, the Rohingya have lived in Arakan (today called Rakhine State) in Myanmar for a number of centuries, although the Myanmar Government does not recognise Rohingya people as its citizens. There have reportedly been three major flows of Rohingyas into Bangladesh over the last century; during WWII following the Japanese invasion of Burma; and again in 1978 and 1991/92. DFAT recognises there are sensitivities and disagreement in both Bangladesh and Myanmar about this history.

3.11 While the majority live in Myanmar, up to 500,000 Rohingyas now live in Cox's Bazar. Adjacent to the Bangladesh – Myanmar border, Cox's Bazar is one of the poorest regions in Bangladesh. Many Rohingyas have familial connections in Myanmar along with the majority Bengali population in Bangladesh. Increasing numbers of Rohingyas live in Dhaka and, to a lesser extent, other areas of Bangladesh. Rohingyas are not easily distinguishable from the majority Bengali population in physical appearance. Many speak fluent Bengali and have otherwise assimilated into the local community, including through marriage.

3.12 The UNHCR identifies three distinct groups of Rohingyas in Bangladesh: those in official UNHCR refugee camps (approximately 32,000); those in unofficial or 'makeshift' camps (50,000); and those in the general community (up to 500,000). Rohingyas in official refugee camps receive basic health, nutrition, educational and vocational services with the support of international humanitarian organisations. According to the International Organisation for Migration (IOM), Rohingyas living in unofficial refugee camps or within the broader community have a growing need for humanitarian services, including health, water, sanitation, hygiene and nutrition. Rohingyas are generally able to move freely in and out of refugee camps.

3.13 Rohingyas are not eligible for Bangladeshi citizenship, including through marriage. They are also not legally entitled to work. However, credible sources have told DFAT that many Rohingyas work informally using fraudulent identity documents such as National Identity Cards (see 'Documentation', below). These sources have also indicated that law enforcement agencies do not actively seek to enforce legal provisions restricting Rohingyas' access to employment, although many Rohingyas

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<sup>18</sup> Australian Government, Department of Foreign Affairs and Trade, (DFAT) *Country Information Report, Burma (Myanmar)*, 9 June 2015

have been forced to accept lower wages and poorer conditions. Law enforcement agencies have demonstrated a reluctance to investigate crimes committed against Rohingyas by Bangladeshi citizens, including rape.

3.14 The Government conducted a census of undocumented Rohingyas in June 2016 as part of its 'National Strategy on Myanmar Refugees and Undocumented Nationals in Bangladesh – the Rohingya'. Those who choose to register will receive identity cards that will facilitate access to health and education services, and allow them to move freely throughout Bangladesh. It is unclear whether the Government will grant citizenship or residence status to these individuals or seek to settle them in another country.

3.15 Low levels of societal tension exist between Rohingyas and the broader community in Cox's Bazar. This is a product of the continuing influx of Rohingya from Myanmar, which has generated concerns within the local community about competition over access to humanitarian services and jobs. For example, a small number of anti-refugee groups in the area have periodically lobbied for the forced expulsion of Rohingyas from Bangladesh.

3.16 There is also a low level of communal tension between Rohingyas and the Buddhist and Hindu communities, partly because of Rohingyas' perceived support for the BNP. For example, Rohingyas took part in BNP-led violence against mostly Buddhist communities in Cox's Bazar during broader Islamist protests in September 2012 sparked by the actions of a local Buddhist man who allegedly insulting Islam on Facebook. Violence between these communities escalated in the lead up to and following the January 2014 national elections.

3.17 DFAT assesses that Rohingyas in Bangladesh are subjected to a high level of official discrimination because of the Government's refusal to grant them legally enforceable rights. Rohingyas are subjected to a low level of societal discrimination, including sporadic (but low level) violence which mostly occurs during national elections.

The United States Department of State (USDOS) report on Bangladesh states the following with regard to Rohingya in Bangladesh.

**Refugee Abuse:** UNHCR reported cases of refugee abuse, including rape, assault, and domestic violence, deprivation of food, arbitrary detention, and documentation problems.

**Employment:** The government did not authorize Rohingya refugees living in the country to work locally. Refugees had limited freedom of movement beyond the camps and had to obtain permission for all movement outside the camps. Despite these constraints, some refugees worked illegally as manual laborers or rickshaw pullers in the informal economy. Undocumented Rohingya also worked illegally, mostly in day-labor jobs.

**Access to Basic Services:** Working with UNHCR, the government continued to improve some aspects of the official refugee camps following findings in recent years that sanitation, nutrition, and shelter conditions had fallen below minimum international standards. Some basic needs remained unmet, and the camps remained overcrowded, with densities on par with the country's urban slums. A 2014 nutrition survey report from UNHCR and World Food Program stated the prevalence of malnourished (stunted) and underweight children in refugee camps remained higher than in the rest of the country and above the emergency threshold levels set by the World Health Organization.

Public education, while mandatory as of 2010 through eighth grade throughout the country, was offered only through seventh grade in the camps, compared with fifth grade in previous years. Government authorities did not allow refugees outside the camps to attend school, but some did so.

Government authorities did not allow registered or unregistered Rohingya formal and regular access to public health care. Instead, UNHCR and NGOs provided basic health services in the official camps to registered refugees, and the International Organization for Migration provided health services to the unregistered Rohingya in the makeshift sites. Although NGOs provided humanitarian assistance to registered Rohingya refugees, undocumented Rohingya, and the local population, the government's restrictions on NGO activities outside the camps limited the unregistered population's access to basic medical care and other services.

International NGOs faced difficulties in providing basic services to undocumented Rohingya and to the surrounding impoverished host communities due to extended delays by the NGO Affairs Bureau in granting permission for them to operate. In 2014 the government issued a temporary authorization allowing international organizations and international NGOs to continue providing basic assistance, such as water, sanitation, health care, and education, to registered, and some unregistered, Rohingya.

Registered refugees did not have access to the formal legal system, although they were able to take legal complaints to a local camp official who could mediate disputes. Members of the unregistered population had no legal protection and were sometimes arrested because the government viewed them as illegal economic migrants.

#### Stateless Persons

The Rohingya in Bangladesh are legally stateless. They cannot derive citizenship from birth in the country, marriage with local citizens, or any other means.<sup>19</sup>

The Tribunal has had regard to media reports from *The Diplomat* in October 2014<sup>20</sup> on the plight of Rohingya refugees in Bangladesh:

#### **The Rohingya in Bangladesh**

Refugees International estimates that 29,000 Rohingya live in official refugee camps in Bangladesh, while another 200,000 are in unofficial camps, where they are categorically denied legal protections and humanitarian assistance. The majority of them live near Cox's Bazar, a city located on Bangladesh's southeastern coast. Although the United Nations High Commissioner for Refugees (UNHCR) has expressed its willingness to help the Bangladesh government cover the costs of additional services and registering refugees, Bangladesh refuses to act. The UNHCR and other international NGOs have offered numerous proposals for ways to improve the situation, but the government continues to drag its feet.

The cost factor is simply not enough to fully explain this puzzle. Indeed, in 1971 when 10 million refugees poured into India from East Pakistan, an extremely impoverished country managed to provide basic services with little or no international assistance. Not only could Bangladesh receive far more international assistance, but the total Rohingya population in Myanmar does not amount to more than 2 million.

Despite close cultural and religious affinity, the Bangladesh government has been reluctant to take responsibility for the Rohingya issue. New arrivals are turned away, and Rohingya are blamed for drug-related and violent crimes in Cox's Bazaar; their movement and access to basic services were further restricted in 2012, following attacks on Buddhist communities in southeastern Bangladesh. Indeed, despite this continuing influx of refugees Bangladesh has not come up with a comprehensive refugee policy.

In 2010, Bangladesh announced that it was working on a national refugee policy, and until it was agreed upon, no new refugees could be registered at the country's two official refugee camps. Nor, for that matter, could NGOs or the UNHCR offer any additional services. However, it took until 2014 for the government to announce its national strategy for Myanmar refugees and undocumented nationals. The policy included five key elements: listing unregistered refugees, providing temporary basic humanitarian relief, strengthening border management, diplomatic engagement with the government of Myanmar, and increasing national level coordination. Although the statement acknowledged the need for basic humanitarian relief, it fell far short of demands for building a system that allowed refugees any opportunities for self-reliance.

More recently, the government has come up with more callous plans to deal with the refugee influx. In May of this year, for example, *The Guardian* reported that Prime Minister Sheikh Hasina had

<sup>19</sup> "Bangladesh - Country Reports on Human Rights Practices 2015", *US Department of State*, 13 April 2016

<sup>20</sup> <http://thediplomat.com/2015/10/refugees-and-neighbors-rohingya-in-bangladesh/>

announced plans to relocate the refugee camps from their current location near Cox's Bazar to an island in the Bay of Bengal. The move appears to be motivated by plans to boost the number of tourists visiting Cox's Bazar's famous beaches.

Besides governmental inefficacy, Bangladesh's highly strained relationship with Myanmar also accounts for the situation of the Rohingya. Continuing differences over border security and insurgencies in regions abutting their borders loom large. Despite ongoing negotiations for a nationwide ceasefire, various insurgent groups are still fighting the Myanmar government. The movement of stateless Rohingya complicates an already insecure border, plagued by drug trafficking and insurgency groups.

The border between these two countries is a major transit zone for methamphetamines from Myanmar. For example, in June 2015, a member of the Border Guard Bangladesh was abducted by the Myanmar Border Guard Police and held for about 10 days before his unconditional release. Neither side offered much in the way of explanation of the incident; many people in Dhaka were convinced that the abduction was probably tied to the involvement of the two border forces in the drug trade from Myanmar to Bangladesh. Methamphetamine addiction is on the rise in Dhaka, even as millions of pills, locally known as *yaba*, are confiscated annually at the border.

Insurgent groups have also taken advantage of the chaos surrounding the border area. In late August, the Bangladesh military organized a series of operations into the border areas to oust members of the Arakan Army, one of Myanmar's ethnic armed organizations, which had been operating in the region illegally while hiding from Myanmar government forces. Rohingya insurgents have also sought refuge in Bangladesh, as have Bangladesh's own insurgent groups from the Chittagong Hill Tracts.

The unchecked movement of Rohingya refugees adds to the Bangladesh government's legitimate concerns about the area. The border is difficult for the state to control given its remoteness from any major cities, there is rampant illegal trade and border crossings, and it appears that some ethnic insurgencies and Islamist groups have used the area as a base of operations. Indeed, the Rohingya are increasingly being pulled into criminal and extremist/terrorist networks.

## Malaysia

The Tribunal assessed the applicant's claims against Malaysia, another country of former habitual residence for the applicant. In so doing the Tribunal considered, amongst other material, the following information from various sources.

An article published in *The Guardian* refers to an Amnesty International report which indicates that Bangladeshi and Rohingya migrants face 'appalling bad' conditions in Malaysian detention centres.

Hundreds of trafficking victims from Myanmar and Bangladesh remain detained in Malaysia a year after being rescued from near-certain death at sea during the Asian migration crisis. In total, 390 trafficking victims – 325 Rohingya and 65 Bangladeshis – have spent the past year in detention, despite nominally being freed from captivity in May 2015, in research Amnesty will be publishing in the coming weeks. Their plight drew the world's attention this time last year after it was discovered that they had been abandoned by their traffickers and left to drift at sea on packed trawlers without any food. Initially, the countries of south-east Asia mostly refused to rescue them, and they survived on food provided by fishermen in the area. Fighting broke out between different groups on board. "They hit us, with hammers, by knife, cutting," one survivor told the Guardian at the time. Following an international outcry, Indonesia and Malaysia took in about 2,900 people, mostly Rohingya and Bangladeshis. Several thousand are believed to have been left at sea. Of the 1,100 brought to Malaysia, around 50 Rohingya have been provided with the opportunity to be resettled internationally, and 670 Bangladeshis were sent back home. But nearly 400 remain jailed in Belantik, a Malaysian detention centre, in what former inmates describe as squalid conditions. "The conditions of [Malaysia's] detention centres are appalling bad," said Khairunissa Dhala, one of the Amnesty researchers who compiled the report, following several weeks of interviews in south-east

Asia. "One year on, these people who have been through this horrific journey are still being punished, rather than being treated as victims of human trafficking." At least one Rohingya woman who was due to be resettled has died in detention, according to Amnesty's research. Another rights group says a Bangladeshi man has also died, but this could not be verified.

Last year's crisis in the Indian Ocean was sparked after a sudden crackdown on traffickers operating along the Thai-Malaysian border. A series of mass graves for migrants were unearthed near the border and a trafficker was arrested, leading to a shutdown of the smuggling routes in the region. Previously, traffickers would take migrants southwards by boat from Myanmar, where the Rohingya minority is persecuted, and Bangladesh. They would then land in Thailand and move across the Malaysian border, usually after being tortured until their families paid a ransom. However, following the crackdown, traffickers abandoned several boats at sea – leaving them to drift as de facto floating prisons. Since the crisis last May, there have been no reports of boats using the same tactics. "But it's just a matter of time – the situation in Myanmar for the Rohingya isn't improving," said Dhala. "The root cause hasn't been solved, and people are still likely to want and need to leave. Maybe they have already found another route and we just don't know yet."

The Malaysian prime minister's office referred press enquiries to the home affairs ministry, who asked for the request to be put in writing. Neither the home affairs ministry nor the Malaysian high commission in London responded to emailed enquiries.<sup>21</sup>

An article published in a Malaysian online newspaper states:

"One year after landing in Malaysia, following a harrowing ordeal in the Bay of Bengal, 36 Rohingya refugees have been resettled in the United States. The United Nations High Commissioner for Refugees (UNHCR) said that the 36 refugees departed Malaysia early Thursday morning under its resettlement programme. The refugees had been released from the Belantik Immigration Detention Centre the previous afternoon. "UNHCR welcomes the move by the Malaysian Government to release the 36 extremely vulnerable Rohingya refugees from the Belantik Immigration Detention Centre," said Richard Towle, UNHCR Representative in Malaysia in a statement on Friday. "We are also extremely grateful to the Government of the United States of America for their generosity in providing resettlement spaces for this group of extremely vulnerable individuals, for whom no other safe, long-term solution would be an option," he added. In May last year, over 1,000 people from Bangladesh and Myanmar had arrived by boat after being stranded in the Bay of Bengal. They were stranded at sea after human trafficking syndicates abandoned them following the discovery of mass graves and detention camps for Rohingya and Bangladeshis in Thailand and Malaysia.

According to UNHCR, 371 of the refugees were identified as Rohingya from Myanmar and of concern to the commission. Towle, however, expressed concern for the remaining 334 Rohingya "boat arrivals" who are still at the Belantik centre. "These people have undergone traumatic experiences at the hands of smugglers and traffickers, and are in need of specialised care." "The best option for them is to be released into UNHCR's care where we can assess their protection needs and help find support for them within the refugee communities in Malaysia," he said.

The Rohingya are considered by the United Nations as one of the most persecuted minorities in the world. They are considered to be stateless and were often subjected to arbitrary violence and forced labour in Myanmar. They come mainly from the Arakan state in Myanmar, which borders Bangladesh. To escape persecution back home, they took long and arduous journeys by boat to other countries in the region. As of February this year, there are 53,700 Rohingya refugees registered with the UNHCR in Malaysia.

The Malaysian Government does not legally recognise refugees, although they are allowed to work in informal sectors.<sup>22</sup>

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<sup>21</sup> "Rohingya trafficking victims stuck in captivity, one year on", *Guardian, The (Australian Edition)*, 27 May 2016, CX6A26A6E4686

The United States, Department of State, provided the following information in its report published in April 2016.

The Office of the United Nations High Commissioner for Refugees (UNHCR) generally had access to registered refugees, asylum seekers, and unregistered persons of concern who may have claims to asylum and refugee status and who authorities held in immigration detention centers and prisons. This access, however, was not always timely. In May, UNHCR representatives said immigration officials unduly delayed access to newly arrived Rohingya refugees at the Belantik detention facility in Kedah State.

According to UNHCR, as of November 30, there were 155,730 persons of concern, including 143,579 of Myanmar origin, while 11,890 refugees were successfully resettled from Malaysia to other countries.

**Access to Asylum:** The country's laws do not provide for the granting of asylum or refugee status; nonetheless, the government cooperated closely with UNHCR and occasionally reported potential persons of concern to UNHCR.

**Refoulement:** The government did not provide legal protection against the expulsion or return of refugees to countries where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. In October, after receiving no reply, four UN special rapporteurs released letters sent to the government in May seeking an explanation to claims that the country pushed back Myanmar and Bangladesh migrants out to sea. The letter also urged the government to explain the measures taken to comply with its nonrefoulement obligations. UNHCR recorded the refoulement of 29 persons during the year.

**Refugee Abuse:** The government sometimes detained asylum seekers, in either police jails or immigration detention centers, until UNHCR established the asylum seekers' bona fides. Local and international NGOs estimated the population at most of the country's 17 immigration detention centers was at or beyond capacity, with some detainees held for a year or more. The number detained in these centers was not publicly available.

NGOs and international organizations involved with migrant workers, refugees, and asylum seekers made credible allegations of overcrowding, inadequate food and clothing, lack of regular access to clean water, poor medical care, improper sanitation, and lack of bedding. An NGO with access to the detention centers claimed these conditions and lack of medical screening and treatment facilitated the spread of disease and contributed to deaths. NGOs provided most of the medical care and treatment in the detention centers. UNHCR reported 13 deaths of refugees or asylum seekers during the year.

**Employment:** Although the government does not legally authorize UNHCR-registered refugees to work, the government typically did not interfere if they performed informal work. UNHCR reported, however, in a few cases the government brought charges against employers for hiring them.

**Access to Basic Services:** For persons with UNHCR cards, the government provided access to health care for refugees at a discounted foreigner's rate, but not to asylum seekers. NGOs operated mobile clinics, but access was limited. Refugees did not have access to the public education system. Access to education was limited to NGO and ethnic community-run schools, and UNHCR estimated no more than 35 percent of refugee children attended school. A lack of resources and qualified teachers limited opportunities for the majority of school-age refugee children. UNHCR staff members conducted numerous visits to prisons and immigration detention centers to provide counseling, support, and legal representation for refugees and asylum seekers.

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<sup>22</sup> "36 Rohingya refugees who landed in Malaysia resettled in the US", *Star Online, The (Malaysia)*, 27 May 2016, CX6A26A6E4853

Temporary Protection: In response to the maritime migrant crisis in May, the government announced it would provide temporary shelter for a maximum of 7,000 migrants at sea, provided UNHCR resettled or repatriated these migrants within one year. The government provided temporary shelter to 1,107 migrants during the crisis. In September, Prime Minister Najib announced the government would provide temporary asylum to a maximum of 3,000 Syrian refugees. The first eight Syrian refugees in the program—two families—arrived in the country in December.

#### Stateless Persons

UNHCR estimated there were approximately 40,000 stateless persons in the country, 40 percent of whom were children. National Registration Department officials stated they do not keep records of stateless persons. A number of local NGOs and SUHAKAM did research, conducted workshops, and ran public awareness campaigns on the problem of stateless children. Foreigners may qualify for permanent resident status after several years of marriage to a citizen: five years of marriage for foreign women married to citizen men; 10 years for foreign men married to citizen women. After two years of permanent resident status, they are eligible to apply for citizenship. While awaiting permanent resident status, authorities usually grant visas to foreign spouses of citizens to allow them an extended legal stay in the country. A local advocacy group for migrant workers reported that in the last five or six years, procedures improved to include shorter waiting times in the processing of permanent residency petitions and visas. Although nationality laws in the country were not overtly discriminatory due to ethnicity or religion, there was a perception that Muslims received preference.

...Individuals who lacked proof of citizenship were not able to attend school, access government services such as reduced cost health care, or own property. UNHCR may provide birth registration or other documentation in some cases.

By law authorities consider illegal anyone entering the country without appropriate documentation. Such persons face mandatory imprisonment for a maximum of five years, a maximum fine of RM 10,000 (\$2,287), or both, and mandatory caning of not more than six strokes.<sup>23</sup>

An article in the *New York Times* in June 2015 reports the following with regard Rohingya in Malaysia:

In Malaysia, their status as refugees and unregistered migrants bars them from sending their children to government schools, meaning many receive little or no education. They are also barred from holding jobs legally, but necessity compels most of the men to find menial off-the-books labor...Most pressing of all, many migrants said they faced a long, uncertain wait for the United Nations refugee agency office in Kuala Lumpur to accredit them as refugees, which would entitle them to a precious identity card that many see as their best protection against detention or abuse by officials and the police.

"It's almost impossible to get the U.N. card", said Ambiya Kadahusan, a 21 year old Rohingya who said she applied nearly a year ago and had yet to receive a response. "Without a card we feel it's unsafe to go out and look for work, or even visit friends. "The police check: 'Where are you from? Are you a Bangladeshi worker?' And sometimes you have to pay some money to be let go."

...The Rohingya are actively employing strategies of community self-protection," said Matthew Smith, an executive director of Fortify Rights, an organization based in Bangkok that monitors refugee conditions in the region. "The government of Malaysia is not providing adequate protection, and so they have to draw more on their own resources."<sup>24</sup>

<sup>23</sup> "Malaysia - Country Report on Human Rights Practices 2015", *US Department of State*, 13 April 2016, OGD95BE926273

<sup>24</sup> Buckley, C., "Even in Safety of Malaysia, Rohingya Migrants Face Bleak Prospects", *The New York Times*, 3 June 2015.

An article in *The Economist* reports the following.

Malaysia was the intended destination of more than 3,000 boat people who scrambled onto beaches around South-East Asia in May, abandoned by their traffickers after a government crackdown blocked commonly used routes across Thailand. Many were Rohingyas, attracted not just by Malaysia's wealth but also its Islamic heritage. Yet life is tough for the 100,000 or so Rohingyas thought to have arrived there since the 1970s. Malaysia has not signed the UN's convention on refugees, and makes no distinction between asylum-seekers and migrants who sneak in to find work. Rohingyas may not legally hold a job and have no right to health care or schooling. They are far more likely than locals to suffer beatings, rape or murder. They are commonly hassled by police who see them as an easy source of bribes.

A refugee card, supplied by the UN's refugee agency (UNHCR) provides some protection from deportation. Obtaining one is an early priority for Rohingyas, many of whom have never owned any kind of ID. Yet the agency has struggled to cope with the growing influx, particularly as its modest resources are sapped by migrant emergencies in North Africa. Asylum seekers can wait two to three years to have their refugee status confirmed. Service is swifter for those languishing in Malaysia detention centres, for whom refugee status often enables release. But the average time they must wait behind bars has also been growing, and in some cases is longer than a year.

Campaigners say the Malaysia authorities have been discouraging the UN from handing out many more cards for fear that it is prompting fresh arrivals.

...Dr Hamid left Rakhine after a bout of violence in the mid-1990s during which an acquaintance died from beatings suffered in military custody. At the time Rohingyas could travel a little more freely; he moved to Malaysia in 1997, where he studied chemistry. But Myanmar refused to renew his passport, and Malaysia will not formalise his residency. That leaves his family stateless. In the coming months they will finally be resettled; they are pleased to be moving to Texas, where the weather is not too cold. Dr Hamid's qualifications will probably not be recognised and the thought of a new start is intimidating – but it is a relief, nonetheless...<sup>25</sup>

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<sup>25</sup> "Rohingyas in Malaysia: The Long Wait", in *The Economist*, 15 June 2015.