

OPERATIONAL GUIDANCE NOTE

Burma

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1. Introduction

1.1 This document evaluates the general, political and human rights situation in Burma and provides guidance on the nature and handling of the most common types of claims received from nationals/residents of that country, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave. Caseowners must refer to the relevant Asylum Instructions for further details of the policy on these areas.

1.2 This guidance must also be read in conjunction with any COI Service Burma Country of Origin Information at:

http://www.homeoffice.gov.uk/rds/country_reports.html

1.3 Claims should be considered on an individual basis, but taking full account of the guidance contained in this document. In considering claims where the main applicant has dependent family members who are a part of his/her claim, account must be taken of the situation of all the dependent family members included in the claim in accordance with the Asylum Instruction on Article 8 ECHR. If, following consideration, a claim is to be refused, caseowners should consider whether it can be certified as clearly unfounded under the case by case certification power in section 94(2) of the Nationality Immigration and Asylum Act 2002. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail.

Source documents

1.4 A full list of source documents cited in footnotes is at the end of this note.

2. Country assessment

2.1 As regards the name of the country Britain's policy is to refer to Burma rather than Myanmar.¹

2.2 Since 1962, Burma has been ruled by a succession of highly authoritarian military regimes dominated by the majority Burman ethnic group. The current controlling military regime, the State Peace and Development Council (SPDC), led by Senior General Than Shwe, is the country's de facto government, with subordinate Peace and Development Councils ruling by decree at the division, state, city, township, ward, and village levels.² The Government has announced a 'Seven-Step Road Map to democracy' the first stage of which is the resumption of the National Convention (NC) to draft a new constitution. The National Convention met three times between 2004 and Jan 2006.³ It reconvened on 10 October 2006 and adjourned on 29 December 2006. In attendance were more than 1,000 handpicked delegates, including representatives from 17 ethnic ceasefire groups. However, it prohibited free debate on the drafting of a new constitution and threatened to imprison persons for any criticism of the process. Due to the limitations on open debate, the NLD continued its 1995 decision not to participate.⁴

2.3 The government's human rights record worsened during 2006 and the government continued to commit numerous serious abuses including extrajudicial killings, deaths in custody, disappearances, rape, torture, abuse of prisoners and detainees, arbitrary arrest without appeal, politically motivated arrests and detentions, restriction of freedom of speech, press, assembly, association and movement, restriction of freedom of religion and forced labour (including against children). The military government totally controlled the country's armed forces, excluding a few active insurgent groups.⁵

2.4 The Foreign and Commonwealth Office corroborate reports of a deterioration in Burma's human rights record in 2006.⁶ They state that during 2006 respect for the basic rights of freedom, of speech, the press, assembly and association were severely limited and that successive resolutions co-sponsored by the UK at the United Nations General Assembly (UNGA) and United Nations Commission on Human Rights (UNCHR) have drawn attention to arbitrary detentions, extra-judicial killings, rape, torture, the large number of political prisoners, abuse of women's and children's rights and the complete absence of democracy. The latest EU co-sponsored UNGA Resolution adopted in December 2006 expressed concern on these issues, with particular concern over the continued detention of political prisoners and the human rights abuses in the ethnic minority areas of Burma.⁷

2.5 Despite laws prohibiting torture, members of the security forces reportedly tortured, beat, and otherwise abused prisoners, detainees, and other citizens including routinely subjecting detainees to harsh interrogation techniques designed to intimidate and disorient.⁸ The Foreign and Commonwealth Office continued to receive credible reports of torture, particularly during interrogation in police or military custody. Since early 2005, at least 10

¹ FCO Country Profile December 2006

² USSD 2006 (introduction)

³ FCO letter 05 September 2006

⁴ USSD 2006

⁵ USSD 2006 (Introduction)

⁶ FCO Human Rights Annual Report October 2006 p.38

⁷ FCO Country Profile December 2006

⁸ USSD 2006 (Section 1(c))

democracy activists have died in detention as a result of torture, mistreatment or in circumstances where poor conditions were probably a contributory factor.⁹

- 2.6** On 1 December 2005, the Assistance Association for Political Prisoners - Burma (AAPP) released a report on the 'brutal and systematic' torture that the regime inflicted on political prisoners. Based on the testimony of 35 former political prisoners, the report gave graphic details of the physical, psychological, and sexual abuse the regime metes out to dissidents, and identified by name many of the perpetrators. The report detailed the kinds of torture the regime uses, including: severe beatings, often resulting in loss of consciousness and sometimes death; repeated electrocution to all parts of the body, including genitals; rubbing iron rods on shins until the flesh rubs off; burning with cigarettes and lighters; prolonged restriction of movement for up to several months using rope and shackles around the neck and ankles; repeatedly striking the same area of a person's body every second for several hours; forcing prisoners to walk or crawl on an aggregate of sharp stones, metal and glass; using dogs to rape male prisoners; and threatening female prisoners with rape.¹⁰
- 2.7** The judiciary is not independent of the government. The SPDC appoints justices to the Supreme Court who, in turn, appoint lower court judges with the approval of the SPDC. These courts then adjudicate cases under decrees promulgated by the SPDC that effectively have the force of law. The court system includes courts at the township, district, state, and national levels.¹¹
- 2.8** Amnesty International has frequently expressed concerns to the SPDC that articles of Burma's legislation excessively restrict the right to freedom of expression, association and assembly. The authorities continue to use these laws to detain peaceful government critics. Since July 2005, the authorities have penalised senior political figures with extraordinarily long prison sentences in secret trials; held individuals incommunicado, and prosecuted persons attempting to report on human rights violations.¹²
- 2.9** The International Labour Organization (ILO) noted with concern the number of people taken into forced labour, particularly by the military. On 5 February 2005, the Burmese Army's light infantry brigade 439 is alleged to have conscripted two villagers to walk ahead to clear any mines with their bodies on the Toungoo-Mawchi road. Another brigade on a southern extension of the same road allegedly conscripted villagers to carry loads ahead of them to clear mines on the road between Kaw Thay Der and Busakee, resulting in one 15-year-old casualty.¹³
- 2.10** As a result of the lack of progress in tackling forced labour issues, plus recent negative developments including the prosecution and detention of individuals who provided information to the ILO, the International Labour Conference (ILC) agreed in June 2005 the need for further action. Governments, employers and workers groups were asked to intensify their review of relations with Burma (initiated in 2000) and take appropriate action on foreign direct investment and relations with state and military owned enterprises. In November 2005 the Governing Body concluded that it was now necessary to examine steps that could be taken under Article 33. At the ILC in June 2006 the SPDC were set a number of deadlines including releasing activists jailed for reporting forced labour, and agreeing a mechanism for investigating such claims. In November 2006 the ILO's Governing Body concluded that legal actions, which could include seeking an advisory opinion from the International Court of Justice should be considered by the ILO at its meeting in March 2007.¹⁴ The Burmese government reached a Memorandum of Understanding (MOU) with the ILO on 26 February 2007 designed to provide a mechanism to enable victims of forced labour to seek redress. The Understanding provides that alleged

⁹ FCO Human Rights Annual Report October 2006 p.39 - 40

¹⁰ USSD 2006 (Section 1)

¹¹ USSD 2006 (Section 1)

¹² AI Travesties of Justice 2005

¹³ Landmine monitor 2005

¹⁴ FCO Country Profile December 2006

victims of forced labour in Burma will have full freedom to submit complaints to the ILO Liaison Officer in Rangoon. The Liaison Officer will then make a confidential preliminary assessment as to whether the case involves forced labour in order that such cases can be investigated by the Burmese authorities and appropriate action taken against perpetrators. The Understanding incorporates guarantees that no retaliatory action will be taken against complainants. It also provides that the ILO Liaison officer shall be accorded timely freedom to travel within Burma for the purpose of meeting complainants or other relevant persons. The mechanism will be implemented on a trial basis over 12 months and may be extended by mutual agreement.¹⁵

3. Main categories of claims

- 3.1** This Section sets out the main types of asylum claim, human rights claim and Humanitarian Protection claim (whether explicit or implied) made by those entitled to reside in Burma. It also contains any common claims that may raise issues covered by the Asylum Instruction on Discretionary Leave. Where appropriate it provides guidance on whether or not an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/ punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below.
- 3.2** Each claim should be assessed to determine whether there are reasonable grounds for believing that the Claimant would, if returned, face persecution for a Convention reason - i.e. due to their race, religion, nationality, membership of a particular social group or political opinion. The approach set out in *Karanakaran* should be followed when deciding how much weight to be given to the material provided in support of the claim (see the API on Assessing the Claim).
- 3.3** If the claimant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the claimant qualifies for neither asylum nor Humanitarian Protection, consideration should be given as to whether he/she qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.
- 3.4** This guidance is **not** designed to cover issues of credibility. Caseowners will need to consider credibility issues based on all the information available to them. (For guidance on credibility see para 11 of the Asylum Instruction on Assessing the Claim)
- 3.5** All Asylum Instructions can be accessed via the IND website at: <http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/>
- 3.6 Involvement with opposition political organisations/parties in Burma**
- 3.6.1** Some claimants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of the Burmese authorities due to their involvement with opposition pro-democracy political organisations/parties in Burma.
- 3.6.2 *Treatment*** Military governments have ruled Burma since 1962. In 1988 pro-democracy protests were brutally crushed by the military. In 1990 national elections were held in Burma for the first time in 30 years. The National League for Democracy (NLD) the main opposition party

¹⁵ ILO website 'ILO concludes Memorandum of Understanding with Myanmar'

in Burma, led by Aung San Suu Kyi (ASSK), won the elections with an overwhelming majority. The military regime refused to recognise the results claiming a new constitution must be passed before power could be handed over.¹⁶

- 3.6.3** There was no progress in 2006 on national reconciliation or the 2003 'road map' for a transition to democracy. The SPDC continued to restrict basic rights and freedoms and the democratic movement inside the country remained suppressed. Aung San Suu Kyi continued to be detained, marking her eleventh year under house arrest, and other political activists also continued to be detained or imprisoned. Most political party offices, including all but one of the NLD, remained closed or under strict surveillance and political activities were generally curtailed. In November 2005 the SPDC moved its headquarters 300 kilometres north of Rangoon to Nay Pyi Taw. Key ministries and thousands of civil servants were relocated. No official reason was given for the move, although key factors appear to include concerns over possible civilian protests in Rangoon, foreign criticism of the SPDC, a fear of foreign military intervention, and the need to locate the SPDC more centrally to direct its military campaigns against ethnic insurgencies along the eastern border.¹⁷
- 3.6.4** The NLD and other opposition political parties faced severe restrictions, harassment and intimidation and over 1,100 people arrested for political reasons remained in prison in 2007, despite the release of 40 political prisoners, including 17 NLD members, as part of an amnesty coinciding with Burma's 59th anniversary of independence.¹⁸ Following arrest, political prisoners were denied access to relatives and in some cases their lawyers. Often lengthy prison sentences were imposed on scores of individuals convicted in political trials, including for the possession of published materials that had been authorised by the state censor, or on trumped-up criminal charges. Individuals who took action to end forced labour were also imprisoned for their legitimate activities.¹⁹
- 3.6.5** Amnesty International has documented the pervasive and systematic use of torture by authorities in pre-trial detention during 2005, and believes that the practice is continuing. There have been widespread reports that individuals in pre-trial interrogation continue to be tortured and ill-treated. Political activists who have been taken into detention for short-term questioning, have reportedly been beaten, denied sleep, and in some cases subjected to abusive language by the authorities.²⁰ Six political prisoners died while in custody during 2006.²¹
- 3.6.6** Authorities released political prisoners Su Su Nway, an activist imprisoned in 2005 and Aye Myint, a lawyer arrested in October 2005. Unlike in previous years, no MPs elect were released from prison.²²
- 3.6.7** **Sufficiency of protection.** As this category of claimants' fear is of ill treatment/persecution by the state authorities, they cannot apply to these authorities for protection.
- 3.6.8** **Internal relocation.** As this category of claimants' fear is of ill treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.
- 3.6.9** **Conclusion** The Burmese authorities do not tolerate political opposition and it is clear that they may take serious action against those expressing opposition political views and that this treatment may amount to persecution. Where an individual is able to demonstrate that they are at serious risk of facing such persecution on account of their activities a grant of asylum will be appropriate.

¹⁶ FCO Country Profile December 2006

¹⁷ HRW 2007

¹⁸ BBC Burmese 14.01.07 'Double Veto for Burma resolution

¹⁹ AI Report 2006

²⁰ AI Travesties of Justice 2005

²¹ USSD 2006 (Section 1)

²² USSD 2005 (Section 1)

3.7 Participation in / involvement with pro-democracy demonstrations in the UK

- 3.7.1** Some claimants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of the Burmese authorities due to their involvement with opposition political parties/organisations in the UK. Their activities in the UK usually centre on their participation in demonstrations outside the Burmese Embassy in London.
- 3.7.2 *Treatment.*** During the early 1990s, the Burmese authorities took photographs of demonstrators outside the Burmese Embassy in London. Such photos were occasionally included in government publications about overseas dissidents. However, this does not appear to have happened in recent years.²³
- 3.7.3** Participation in demonstrations overseas is not an automatic bar to safe return to Burma and would not necessarily lead to persecution. It is possible that photos could be used to identify individuals and if they returned to Burma, they might be questioned as to why they were participating in demonstrations. The Foreign and Commonwealth Office are not aware of any cases of individuals being arrested or detained simply as a result of participating in demonstrations overseas.²⁴
- 3.7.4** Those involved in known political activity could at the very least be interviewed by Military Intelligence on their return. What would happen next would depend on whether the returnee co-operated with the authorities about the exile movement: or whether they showed no remorse, and intended to continue their opposition politics once back in Burma. If the latter, they could expect to be harassed in the same way as those who remain in the country and engage in opposition politics. The former are almost actively welcomed by the government, particularly if they can be persuaded to state publicly that they were led astray and have now seen the light and recognise that the military regime is doing its best for the Burmese people.²⁵
- 3.7.5 *Sufficiency of protection.*** As this category of claimants' fear is of ill treatment/persecution by the state authorities, they cannot apply to these authorities for protection.
- 3.7.6 *Internal Relocation.*** As this category of claimants' fear is of ill treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.
- 3.7.7 *Conclusion.*** The claimant's level of involvement in the pro-democracy movement in the UK will be relevant to whether or not a grant of asylum is appropriate. Where it has been established that the claimant is involved at a high level and has close links to the opposition movement either in Burma or the UK they are likely to face difficulties if returned to Burma. Therefore high level activists are likely to qualify for a grant of asylum.
- 3.7.8** However, simply protesting outside the Burmese Embassy and the mere existence of photographic evidence to this effect does not necessarily indicate a high level of political involvement in anti-government activities or that the claimant will face persecution or ill-treatment if returned to Burma. Furthermore the Burmese authorities could not from the photographs alone know that the appellant was Burmese. Therefore those who are involved in low level opposition politics in the UK are unlikely to qualify for asylum or Humanitarian Protection.

3.8 Minority ethnic groups; Rohingya, Shan, Karen and Mon

²³ FCO letter 21 Sept 2004

²⁴ FCO letter 21 Sept 2004

²⁵ FCO letter 19 Aug 2004

- 3.8.1** Some claimants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of the Burmese authorities due to their membership of one of the above minority ethnic groups.
- 3.8.2** **Treatment** The following ethnic groups make up the population of Burma: Bamar or Burman (69%), Shan (8.5%), Karen (6.2%), Rakhine (4.5%), Mon (2.4%), Chin (2.2%), Kachin (1.4%), Karrenni (0.4%), other indigenous (0.1%) and foreign nationalities including Burmese Indian & Sino Burmese people (5.3%).²⁶
- 3.8.3** Wide-ranging governmental and societal discrimination against minorities persisted during 2006. Animosities between the country's many ethnic minorities and the Burman majority, which has dominated the government and the armed forces since independence, continued to fuel active conflict that resulted in serious abuses during 2006.²⁷
- 3.8.4** The abuses included reported killings, beatings, torture, forced labour, forced relocations and rapes of Chin, Karen, Karenni, Rohingya, Shan, Mon and other ethnic groups by SPDC soldiers. The army increased attacks on ethnic minority villagers in Bago Division and Karen State designed to drive them from their traditional land.²⁸
- 3.8.5** A few ethnic insurgent groups continued to battle the government for autonomy or independence, including the Shan State Army-South (SSAS), the Karenni National Progressive Party (KNPP) and the Karen National Union (KNU), through its armed wing, the Karen National Liberation Army (KNLA). Despite a 2003 cease fire between the KNU and the government, during the year fighting that began in September 2005 in Bago Division spread to many other areas of northern Karen State.²⁹
- 3.8.6** Ethnic armed groups allegedly committed human rights abuses, including forced labour, although reportedly to a much lesser extent than the government. Some cease fire groups also reportedly committed abuses, including forced relocation of villagers in their home regions. Armed insurgent groups and cease fire groups also practised forced conscription of child soldiers.³⁰
- Rohingya**
- 3.8.7** Only persons who were able to prove long familial links to the country were accorded full citizenship. Native-born but non-indigenous ethnic populations (such as Chinese, Indians, Bengalis, and Rohingyas) were denied full citizenship and were excluded from government positions. Members of the Rohingya Muslim minority in Rakhine State continued to experience severe legal, economic, and social discrimination. The government denied citizenship to most Rohingyas on the grounds that their ancestors did not reside in the country for one year prior to the start of British colonial rule in 1824, as required by the country's highly restrictive citizenship law.³¹ Rohingya Muslims did not have access to state run schools beyond primary education because the Government reserved secondary state schools for citizens.³²
- Freedom of movement for ethnic minorities**
- 3.8.8** Ethnic minorities from the large Karen areas of Ayeyarwady Division and Muslim Rohingya from Buthidaung, Kyauktaw, Maungdaw and Rathedaung townships along the border between Rakhine State and Bangladesh continue to experience tight controls on personal movement including frequent military checkpoints. Moreover, Muslim Rohingya and other non citizens primarily South Asians and Chinese are required to seek prior permission from the government to travel internally.³³

²⁶ FCO Country Profile December 2006

²⁷ USSD 2006 (Section 5)

²⁸ AI Report 2006

²⁹ USSD 2006 (Section 1)

³⁰ USSD 2006 (Introduction)

³¹ USSD 2006 (Section 5)

³² USSD 2006 (Section 5)

³³ USSD 2006

3.8.9 Sufficiency of protection. As this category of claimants' fear is of ill treatment/persecution by the state authorities, they cannot apply to these authorities for protection.

3.8.10 Internal relocation. As this category of claimants' fear is of ill treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.

3.8.11 Caselaw

[2004] UKIAT 00085 AH (Burma) The IAT found that although Rohingya as a group are marginalised by the Burmese authorities and may be subject to harassment and discrimination there is no evidence to show that being a Rohingya would lead to a real risk of persecution on return. In general, claimants will not qualify for asylum or Humanitarian Protection simply for being a member of a minority ethnic group.

3.8.12 Conclusion. Members of Burma's ethnic groups do face societal and government sponsored discrimination in Burma and the Burmese security forces continue to commit serious human rights abuses in ethnic minority areas. Where an individual is able to demonstrate that they are at serious risk of facing such persecution on account of their activities a grant of asylum will be appropriate. However, the level of ill-treatment experienced by individuals varies and may not necessarily amount to persecution or reach the threshold for a breach of Article 3.

3.9 Minority religious groups; Muslims, Christian and Hindu

3.9.1 Some claimants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of Burmese authorities due to their involvement with minority religious groups.

3.9.2 Treatment The predominant religion in Burma is Buddhism. The other main religions are Christianity, Islam and Animism.³⁴ Burma is ethnically diverse, and there is some correlation between ethnicity and religion. Theravada Buddhism is the dominant religion among the majority Burman ethnic group and among the Shan, Arakanese, and Mon ethnic minorities of the eastern, western, and southern regions.³⁵

3.9.3 Christianity is the dominant religion among the Kachin ethnic group of the northern region and also the Chin and Naga ethnic groups of the western region, some of whom also practise traditional indigenous religions. Christianity is also practised widely among the Karen and Karenni ethnic groups of the southern and eastern regions, although many Karen and Karenni are Theravada Buddhists.³⁶

3.9.4 Hinduism is practised chiefly by the Indian population, who are concentrated in major cities and in the south-central region, although some Indians are Catholic. Islam is practised widely in Arakan State, where it is the dominant religion of the Rohingya minority, and in Irrawaddy Division, as well as among some Burmans, Indians, and ethnic Bengalis. The Chinese ethnic minorities generally practise traditional Chinese religions. Traditional indigenous religions are practised widely among smaller ethnic groups in the northern regions, and practices drawn from those indigenous religions persist widely in popular Buddhist rituals, especially in rural areas.³⁷

3.9.5 Most adherents of religions that are registered with the authorities generally enjoy the right to worship as they choose; however, the Government has imposed restrictions on certain

³⁴ FCO Country Profile December 2006

³⁵ USIRF 2006 (Introduction)

³⁶ USIRF 2006 (Introduction)

³⁷ USIRF 2006 (Introduction)

religious activities and has frequently abused the right to religious freedom.³⁸

- 3.9.6** In 2006 the government continued to infiltrate and covertly and overtly monitor meetings and activities of all organisations, including religious organisations. The government actively promoted Theravada Buddhism over other religions, particularly among members of minority ethnic groups. There were no reports of forced conversions of non-Buddhists although adherence or conversion to Buddhism is generally a prerequisite for promotion to senior government and military ranks.³⁹ There were no reported incidents of violence carried out by the government or its agents against religious groups.⁴⁰
- 3.9.7** During 2006 Christian and Islamic groups continued to experience difficulties in obtaining permission to repair existing churches or build new ones in most regions. Minority religions were discouraged and prohibited from constructing new places of worship.⁴¹
- 3.9.8** Violent clashes between Muslims and Buddhists were reported in February 2006 in Magway Division. Local security forces imposed strict curfews to prevent the spread of violence and arrested seventeen people in Sinbyukyun and another fifty-five persons in Chauk, mostly Muslims. Persistent social tensions remained between the Buddhist majority and the Christian and Muslim minorities. Preferential treatment for Buddhists and widespread prejudice against ethnic Indians, particularly ethnic Rohingya Muslims were key sources of social tensions between the Buddhist majority and Christian and Muslim minorities.⁴² Muslims in Rakhine State (Arakan) continued to experience the severest forms of discrimination.⁴³
- 3.9.9** *Sufficiency of protection.* As this category of claimants' fear is of ill treatment/persecution by the state authorities, they cannot apply to these authorities for protection.
- 3.9.10** *Internal relocation.* As this category of claimants' fear is of ill treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.
- 3.9.11 Caselaw**
- [2003] UKIAT 00135 S (Burma) Heard: 13 October 2003 promulgated 11 November 2003** The IAT found that although Muslims in Arakan province (bordering on Bangladesh) have in the past had, and may continue to have serious problems, and though there have been a number of incidents elsewhere, there is nothing in general to prevent Muslims in Rangoon from practising their religion in peace, in the light of this, no point based on religion could succeed.
- The Tribunal were also very critical of Mr Win Soe as a country expert. The IAT found that Mr Win Soe's evidence should be treated with the very greatest caution, in this or any other case where it may be relied on.
- 3.9.12 Conclusion** Although members of minority religious groups do face discrimination and the Burmese authorities do restrict religious freedom this does not necessarily amount to persecution and most adherents of religions that are registered with the authorities generally enjoy the right to worship as they choose. Therefore it is unlikely that claimants whose claim is based solely on persecution due to belonging to a minority religious group will qualify for asylum or Humanitarian Protection.

3.10 Departure and return

³⁸ USIRF 2006 (Introduction)

³⁹ USIRF 2006 (Introduction)

⁴⁰ USSD 2006 (Section 2)

⁴¹ USIRF 2006

⁴² USIRF 2006

⁴³ USIRF 2006

3.10.1 Some claimants will apply for asylum or make a human rights claim based on persecution or ill treatment at the hands of the Burmese authorities due to them having left Burma illegally. Some claimants will also claim that they cannot return to Burma as they do not have the correct documentation and will therefore be entering Burma illegally and will face imprisonment. Some claimants will further claim that the very fact of making an asylum application in the United Kingdom has increased their risk of persecution or ill-treatment.

Treatment An ordinary citizen needs three documents to travel outside the country: a passport from the Ministry of Home Affairs; a revenue clearance from the Ministry of Finance and Revenue; and a departure form from the Ministry of Immigration and Population. To address the problem of trafficking in persons, the government continued to hinder or restrict international travel for women, particularly those under 25 years of age. New passport procedures went into effect in August 2004 allowing citizens to retain their passports after completing trips abroad through their validity dates, namely: one year for incidental travel; three years for dependents; four years for employment; and 18 months for those travelling on business. In January 2005 the government announced that new passports would be issued within a week. However, it still frequently took several months to receive a passport, particularly if the applicant was unwilling to offer a bribe as incentive for speedier service.⁴⁴

3.10.3 The government carefully scrutinised prospective travel abroad for all passport holders. Rigorous control of passport and exit visa issuance perpetuated rampant corruption, as applicants were forced to pay bribes of up to \$230 (300,000 kyat), the equivalent of a yearly salary. The board that reviews passport applications denied passports on political grounds. Citizens who emigrated legally generally were allowed to return to visit relatives, and some who lived abroad illegally and acquired foreign citizenship were also able to return.⁴⁵

3.10.4 The country's borders with China, Thailand, Bangladesh, and India remained very porous with significant undocumented migration and commercial travel occurring.⁴⁶ The Foreign and Commonwealth Office reported that Burmese citizens who have worked illegally in other Asian countries, but who have passports, have been able to return to Burma without difficulty.⁴⁷

3.10.5 In October 2004 Swiss parliamentarians tabled a motion in the Swiss National Council requesting that it order the Federal Refugees Office to refrain from any refoulement to Burma. They also called upon it to intercede with the authorities of Burma to obtain the release, or at least the reduction of the sentence, of Mr. Stanley Van Tha, who had been handed over to the Burmese authorities after his request for asylum in Switzerland was rejected, and was subsequently sentenced to 19 years in prison.⁴⁸

3.10.6 The 19 year sentence given to Mr. Stanley Van Tha consisted of 7 years under article 5(J) of the Burma Emergency Act 1950 as the court ruled that Mr. Van Tha had acted to undermine the security of the Union of Burma and the restoration of law and order. Another 7 years under the Penal Code Article 468 for having forged stamps in his passport and 5 years under the Burma Immigration Act 1947 section 13(1) for illegal entry into Burma.⁴⁹

Illegal exit from Burma

3.10.7 According to the Foreign and Commonwealth Office those who exit or return to Burma illegally without a valid passport face substantial prison sentences. Returnees who are known political activists can face additional charges and harsher sentences, which can be as long as 30-40 years.⁵⁰ (See section 3.6 on political organisations)

⁴⁴ USSD 2006 (Section 2)

⁴⁵ USSD 2006 (Section 2)

⁴⁶ USSD 2006 (Section 2)

⁴⁷ FCO letter 27 August 2004

⁴⁸ Inter-Parliamentary Union June 2005

⁴⁹ AIT determination [2006] UKAIT 00012 HM (Risk factors for Burmese citizens) Burma CG - paragraph 36

⁵⁰ FCO letter 3 March 2005

3.10.8 According to a representative of the US Committee for Refugees (speaking in 2001), travel to unauthorised destinations, e.g. obtaining a passport for travel to Singapore or Bangkok and then going to several other places, does not generally raise scrutiny upon one's return to Burma. On the other hand, those who seek to emigrate illegally to the U.S. (or other western countries) will likely be jailed upon return to Burma. Also, those who return to Burma with an expired passport, and those who have 'caused embarrassment' to the government, e.g. applied for asylum abroad, could be immediately jailed upon return to Burma.⁵¹

People who return to Burma without a valid passport

3.10.9 Under the terms of the Burma Immigration (Emergency Provisions) Act of 1947, section 3 sub section 2, 'no citizen of the Union of Burma shall enter the Union without a valid Union of Burma passport, or a certificate in lieu thereof, issued by a competent authority'⁵² and, if a citizen violates this provision, he is automatically liable to 'be punished with imprisonment for a term which may extend from a minimum of six months to a maximum of five years or with fine of a maximum of K.1500 or with both' under the terms of section 13 sub section 1 of the same Act.⁵³

Obtaining a valid passport

3.10.10 According to the Foreign and Commonwealth Office if an individual has left Burma illegally without a passport and, in political or criminal cases, in breach of bail conditions then it is unlikely that the Burmese Embassy would issue him with a new passport. In cases where the passport has expired the holder is usually able to renew it at the Burmese Embassy following payment of any outstanding taxes.⁵⁴

3.10.11 Sufficiency of protection. As this category of claimants' fear is of ill treatment/persecution by the State authorities, they cannot apply to these authorities for protection.

3.10.12 Internal relocation. As this category of claimants' fear is of ill treatment/persecution by the State authorities, relocation to a different area of the country to escape this threat is not feasible.

3.10.13 Caselaw

[2006] UKAIT 00012 HM (Risk factors for Burmese citizens) Burma CG Heard 29 November 2005, Promulgated 24 January 2006 The AIT found that a Burmese citizen who has left Burma illegally is in general at real risk on return to Burma of imprisonment in conditions which are reasonably likely to violate his rights under article 3 of the ECHR. The AIT consider the following to constitute illegal exit: (a) leaving without authorisation from the Burmese authorities, and (b) travel to a country to which the person concerned was not permitted to go by the terms of an authorised exit. The AIT found that it is likely that the Burmese authorities keep lists of those who leave Burma on a properly issued exit stamp.

The AIT also found that a Burmese citizen is in general at real risk of such imprisonment if he is returned to Burma from the United Kingdom without being in possession of a valid Burmese passport. They also found it is not reasonably likely that a Burmese citizen in the United Kingdom will be issued with a passport by the Burmese authorities in London, unless he is able to present to the Embassy an expired passport in his name.

The AIT also found that if it comes to the attention of the Burmese authorities that a person who left Burma illegally or who returned without the correct documentation is a failed asylum seeker, that it is reasonably likely to have a significant effect upon the length of the prison sentence imposed for his illegal exit and/or entry. To return such a person from the United Kingdom would accordingly be a breach of Article 33 of the Refugee Convention. However,

⁵¹ US Immigration & Nationality Service 2001

⁵² The Burma Immigration Act 1947

⁵³ Law Amending the Myanmar Immigration (Emergency Provisions) Act, 1947

⁵⁴ FCO letter 27 August 2004

whether the fact of being a failed asylum seeker would come to the attention of the Burmese authorities will need to be determined on the facts of the particular case, bearing in mind that the person is highly likely to be interrogated on return.

[2004] UKIAT 00285 TW (Risk on return – Unauthorised Departure) (Myanmar) Heard 7 October 2004, Promulgated 12 October 2004 The IAT found that a person wholly lacking in credibility in respect of past experiences, could still be found credible vis-à-vis leaving Burma without authorisation. Adjudicators should make findings on whether a person left with or without authorisation. Even if an adjudicator was to find an individual had left Burma without authorisation, he would need to go on and make findings on the consequences the person would face upon return.

3.10.14 Conclusion.

Illegal exit from Burma

3.10.15 It is a criminal offence to leave Burma illegally punishable by a substantial prison sentence. The Burmese authorities keep detailed records of those who leave Burma legally on properly acquired exit stamps and are therefore likely to know if a claimant has left without the required authorisation. Any Burmese citizen who leaves Burma illegally is likely to be detained and imprisoned if returned to Burma. According to the AIT in **[2006] UKAIT 00012 HM** an illegal exit can be defined as 'leaving Burma without authorisation from the Burmese authorities **which includes travel to a country to which the person concerned was not permitted to go by the terms of an authorised exit.**' This definition includes claimants who have left Burma legally to travel to a third country such as Thailand but who then travel to a western country (note illegal travel to Asia countries may not always cause the same difficulties as illegal travel to western countries see para 3.10.7) without authorisation from the Burmese authorities. These people will not have the correct exit stamps in their passport and will be deemed to have left Burma illegally. While illegally exiting Burma is a criminal offence and not a political act and would not in itself engage the UK's obligations under the 1951 Refugee Convention a grant of Humanitarian Protection will usually be appropriate as prison conditions in Burma are generally considered to breach Article 3 of the ECHR.

Returning to Burma without a valid passport

3.10.16 In addition the AIT found that a Burmese citizen is in general at real risk of imprisonment if he is returned to Burma from the United Kingdom without being in possession of a valid Burmese passport.

EU letters – An EU Letter is not a valid passport, such that a person should not be returned on an EU Letter.

Replacement passports – See para 3.10.19 for those who are likely to be able to obtain a replacement passport from the Burmese authorities. If a replacement passport is issued, it will constitute a valid passport.

Note that if a person has the passport they left Burma with, but has not complied with the terms of the visa stamps, that will be treated by the Burmese authorities as an illegal exit (see 3.10.14).

3.10.17 If the claimant returns to Burma without a valid passport then he is likely to be detained and imprisoned under the provisions of the Burma Immigration (Emergency Provisions) Act 1947 section 13(1). Therefore claimants who do not have a valid passport or are unable to acquire a replacement passport are likely to face imprisonment on return to Burma. While this is a criminal and not a political act and would not in itself engage the UK's obligations under the 1951 Refugee convention a grant of Humanitarian Protection will usually be appropriate as prison conditions in Burma are generally considered to breach Article 3 of the ECHR.

Risk on return to failed asylum seekers

3.10.18 As outlined above, claimants who have left Burma illegally or who cannot be returned on a valid passport will be imprisoned if returned to Burma. The AIT found that if it comes to the

attention of the Burmese authorities that the person who has left or attempts to enter Burma illegally is also a failed asylum seeker then there is a reasonable likelihood that the prison sentence will be increased. Therefore, if it appears from the individual facts and circumstances of a case that if returned the Burmese authorities will be aware that the claimant is a failed asylum seeker then a grant of asylum may be appropriate.

3.10.19 However, the AIT also found that those who have left Burma legally and will return to Burma legally (see para 3.10.20 below) will not face persecution or ill-treatment on return to Burma by reason of having claimed asylum in the United Kingdom, even if the Burmese authorities have reason to believe that he has made such a claim, unless the authorities have reason to regard him as a political opponent. In this case a grant of asylum or Humanitarian Protection will not be appropriate.

Legal exit and return

3.10.20 Claimants who have left Burma legally, complied with the terms of their exit visas and whose passport have simply expired should be able to obtain a valid passport from the Burmese Embassy in London. Information indicates that the Burmese authorities keep records of those who leave Burma legally on properly acquired exit stamps, therefore it should be possible for the Burmese Embassy to check the details of those who have left Burma legally and issue a replacement passport if required. Although the AIT found that it is 'not reasonably likely' that a passport will be issued unless an expired passport is provided, our view is that a claimant who has left Burma legally, complied with the terms of their exit visas but who does not have an expired passport should be able to obtain a valid replacement passport from the Burmese Embassy in London.

3.10.21 Claimants who have left Burma legally, complied with the terms of their exit authorisations and who can be returned on the same passport they left with or on a correctly issued passport from the Burmese Embassy in London will not face imprisonment if returned to Burma and will not qualify for asylum or Humanitarian Protection.

3.11 Prison conditions

3.11.1 Claimants may claim that they cannot return to Burma due to the fact that there is a serious risk that they will be imprisoned on return and that prison conditions in Burma are so poor as to amount to torture or inhuman treatment or punishment.

3.11.2 The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of ECHR and warrant a grant of Humanitarian Protection. If imprisonment would be for a Refugee Convention reason, or in cases where for a Convention reason a prison sentence is extended above the norm, the claim should be considered as a whole but it is not necessary for prison conditions to breach Article 3 in order to justify a grant of asylum.

3.11.3 Consideration The Department of Prisons operated approximately 35 prisons and approximately 70 labour camps throughout the country and conditions in both generally remained harsh and life threatening. In prisons, food, clothing, and medical supplies were reportedly in very short supply. Bedding consisted of a single mat on the floor. Prisoners were forced to rely on their families, who were allowed to visit once every two weeks for 15 minutes per visit, for basic necessities. Prisoners were held without being charged for weeks or months, and until a prisoner was officially charged with a crime, families could not visit or send critical supplementary food.⁵⁵

3.11.4 The government continued to deny prisoners adequate medical care, although medical services in prisons partially reflected health care services available to the general population. During the year the health of several political prisoners deteriorated, and several died while in prison. On 10 January, Khin Maung Lwin died in Putao Prison after the officer in charge rejected appeals for medical treatment. On 23 March, Ko Oo died. He

⁵⁵ USSD 2006 (Section 1)

suffered from various ailments, but prison authorities would not refer him for treatment. On 2 May, Myiunt Than died in Thandwe Prison. He reportedly suffered a stroke and died after one month in hospital. In mid August Daw Nyunt Yin died in Insein Prison. She reportedly vomited blood before she died and did not receive qualified medical treatment. On 16 October, student leader Thet Win Aung died in Mandalay Prison. Despite his 2002 hunger strike to protest the lack of adequate medical treatment, and the poor prison diet, prison authorities continued to deny him adequate health care. On 26 October, Maung San died in Mawlamyine Prison minutes after a paramedic treated him for gastric pain. He was denied treatment by a qualified doctor⁵⁶

- 3.11.5** According to the government, political detainees were separated from common criminals. However, reports by prisoners indicated that the authorities frequently placed political prisoners in communal cells where they were subjected to beatings and mistreatment by hard-core criminals. On 2 January, criminal prisoners in Insein Prison severely beat three political prisoners: Aung San Myat, Thiha Tun, and Han Win Aung. Prison officers reportedly allowed the attack and did not intervene. On 2 October, political prisoners in Mawlamyine Prison staged a hunger strike to protest being housed with the criminal population rather than held separately with political prisoners. The warden beat the prisoners and used criminal prisoners to beat the political prisoners housed with them.⁵⁷
- 3.11.6** In June 2005, Amnesty International detailed the case of prisoners who were punished by prison authorities, including being shackled, beaten, and made to perform *pounzan* (a squatting position, in which the individual has to place his hands clenched on his knees).⁵⁸
- 3.11.7** The authorities in Burma continue to regularly use corporal punishment, shackling and other restraints and confinement in a dark cell as a punishment against detainees and prisoners, particularly against individuals who have protested their conditions of detention, including by staging hunger strikes. While the authorities have frequently stated that the use of prisoners to discipline other prisoners is forbidden, it appears that they are continuing to use criminal prisoners to beat other prisoners, including political prisoners.⁵⁹
- 3.11.8** Amnesty International has documented the pervasive and systematic use of torture by authorities in pre-trial detention during 2005, and believes that the practise is continuing. There have been widespread reports that individuals in pre-trial interrogation continue to be tortured and ill-treated. Political activists who have been taken into detention for short-term questioning, have reportedly been beaten, denied sleep, and in some cases subjected to abusive language by the authorities.⁶⁰
- 3.11.9** At least six deaths in custody have been reported since January 2005, in which individuals in pre-trial detention and prisons are suspected to have died either as a result of a lack of adequate medical attention or torture or ill-treatment. No independent investigation is known to have taken place into the deaths that occurred in custody this year. Attempts by families to use the courts to secure such investigations have reportedly failed.⁶¹
- 3.11.10** In November 2005, authorities insisted that the USDA, MAAF and Myanmar Red Cross accompany the ICRC on all prison visits. After failing to obtain government permission to maintain its international practice of unfettered access to prisoners, the ICRC did not visit prisons or labour camps during 2006. The ICRC terminated some of its traditional services, such as providing medications and soap to detainees, because it could not verify that these supplies reached the prisoners. The ICRC could no longer follow the cases of more than 4000 detainees. During 2006, gains achieved earlier by the ICRC on prison problems, including the right to talk in private with prisoners, make repeated visits as desired, and

⁵⁶ USSD 2006 (Section 1)

⁵⁷ USSD 2006 (Section 1)

⁵⁸ AI Travesties of Justice 2005

⁵⁹ AI Travesties of Justice 2005

⁶⁰ AI Travesties of Justice 2005

⁶¹ AI Travesties of Justice 2005

have full access to most prisoners, were suspended, as were its efforts to expand ICRC access to more detainees. In November the government ordered ICRC field offices in Hpa an, Kengtung, Mandalay, Mawlawmyine and Taunggyi to close but later 'clarified' that instead of closing, the offices had to cease all field activities, including protection, basic hygiene and health care until further notice. The government allowed the ICRC to continue prosthetic services to mine victims.⁶²

3.11.11 Conclusion. Prison conditions in Burma are severe and taking into account ill-treatment of detainees by prison officials, the lack of adequate food and medical care coupled with overcrowding and poor sanitation, conditions in prisons and detention facilities in Burma are likely to reach the Article 3 threshold. Where caseowners believe that an individual is likely to face imprisonment on return to the Burma they should also consider whether the claimant's actions means they fall to be excluded by virtue of Article 1F of the Refugee Convention. Where caseowners consider that this may be the case they should contact a senior caseworker for further guidance. Where individual claimants are able to demonstrate a real risk of imprisonment on return to Burma and exclusion is not justified, a grant of HP will be appropriate.

4. Discretionary Leave

4.1 Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See Asylum Instruction on Discretionary Leave) Where the claim includes dependent family members consideration must also be given to the particular situation of those dependants in accordance with the Asylum Instruction on Article 8 ECHR.

4.2 With particular reference to Burma the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should *not* imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instruction on Discretionary Leave and the Asylum Instruction on Article 8 ECHR.

4.3 Minors claiming in their own right

4.3.1 Minors claiming in their own right who have not been granted asylum or HP can only be returned where they have family to return to or there are adequate reception, care and support arrangements. At the moment we do not have sufficient information to be satisfied that there are adequate reception, care and support arrangements in place.

4.3.2 Minors claiming in their own right without a family to return to, or where there are not adequate reception, care and support arrangements, should if they do not qualify for leave on any more favourable grounds be granted Discretionary Leave for a period as set out in the relevant Asylum Instruction.

4.4 Medical treatment

4.4.1 Claimants may claim they cannot return to Burma due to a lack of specific medical treatment. See the IDI on Medical Treatment, which sets out in detail the requirements for Article 3 and/or 8 to be engaged.

4.4.2 The Ministry of Health is the focal point for provision of health care for the entire population and plays a very important role in the planning, organising, coordinating, financing, regulation in delivery of health care. Medical services are provided through various institutions ranging from

⁶² USSD 2006 (Sections 1&4)

teaching hospitals, specialist hospitals, state/division hospitals, district hospitals and township hospitals at the urban areas to station hospitals and traditional clinics at the rural areas. Total expenditure on health was 1.5% of GDP which equalled per capita government expenditure of \$13 in 1998.⁶³

- 4.4.3** Burma has fairly well developed health facilities, but they are far from comprehensive, illustrated by a rate of 0.8 hospital beds per thousand population. Similarly, there is a lack of trained medical personnel, with Burma recording a rate of 0.3 doctors per thousand population. Healthcare has undergone little development since the advent of military rule and the lack of available funds results in limited expenditure on medical equipment and supplies.⁶⁴
- 4.4.4** The military government's spending on health care remains very low, resulting in a shortage of facilities, staff and medical supplies. Communicable and infectious diseases continue to take their toll on the population.⁶⁵ Each township has one hospital with a bed strength varying from 16 to 50 depending upon the population, one or two station hospitals and four to seven rural health centres (RHCs). Under each RHC there are four sub-centres staffed by midwives and public health supervisor (PHS II).⁶⁶
- 4.4.5** In addition to health care by modern medicine, the Department of Traditional Medicine provides community health care by traditional system of medicine through traditional medicine hospital and traditional medicine clinics all over the country. There are two 50-bed traditional medicine hospitals and ten 16-bed traditional medicine hospitals.⁶⁷

HIV/AIDS

- 4.4.6** Almost 339,000 people in Burma were infected with the HIV virus at the end of 2004, double the estimated 177,000 infections recorded in March 2002. Most Burmese living with HIV cannot afford anti-retroviral drugs. Many use herbal supplements or meditation techniques taught by Buddhist monks. UNICEF said it spends an average of 2 million dollars per year in Burma in support of HIV/AIDS prevention and care.⁶⁸
- 4.4.7** The Article 3 threshold will not be reached in the majority of medical cases and a grant of Discretionary Leave will not usually be appropriate. Where a caseowner considers that the circumstances of the individual claimant and the situation in the country reach the threshold detailed in the IDI on Medical Treatment making removal contrary to Article 3 or 8 a grant of Discretionary Leave to remain will be appropriate. Such cases should always be referred to a Senior Caseworker for consideration prior to a grant of Discretionary Leave.

Returns

- 5.1** Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should however be considered in line with the Immigration Rules, in particular paragraph 395C requires the consideration of all relevant factors known to the Secretary of State, and with regard to family members refers also to the factors listed in paragraphs 365-368 of the Immigration Rules.
- 5.2** Burmese nationals may return voluntarily to any region of Burma at any time by way of the Voluntary Assisted Return and Reintegration Programme run by the International Organisation for Migration (IOM) and co-funded by the European Refugee Fund. IOM will

⁶³ WHO Country Health Profile

⁶⁴ Episcom – Burma Medical Devices Market Report 2002

⁶⁵ MSF Activity Report 2002

⁶⁶ WHO Country Health Profile

⁶⁷ WHO Country Health Profile

⁶⁸ UNICEF HIV/AIDS

provide advice and help with obtaining travel documents and booking flights, as well as organising reintegration assistance in Burma. The programme was established in 2001, and is open to those awaiting an asylum decision or the outcome of an appeal, as well as failed asylum seekers. Burmese nationals wishing to avail themselves of this opportunity for assisted return to Burma should be put in contact with the IOM offices in London on 020 7233 0001 or www.iomlondon.org.

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