

UNHCR's views on the concept of effective protection as it relates to Malaysia
March 2005

The situation in Malaysia can not, at this stage, be characterized as affording effective protection to refugees.

Malaysia is not a signatory to the 1951 Convention Relating to the Status of Refugees/ 1967 Protocol and has no constitutional, legislative or administrative provisions dealing with the right to seek asylum or the protection of refugees. Despite acceding to the Convention on the Rights of the Child (with 8 reservations) and the Convention on the Elimination of all Forms of Discrimination against Women, none of the articles potentially relevant to refugees or asylum-seekers in these treaties have been the subject of enabling legislation or administrative practice. Human rights organizations who sought to incorporate international human rights law principles into domestic courts failed doing so following the landmark judgment in the case known as Mohamad Ezam Mohd Noor V. Ketua Polis Negara & other Appeals [2002] 4 CLJ 309, where the Judge showed a disregard of Section 4 (4) of the Malaysian Human Rights Commission Act, which stipulates that regard shall be paid to the 1948 Universal Declaration of Human Rights.

Any person who enters or remains in Malaysia illegally is liable to prosecution under the Immigration Act 1959/ 63 (Act 155), which may result in indefinite detention without judicial scrutiny, corporal punishment in the form of whipping with a rotan cane across the buttocks or back, fine and deportation. The vast majority of persons of concern to UNHCR fall into the category of "illegal immigrants" under Malaysian law, which provides no legal method to differentiate those in need of international protection from other migrants. Thus, asylum seekers and refugees alike are at constant risk of arrest, detention, prosecution, imprisonment, caning and deportation, which in some cases resulted in refoulement in the past.

This said, the relationship between UNHCR and the Malaysian Government has been strengthened during 2004 and there is a considerable degree of cooperation in the protection of refugees between UNHCR and the Malaysian authorities. However, a consistent implementation of oral agreements and political decisions in form of specific laws, regulations or instructions is still lacking. The Police issued written instructions towards the end of 2004 with a view to respecting UNHCR documentation. Other Government institutions have not yet followed this path. Conflicting messages from different Government institutions on whether UNHCR refugee documentation shall be respected on Malaysian territory or not results in continued detention of persons of concern to UNHCR. Once detained by the Immigration authorities, release is virtually impossible until the individual either consents to be deported or can be resettled by UNHCR in a third country. During 2004, there was a regular detention population of persons of concern to UNHCR of over 300 persons at any time. This included on average the detention of about 10-12 children per month. Also in the case of children, release was only secured when there was confirmation of resettlement of the minor or their family.

In most cases where UNHCR intervened to stop deportation proceedings, the authorities respected the principle of non-refoulement. Given the difficult conditions in detention depots, however, there were serious concerns that many allegedly "voluntary" returns were carried out under duress and, despite consistent attempts, UNHCR was not always able to verify the voluntary character of deportations, of which UNHCR was often only informed *post factum*.

The long announced "crackdown" on the estimated 1,5 million illegal migrants in the country started on 1 March 2005, following an amnesty period for illegal migrants from November 2004 to end January 2005. While UNHCR has obtained assurance from the Malaysian Government that persons of concern to UNHCR would not be affected by the crackdown, alone during March some additional 209 persons of

concern to UNHCR were detained in immigration depots and more than 130 persons so far are being prosecuted in connection with immigration proceedings in spite of being in possession of UNHCR documentation, one person was already sentenced at first instance, while over 200 persons were released by the authorities before they reached the immigration depots based on UNHCR documentation or as a result of UNHCR's direct intervention. By end March the total detention population of persons of concern to the Office has reached 740 persons. A comprehensive legal aid programme established by UNHCR, in cooperation with a group of human rights lawyers, resulted in 2004 in the discontinuation of legal proceedings from the Public Prosecutor, the release of persons of concern by the Magistrate, or the quashing of sentences by the High Court. However, since March 2005 the Attorney General started prosecuting refugees who are detained based on offences under the Immigration Act.

Because the Malaysian authorities treat refugees as illegal immigrants, their prospects for local integration are limited. However, there have been exceptions to this in the past, most notably for groups such as the Cambodian Khmer Muslims, Filipinos in East Malaysia, and Bosnians. The recent announcement by the Malaysian Government that it intends to grant temporary residency to the former Muslim residents of Northern Rakhine State, Myanmar (called Rohingya), is welcome news, especially considering that many in this group have resided in Malaysia for periods of up to fifteen years. Implementation of this announcement has not yet started.

At the moment, persons of concern to UNHCR do not have access to public services, such as public education or the legal labour market. As a consequence refugees are subject to exploitation and abuse in the informal labour market and some 4,700 refugee children have never had access to education. Taking the above into account, the Malaysian authorities are far from offering options to refugees for family reunification and far from having systematic means to identify specific needs of vulnerable refugees.

The Malaysian government takes no part in the registration of refugees and in the refugee status determination procedures. Determination of eligibility for international protection is carried out entirely by UNHCR under its mandate and relates to three main caseloads: Indonesians from the province of Aceh (52%), Rohingyas (26%) and Chins (10%) as well as other ethnic minorities from Myanmar (7%) and a small group of other nationalities (5%). The total UNHCR registered caseload is 38,245 persons of concern as of end March 2005. In addition, there is an old caseload of some 61,314 Filipino Muslim refugees in Sabah. While UNHCR has streamlined its procedures and is producing some 1,500 status determination decisions per month, the backlog of pending decisions is large, and UNHCR is aware of thousands of potential asylum seekers wishing to apply for asylum but unable to do so due to the fact that UNHCR Kuala Lumpur is already working to its maximum capacity.

In order to be able to cope with the high numbers of asylum seekers, representing well in excess of 1,000 new applications each month, UNHCR concentrates on screening vulnerable cases, which the Office processes on a priority basis. Taking the above major constraints into account, the mere presence of UNHCR in Malaysia can by all means not be equated with provision of effective protection.

As for the overall strategy, in cooperation with the Government of Malaysia, UNHCR is promoting and supporting group-based, temporary local solutions in respect of the Rohingya Muslim population from Myanmar and persons of concern from the Indonesian Province of Aceh, based on their links to Malaysia. For all other persons of concern, who are found to be in need of international protection and who have no links to Malaysia, UNHCR is working on resettlement solutions in third countries.

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