

Submission by the United Nations High Commissioner for Refugees

For the Office of the High Commissioner for Human Rights' Compilation Report

Universal Periodic Review: *Fourth Cycle, 45th Session*

MALAYSIA

I. BACKGROUND INFORMATION

Malaysia is not party to the *1951 Convention relating to the Status of Refugees*, its *1967 Protocol* (hereafter *1951 Refugee Convention*), the *1954 Convention relating to the Status of Stateless Persons*, nor the *1961 Convention on the Reduction of Statelessness* (hereafter *1954 Convention* and *1961 Convention*, respectively).

There is presently no comprehensive domestic legal or policy framework to identify and protect asylum-seekers and refugees in Malaysia. As a result, asylum-seekers and refugees remain in a precarious protection environment. The current legal and policy framework does not distinguish asylum-seekers and refugees from undocumented migrants,¹ thus placing them at risk of arrest, prosecution, detention, deportation and *refoulement*.² It also further limits their ability to access lawful work, health and education opportunities and exposes them to abuse, exploitation and other rights violations. Under its statutory mandate, UNHCR undertakes the reception and processing of asylum-seekers, including the identification, registration, refugee status determination (RSD) and issuance of documentation. Notwithstanding its longstanding presence in Malaysia for over forty years, there is no formal status agreement for UNHCR in Malaysia.

As of April 2023, there are 185,323 refugees and asylum-seekers registered with UNHCR in Malaysia. This population is largely urban, often living around major cities. Among them, 86% (159,877 persons) originate from Myanmar, of whom 67% have been identified to be ethnic Rohingya. In addition, UNHCR has registered asylum-seekers and refugees originating from 50-plus countries including Pakistan, Yemen, Afghanistan, and Somalia. Among the asylum-seeker and refugee population, 49,065 are children aged below 18 years old, of which 28,673 are of school-going age and should be in school.

In relation to statelessness, national laws on access to birth registration and nationality are not applied consistently, and this has resulted in the failure to recognize some individuals as Malaysians even though they are entitled to nationality. This would include some 9,040 stateless ethnic Indian Tamils residing in West Malaysia.³ There is no official data on the extent of statelessness in East Malaysia. While the Government of Malaysia has made efforts to address this issue alongside a number of NGOs, challenges remain in ensuring the births of all children are registered in accordance with the law and that legal identification documentation is properly issued. Without regular status and proper documentation, stateless and undocumented individuals are at risk of arrest and detention and have limited access to employment, public education, and government-supported health care. The Government of Malaysia has nevertheless taken positive steps towards removing gender unequal nationality laws by proposing amendments to the Federal Constitution to allow Malaysian women the right to transmit nationality to their children born overseas on the same basis as Malaysian men.

¹ Malaysian *Immigration Act* 1959/63

² Malaysia is not a signatory to the *1951 Refugee Convention*. However, an Attorney General's Circular issued in 2005 provides a degree of immunity from prosecution under the *Immigration Act* for asylum-seekers and refugees registered with UNHCR.

³ Based on data collected by Development of Human Resources in Rural Areas Malaysia (DHRRA), a Malaysian-based NGO.

II. ACHIEVEMENTS AND POSITIVE DEVELOPMENTS

Linked to 3rd cycle UPR recommendation no. 151.42: “Take immediate legislative or administrative measures, including ratifying the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, to provide legal status to refugees and asylum seekers to allow them to reside, work and access education and health care in Malaysia (Canada)”.

As a result of multiple changes of government in recent years, a much-anticipated government policy directive on refugees was delayed. Nevertheless, UNHCR welcomes the Government’s interest to take on more responsibility for refugees and to develop the framework for a national asylum system that is aligned with international protection principles, and is supported by UNHCR through capacity sharing initiatives, offers for a data sharing agreement, joint registration, and other technical support. Ongoing dialogue on these matters is sustained through the Government of Malaysia - UNHCR Joint Task Force, a platform that has been operating since 2016.

UNHCR also welcomes Malaysia’s commitments to the eradication of forced labour, exemplified through the ratification in 2022 of the *Protocol of 2014 to the Forced Labour Convention, 1930*. In particular, UNHCR takes note of the inclusion of refugees and asylum-seekers within the country’s *National Action Plan on Forced Labour 2021-2025*, which envisions the elimination of forced labour in any and all forms in Malaysia by 2030, and calls for “a human-centred strategy to protect refugees and asylum-seekers from labour abuses”.

III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Challenges linked to outstanding 3rd cycle UPR recommendations

Issue 1: Establishment and implementation of a national legislative and policy framework for refugee protection

Linked to 3rd cycle UPR recommendation no. 151.42: “Take immediate legislative or administrative measures, including ratifying the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, to provide legal status to refugees and asylum seekers to allow them to reside, work and access education and health care in Malaysia (Canada)”; and **no. 151.268:** “Intensify its efforts to ensure access to primary and secondary education to asylum seekers and refugees and to offer them equal education opportunity (Afghanistan)”.

The absence of a comprehensive domestic legal and policy framework governing refugee protection and assistance matters in Malaysia results in a precarious protection environment for asylum-seekers and refugees, most of whom are currently unable to access legal employment, formal education or other public services and face limitations on their ability to access adequate health services.

Without access to legal work, refugees survive by labouring in the informal sector, but the majority live in deep poverty, with the average household income falling below the Malaysian poverty line. Lack of legal status and employment also prevents most refugees from accessing financial services. UNHCR documentation is not recognized for the purposes of registering for SIM cards, further excluding refugees from the economy and basic services.

Refugees registered with UNHCR are charged 50% of foreigners’ medical rates at government health facilities, but these fees continue to be high and place the costs of some services beyond the reach of most; in 2022, average hospitalization costs for refugee households were more than three times their average monthly income. Only one vaccine on the childhood immunization schedule is free for refugee children. There is also a Ministry of Health Circular 10/2001 in place in public hospitals establishing that undocumented asylum-seekers and migrants who seek medical attention must be referred to the Immigration

Department. In this context, some unregistered asylum-seekers have been arrested and taken from hospitals directly to Immigration Detention Centres (IDCs), including women and their newborn babies. This may deter some unregistered asylum-seekers from seeking necessary care for themselves and their families.

While refugee children in Malaysia can access informal education through NGO or community run-schools, they are currently unable to access the formal education system. Only 30% of school-age children regularly attend informal schools; the remaining 70% have no access to any kind of education. Those who do receive some education are nevertheless prohibited from sitting for national examinations, preventing them from certifying and furthering their education. Without legal status in the country, safety and security concerns for children affect school attendance. The inability of parents to work legally also means incomes are often insufficient to support school costs, and children are at risk of being sent to work or being subjected to early marriage instead of attending school.

The lack of a comprehensive legal and policy framework for asylum-seekers and refugees also impacts their protection against *non-refoulement*. UNHCR is aware of instances where individuals were reportedly *refouled* in recent years (25 individuals in 2021 and 23 individuals in 2022, respectively). Large scale forced returns of Myanmar nationals were also widely reported, in contravention of the principle of *non-refoulement*.⁴ There have been a number of cases involving asylum-seekers and refugees registered with UNHCR “voluntarily” repatriating to their country of origin or departing to other countries from IDCs. The indefinite nature of their detention brings into question the voluntariness of the decision, as is required under international standards.⁵

Recommendations:

UNHCR recommends that the Government of Malaysia:

- a) Work with UNHCR to enact a legislative and administrative framework for the management of refugees, in line with international refugee protection standards and including appropriate mechanisms to receive, register, process and document asylum-seekers and refugees and provide them access to basic services and legal work;
- b) Fully respect the principle of *non-refoulement* in accordance with international human rights instruments and customary international law;
- c) Put in place measures to regularize all refugees and asylum-seekers, permitting their legal temporary stay in Malaysia and enabling access to legal employment as well as to formal education, health and other public services;
- d) Ensure asylum-seekers and refugees have access to identity documents which enable their access to essential services, such as registrations of mobile phones to obtain SIM cards, including by adding UNHCR identity documents to the Malaysian Communications and Multimedia Commission (MCMC) list of acceptable identity documents;
- e) Waive foreigner rates charged to refugees at government health facilities, including for all vaccines on the childhood immunization schedule and repeal Ministry of Health Circular 10/2001; and
- f) Remove Malaysia’s reservation to Article 28 (a) of the *1989 Convention on the Rights of the Child*, pertaining to universal access to education, and allow refugee children to enrol in government schools and sit for national examinations, such as the Malaysian Certificate of Education (SPM).

Issue 2: Statelessness

⁴ Briefing Notes, “UNHCR deplores continued deportation of Myanmar asylum-seekers from Malaysia”, 25 October 2022, <https://www.unhcr.org/news/briefing-notes/unhcr-deplores-continued-deportation-myanmar-asylum-seekers-malaysia>

⁵ 1993 Vienna Declaration and Programme of Action, as well as in Resolution 1994/24 of the UN Sub-Commission on the Prevention of Discrimination and Prevention of Minorities.

Linked to 3rd cycle UPR recommendation 151.152: “Protect the right to nationality and prevent statelessness of children born to Malaysian citizens by removing restrictions thereof (Kenya)”.

Malaysian citizenship provisions contain elements of gender inequality insofar as they do not allow Malaysian mothers to transfer nationality to their children born overseas on the same basis as Malaysian fathers,⁶ and Malaysian men may not transfer nationality to their children born within Malaysia if the child is born outside a legally recognized marriage. Furthermore, the Federal Constitution allows for deprivation of citizenship for women on an unequal basis to men.⁷

Lengthy administrative procedures and long waiting periods continue to be barriers to those entitled to Malaysian citizenship. As of April 2023, there were 150,000 citizenship applications pending a resolution by the Ministry of Home Affairs, with the Government making a commitment to resolve at least 10,000 applications in 2023.⁸ Within those applications, it is unknown how many persons are stateless, as the Government does not collect data on stateless persons.

Recommendations:

UNHCR recommends that the Government of Malaysia:

- a) Continue its positive efforts to prevent and end statelessness, by taking measures to address gender inequality in citizenship laws, through taking steps to amend the provision of the Federal Constitution which do not allow women to confer citizenship to their children on an equal basis with men and the provisions which would deprive women of citizenship if it would leave them stateless;
- b) Improve baseline data on persons who may be affected by statelessness, disaggregated based on age, gender, and other relevant considerations, including legal status;
- c) Ensure that all persons are able to register the births of their children in a timely and accessible manner, including asylum-seekers and refugees; and
- d) Ensure that citizenship applications are processed in a timely manner to enable persons entitled to Malaysian citizenship to access rights and services.

Additional protection challenges

Issue 3: Arrest, detention, prosecution and deportation of asylum-seekers and refugees

A 2005 Circular issued by the Attorney-General’s Chambers establishes that those persons registered with UNHCR at the time of arrest should not be prosecuted for immigration offences. Although in the past this Circular provided a certain degree of protection from prosecution for immigration charges, the Circular is not systematically implemented, and even registered refugees continue to be at risk of arrest, detention, prosecution and in some cases deportation. Individuals who are unregistered continue to face heightened risks of arrest and detention under applicable immigration law. In addition, persons seeking

⁶ See Article 14(1)(b), Second Schedule, Part II, section 1(b) of the Federal Constitution, which provides that regardless of discretionary registration provisions that parents can use to register the child as a Malaysian citizen, a child may be rendered stateless unless or until the child acquires nationality.

⁷ See Article 24(4) of the Constitution, which provides that women who acquire citizenship by registration under Article 15(1) of the Constitution may be deprived of citizenship who acquire citizenship of another country through marriage. See also Article 26(2) of the Constitution, which provides that women who acquire citizenship by registration under Article 15(1) may be deprived of citizenship if the marriage dissolves otherwise than by death, within two years of the date of marriage.

⁸ “Saifuddin: Home Ministry receives 150,000 citizenship applications”, New Straits Times, 5 April 2023, available at: <https://www.nst.com.my/news/nation/2023/04/896726/saifuddin-home-ministry-receives-150000-citizenship-applications>

international protection, including children, are frequently detained upon entry, without having access to asylum procedures.

Thousands of asylum-seekers and refugees experience immigration detention every year, including women and children. Based on statistics recorded by the Government of Malaysia as of end January 2023, there were 15,845 “*illegal immigrants*” detained in IDCs nationwide, consisting of 11,983 men, 2,683 women, 656 boys and 523 girls (661 unaccompanied minors). Out of the total individuals detained, 4,424 were Myanmar nationals including Rohingya.⁹

Despite ongoing advocacy, UNHCR has not been granted access to IDCs to assess international protection needs and register asylum-seekers since August 2019. Moreover, the release of detained asylum-seekers and refugees remains limited. This situation has undermined UNHCR’s ability to fully exercise its mandate and has resulted in lack of access to asylum procedures for persons seeking international protection. Deportations of refugees and asylum-seekers known to UNHCR as well as large-scale forced returns of Myanmar nationals from IDCs continue.

As reported by the Human Rights Commission of Malaysia (SUHAKAM), conditions in IDCs are chronically overcrowded, and reportedly fall short of international and national standards. Some of these IDCs are not suitable for children, babies and nursing mothers, due to the lack of facilities to cater for their needs. Any detention, whether definite or indefinite, can be traumatising, especially for children, and have negative, long-lasting effects on their health and development.

Recommendations:

UNHCR recommends that the Government of Malaysia:

- a) Ensure that refugees and asylum-seekers are not penalized for illegal entry or stay;
- b) Ensure that alternatives to detention are applied in practice, and that immigration detention is only be used as a last resort for the shortest duration possible and is subject to safeguards to prevent arbitrary and/or indefinite detention;
- c) Ensure that persons currently in detention are given access to asylum procedures, including by reinstating UNHCR’s access to Immigration Detention Centres, which would enable the identification of refugees and asylum-seekers and thereby help to ensure that the *non-refoulement* principle is upheld; and
- d) Establish alternatives to immigration detention, such as screening and referral protocols to ensure that unregistered women, children, victims of human trafficking and other vulnerable asylum-seekers and refugees are identified and appropriately referred at the point of arrest and/or upon detention; and,
- e) End the use of immigration detention for children, as it is never in their best interest, and ensure that families are not separated as a result of immigration detention.

UNHCR
July 2023

⁹ “Over 15k illegal immigrants detained nationwide”, New Straits Times, 21 March 21 2023, available at: <https://www.nst.com.my/news/nation/2023/03/891191/over-15k-illegal-immigrants-detained-nationwide>