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**International Association of**  
**Refugee Law Judges (IARLJ)**

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**Session 7**

**“Convergence and Consistency in Processes and Case  
Law; Identification of areas of divergence, including  
“The Children of 2014 in Refugee Law:  
The Cry of the Weak and Helpless”**

***MAH WENG KWAI***  
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***Malaysia***

**Session 7 : Convergence and Consistency in Processes and Case Law; Identification of Areas of Divergence, including “The Children of 2014 in Refugee Law: The Cry of the Weak and Helpless”**

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Good morning and thank you for inviting me to this Conference.

1. Will speak from Malaysian Perspective.
2. Starting with some history – after the fall of the South Vietnamese government .
  - 1975 - Arrival of Vietnamese Boat People – off east coast of Peninsular Malaysia
    - settled on Pulau Bidong
    - former Prime Minister Mahathir was quoted as saying “shoot on sight” but when taken to task said he meant “shoo on sight”!
    - Paul Keating former Australian Prime Minister once called him recalcitrant!
3. Present numbers. Malaysia as a Transit Country.

As at end May 2014, there are some 145,025 refugees and asylum-seekers registered with UNHCR in Malaysia.

  - 134,430 are from Myanmar, comprising some 51,620 Chins; 37,100 Rohingyas; 11,840 Myanmar Muslims; 5390 Mon; 5,047 Kachins; 7735 Rakhnie; 3610 Bamars and other ethnicities from Myanmar.
  - There are some 10,590 refugees and asylum-seekers from other countries, including some 4,280 Sri Lankans, 1,110 Somalis, 920 Syrians, 780 Iraqis and 320 Afghans.

Some 70% of the refugees and asylum-seekers are men, while 30% are women. There are some 30,560 children below the age of 18.

There are also a large number of persons of concern to UNHCR who remain unregistered. Refugee communities themselves estimate that the population of unregistered refugees and asylum-seekers to be some 49,000 persons.

4. (a) Big area of divergence from the international community.
  - Malaysia does not expressly recognise concept of refugees.
- (b) Malaysia not a signatory to
  - (i) 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.
  - (ii) 1987 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.But has ratified Convention on the Rights of the Child.

5. Applicable law:

- (i) Immigration Act 1959
- (ii) Amendment in 2002 – introduced mandatory whipping for persons guilty of entering Malaysia illegally
- (iii) Section 6(1)(c) Immigration Act - not being in possession of a valid pass lawfully issued to enter Malaysia.  
Section 6(3) - Penalty : Fine not exceeding RM10,000.00 or to imprisonment not exceeding 5 years or both and shall also be liable to whipping of not more than 6 strokes.  
Whipping – cruel and inhumane, adds insult to injury.

6. Asylum seekers, refugees are equated to illegal migrants.
  - ignores humanitarian issues – Asylum Seekers and Refugees are vulnerable to arrest, detention, imprisonment, whipping and deportation.
  
7. Screening by UNHCR.  
Interim – UNHCR issues Temporary Protection Letters.
  
8. Cases of deportation.
  - breach of Principle of Non-refoulement in customary international law.
  - 11 Chinese nationals of Uighur ethnicity deported – 18/8/11.
  - wanted by Chinese government for human trafficking? Malaysia has Anti Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.
  
9. Asylum Seekers and Refugees are often hassled by police, immigration and RELA (Voluntary Police).
  - avenue for corruption.
  - not informed of their right to legal representation.
  - no reasonable opportunity to seek assistance such as from UNHCR and NGOs.
  - when charged in Court
    - (i) lack of interpreters
    - (ii) nudged/urged to plead guilty without understanding nature and consequence of the plea fully until it is too late
    - (iii) long periods of remand
    - (iv) overcrowded lock-ups and detention centres.
    - (v) physical and emotional trauma
    - (vi) poor food, hygiene, sanitation
    - (vii) poor medical attention
    - (viii) detention of child refugees – fear and depression

10. 2005 World Refugee Survey places Malaysia as one of the worst offenders of refugee rights.
11. Change of mind set necessary – refugees often seen as troublemakers and criminals.

### **The Australia – Malaysia Arrangement**

1. 7/5/2011 - Australia agreed to send to Malaysia 800 asylum seekers (Irregular Maritime Arrivals) who have been detained by Australia authorities.
  - in return Malaysia agreed to send 4,000 refugees to Australia over a period of 4 years.
  - arrangement was to exchange asylum seekers with refugees.
  - civil society in Malaysia opposed the Arrangement.
    - asylum seekers and refugees are not commodities to be traded.
    - misguided approach.
    - Malaysia not a State Party to the 1951 Convention yet Australian Government saw it proper to do the swap with Malaysia.
  - double standards – preferential treatment in terms of financial aid and other support for the 800 persons meantime ignoring the nearly 100,000 already in Malaysia.

### **Education**

Like all children, refugee children have the fundamental right to life, survival and development to the maximum extent possible. However, living in exile, refugee children are often denied normal childhoods. Security fears make

everyday activities like playing outdoors, difficult. Refugee children in Malaysia also do not have access to formal education.

- In Malaysia, there are some 18,500 refugee children below the age of 18 registered with UNHCR.
- Some 13,800 of these children are of school-going age. However, it is estimated that only approximately 40% of these children have access to any kind of education. This means over 60% of refugee children of school going age are not in school.
- Unable to access formal education, refugee communities establish community-based schooling for their children, and these are often held under resource-scarce conditions.

UNHCR partners with Non-Governmental Organisations to run structured education projects for refugee children. There are eight of such projects and only 20% of refugee children in school benefit from these projects.

### **Schooling for Refugee Children**

Refugee children who have access to education in Malaysia attend either education projects run by UNHCR in partnership with Non-Governmental Organisations, or community-based education classes organised by the refugee communities themselves.

UNHCR volunteers are a dedicated group of individuals who selflessly offer their time, resources and expertise to assist refugees and asylum seekers living in Malaysia. They assist with an extremely diverse range of projects including education.

Community-based schools are education classes that are run by the refugee communities themselves, with some support from the public. These community-based schools are located within the refugee population,

wherever there are refugee communities with a large number of children of school-going age.

- According to information gathered from the refugee communities, at least 70 such schools are located in Kuala Lumpur and Selangor. Some 4,000 refugee children attend such schools.
- The scope and reach of these classes are largely restricted by a lack of resources, including qualified teachers. Classes are usually held in rented flats or shop houses, where rooms are converted into classrooms, and are largely overcrowded, lacking in basic teaching facilities and with no space for children to play.
- Children accessing these schools are from the lower primary school age group. Most adolescent children drop out of school to work in order to supplement their family's income.

### **Refugee School Adoption Programme**

The Refugee School Adoption Programme is an opportunity for concerned individuals and organisations in Malaysia to explore avenues for supporting educational programmes for refugee children.

The scope of UNHCR's funding is limited and unable to reach all aspects of needs faced by refugee community-based schools. UNHCR therefore also relies on partners to meet the needs of refugees.

For years, individuals and organisations in Malaysia have been channeling assistance to these schools in the form of volunteers, technical support, financial and contributions in-kind. Hundreds of refugee children have enjoyed basic education thanks to the support of these individuals.

The Refugee School Adoption Programme is a structured way for concerned individuals and organisations to help in the area of refugee education.

## **Project Self Help**

Project Self Help is an innovative new programme launched by the HELP Education Group and the UNHCR to give young refugees a chance to learn new skills for the future.

Education remains one of the most important concerns for refugee parents. It is the hope they have that their children will have a chance for a better life.



## **RECENT COURT CASES**

1. **Iskandar Ab. Hamid v Public Prosecutor** [2005] 6 CLJ 505 per Abdul Kadir Musa J
  - High Court reversed Magistrate's decision disallowing UNHCR officer to be present at trial of a refugee child. Officer was responsible for the welfare of the child. Judge allowed right within context of Child Act 2001.
  
2. **S. Subramaniam v Public Prosecutor** [2007] 1 CLJ 470 per Sofian J Sri Lankan working in a metal producing company.
  - Malaysia is not a signatory to the 1951 Convention and therefore the Immigration Act applies. Whipping upheld. Appellant pleaded guilty and sentenced to 4 months and 1 stroke of rattan. Court of Appeal gave leave to refer 3 questions to it – but later appeal was withdrawn.
  
3. **Tun Naing Oo v Public Prosecutor** [2009] 6 CLJ 490 per Yeoh Wee Siam J  
Immigration operation. Appellant, an asylum seeker from Myanmar. Worked as a salesman selling computer accessories. Arrested without passport and valid entry pass. Convicted and sentenced to 100 days imprisonment and 2 strokes. On Revision the sentence of whipping was set aside as the sentence was held to be manifestly excessive and there was no evidence of violence.
  
4. **Public Prosecutor v Lian Hoe & 3 Ors** – Shah Alam High Court (Petaling Jaya) 43-13-2009
  - the registration of 3 defendants by UNHCR was pending.
  - UNHCR officer was present in Court as amicus curiae and informed the Court that the 3 defendants were eligible for registration.

- but Court only allowed setting aside of whipping of 2 strokes of the rattan on the 4<sup>th</sup> defendant, who was a registered person.

5. **Ali Salih Khalaf v Taj Mahal Hotel** – Industrial Court, Kuala Lumpur [2014] 2 LNS 0245.

Hotel receptionist – UNHCR registered as refugee.

- claim of unfair dismissal and for backwages and compensation allowed.

### **Pro Active Solutions**

1. Malaysia to be signatory of the 1951 Refugee Convention 1967 Protocol relating to status of Refugees and 1987 Convention against Torture. To stop arresting refugees for non-possession of Section 6 documents.
2. To amend Section 6 Immigration Act – to repeal provision on whipping of refugees.
3. Minister to exercise discretion under Section 55 Immigration Act to exempt refugees and asylum seekers from application of Section 6(3) on humanitarian grounds.
4. Malaysian Human Rights Commission (SUHAKAM) to play a more active role.
5. Magistrates, Sessions Court Judges and High Court Judges – to be enlightened on refugee rights and international norms. That refugees and asylum seekers are NOT undocumented migrants or foreign workers.

6. Refugees to be given the right to work eg. Rohingyas from Myanmar and Filipinos in Sabah. Malaysia needs migrant workers yet no guarantee to work legally exist presently.
7. To weed out corrupt practices in Police, Immigration, RELA and other departments.
8. Domestic laws to match social realities as well as international and humanitarian obligations.
9. To prevent human rights abuses against refugees and displaced persons.
10. To accord displaced persons with protection from repatriation and deportation.
11. Malaysia to expressly adhere to principle of non- refoulement.
12. UNHCR to carry out comprehensive registration and early determination of refugee and asylum seekers status. UNHCR to have improved access to Immigration Detention Centers, premises.
13. To issue birth certificates for babies born in Detention Centers.
14. To allow refugees to register their marriages with the civil registry using UNHCR papers as a proper form of identification.
15. To allow Muslim refugees – access to Syariah Court for family disputes eg. marriage, divorce, maintenance, custody.
16. Moratorium on whipping.

17. To have legal guarantee of access to education - to allow access to vocational schools, technical education for youths below 18 years.

18. To ensure better health care.

19. To have legislative and administrative provisions in place to deal with refugees and asylum seekers.

Currently – they have no legal rights, no protection and no security. They exist in a “shadow society”. They live in constant fear of the authorities.

Convergence – to get Malaysia into the International community.