



*Permanent Representative of Malaysia
Geneva*

31 March 2022

Mr. Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Ms. Elina Steinerte

Vice-Chair of the Working Group on Arbitrary Detention

Mr. Felipe González Morales

Special Rapporteur on the human rights of migrants

Dear Sir/Madam,

I refer to the joint urgent appeal dated 19 February 2021, bearing reference no. UA MYS 2/2021.

2. I wish to hereby transmit in the **ANNEX** the response of the Government of Malaysia to the afore-mentioned case.

3. In thanking the Human Rights Council's Special Procedures Mandate Holders for the understanding and cooperation, I express my sincere hope that the attached response from the Government of Malaysia will be fully taken into consideration.

Please accept, Sir/Madam, the assurances of my highest consideration.

Yours sincerely,

Ahmad Faisal Muhamad
Ambassador/Permanent Representative

THE GOVERNMENT OF MALAYSIA'S RESPONSE TO THE JOINT URGENT APPEAL FROM SPECIAL PROCEDURES, OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS

INTRODUCTION

1. The Government of Malaysia ("the Government") presents herewith the information in response to the allegations concerning the return of at least 1,200 undocumented Myanmar immigration detainees in Malaysia, which was brought to the attention of the Government *vide* a joint urgent appeal by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detentions and the Special Rapporteur on the Human Rights of Migrants that was attached to the letter from Ms. Beatriz Balbin, the Chief of Special Procedures Branch of the Office of the High Commissioner for Human Rights ("OHCHR") (reference no.: UA MYS 2/2021) dated 19 February 2021 ("SP Letter").

OBSERVATIONS BY THE GOVERNMENT

(i) **Please provide any additional information and any comment you may have on the above-mentioned allegations.**

2. The Government regrets to note that the information on the "*imminent return of at least 1,200 undocumented Myanmar nationals*" in the SP Letter is inaccurate. Factually, on 23 February 2021, the repatriation of 1,086 Myanmar immigration detainees from Malaysia was carried out at the Royal Malaysian Naval Base in Lumut, Perak upon the request and decision by the Myanmar Government via three (3) of its naval vessels.

3. The Government of Malaysia reiterates that the repatriation of immigration detainees has been a regular and on-going effort by the Government with other countries, among others, Indonesia, Bangladesh and Thailand where foreign missions facilitated and verified its nationals, so as to ensure that all documentation for repatriation was in order.

4. The Myanmar Embassy in Kuala Lumpur had given assurance on the safety of all Myanmar immigration detainees who were returning to Myanmar voluntarily. Additionally, none of the Myanmar immigration detainees was included in the categories of wanted persons, perpetrators of serious crime or was undergoing extradition. Hence, the issue of risk of the Myanmar immigration detainees being subjected to torture or other cruel, inhuman or degrading treatment or punishment, upon return to Myanmar does not arise.

5. Prior to the COVID-19 pandemic in Malaysia in 2020, Malaysia had approached several countries that have a large number of citizens detained in Malaysia's immigration centres, including Bangladesh, Indonesia, Myanmar, and Thailand. Repatriation of immigration detainees have taken place since then, in smaller numbers and via repatriation flights. The repatriation of Myanmar immigration detainees has been a regular and on-going effort by the Government of Malaysia in line with its immigration laws.

6. However, since the outbreak of COVID-19 virus, the repatriation process has been significantly affected, leading to the overcrowding of immigration detention centres across the country. Throughout the year 2020, the Department of Immigration has repatriated 37,038 immigration detainees, including 17,002 to Indonesia, 5,450 to Bangladesh, 3,322 to Myanmar, 2,358 to Thailand, 1,493 to Pakistan and 1,829 to respective home countries.

7. The latest repatriation was discussed and agreed with the Government of Myanmar in 2020. Since January 2020 to December 2020, more than 3,322 Myanmar citizens who were detained for immigration offences in Malaysia have returned to their home country. The routine exercise is expected to continue, irrespective of the government of the day in both countries.

8. The immigration detainees involved in the repatriation were Myanmar citizens, selected and verified by the Myanmar Embassy in Kuala Lumpur. The issuance of a Certificate of Identity was carried out through face-to-face interviews, whereby the detainees must possess Myanmar identification card. Since January 2020, Myanmar Embassy visited the immigration detention centres for about 25 times for verification purposes.

9. Prior to the repatriation, the Ministry of Health conducted COVID-19 RT-PCR tests on all Myanmar immigration detainees involved in the repatriation. The costs and expenses for such tests were fully funded by the Government of Malaysia. The Government avers that only Myanmar immigration detainees who were tested negative for the COVID-19 virus were repatriated to Myanmar.

10. All Myanmar immigration detainees involved in the repatriation were detained for committing various offences under the Immigration Act 1959/63 [Act 155] and the Immigration Regulations 1963 [LN 228/1963], such as overstaying or misusing their social pass, and not having valid travel documents. The Myanmar immigration detainees were brought before a Magistrate within fourteen (14) days from the date of arrest in accordance with the Federal Constitution (FC) of Malaysia.

11. Subsequently, the Myanmar immigration detainees were informed of the reasons for detention and were given the opportunity to appoint a legal practitioner in compliance with Article 5(3) of the FC.

12. Similarly, the same provision has been stipulated in section 28A of the Malaysia's Criminal Procedure Code [Act 593] which guarantees the rights of the person arrested among others, to be informed as soon as may be of the grounds of his arrest. Section 28A(2)(b) of Act 593 allows for the person arrested to communicate or attempt to communicate and consult with a legal practitioner of his choice.

13. By virtue of section 39 of the Immigration Act 1959/63 [Act 155], the immigration officer shall have the authority and powers of a police officer to enforce any of the provisions of Act 155 relating to arrest, detention or removal.

14. All the Myanmar immigration detainees were prosecuted and sentenced accordingly in the Malaysian court during which, the Myanmar immigration detainees were entitled to challenge their detention throughout the judicial proceeding.

15. Subsequent to their repatriation, the non-governmental organizations (NGOs) have filed an application for judicial review to the High Court of Malaya in Kuala Lumpur to challenge the repatriation of the Myanmar immigration detainees under Rule 53 of the Rules of Court 2012 [*P.U.(A) 205/2012*] the proceeding is currently on-going.

16. The Government reiterates that the Myanmar immigration detainees involved in the repatriation were Myanmar citizens, selected and verified by the Myanmar Embassy in Kuala Lumpur who had voluntarily agreed to return to their country of origin. The repatriation exercise was also carried out upon the request, involvement and decision of the Myanmar Government via three (3) of its naval vessels.

(ii) **Please provide detailed information on the assessment/screening carried out by authorities in Malaysia to ascertain whether on an individual basis, individuals in this in this group of migrants are at risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, upon return in Myanmar if deported. If no such assessment has been conducted, please indicate how this is compatible with the international norms mentioned above.**

17. As announced by the Immigration Department of Malaysia through a media statement dated 23 February 2021, the repatriation of 1,086 Myanmar immigration detainees from Malaysia did not involve asylum seekers or Rohingyas.

18. The group of detainees were detained for committing various offences under Act 155 and the Immigration Regulations 1963 [LN 228/1963]. They also did not produce any supporting documents including the letter from the United Nations High Commissioner for Refugees (UNHCR) issued to asylum seekers during the process of arrest or detention.

19. At this juncture, it is to be noted that as soon as the Myanmar immigration detainees were arrested under the Malaysian domestic laws, they became liable to be removed under sections 32, 33 and 56(2) of Act 155 respectively, which provides as follows –

“Removal of illegal immigrants

32. *(1) Any person who is convicted of an offence under section 5, 6, 8 or 9 shall be liable to be removed from Malaysia by order of the Director General*

Provided that no citizen convicted of an offence under section 5 shall be ordered to be removed from Malaysia under this subsection.

(2) (Deleted by Act 27 of 1963)

Removal of persons unlawfully remaining in Malaysia

33. *(1) Where the presence of any person in Malaysia is unlawful by reason of section 9, 15 or 60 the person shall, whether or not any proceedings are taken against him in respect of any offence against this Act, be removed from Malaysia by order of the Director General.*

(2) Any person in respect of whom an order of removal has been made under subsection (1) may appeal to the Minister in such manner and within such time as may be prescribed*

Provided that there shall be no appeal under this subsection against an order of removal under subsection (1) made in respect of any person whose presence in Malaysia is unlawful under section 9 by reason of any order made under paragraph 9(1)(a) or by reason of the cancellation of a Pass or Permit under paragraph 9(1)(b) or 9(1)(c) respectively, or is unlawful under paragraph 15(1)(c) or section 60 by reason of the expiry of any Pass relating to or issued to him.

Offences

56. (1) ...

...

(2) *Any person who is not a citizen unlawfully entering or reentering or attempting unlawfully to enter or re-enter Malaysia or unlawfully remaining in Malaysia shall whether or not any proceedings are taken against him in respect of the offence be liable to be removed from Malaysia by order of the Director General."*

20. Based on the above, the Government had decided to repatriate 1,086 Myanmar detainees back to Myanmar on 23 February 2021 via Myanmar naval vessels following the issuance of a removal order by the Immigration Department of Malaysia, with the authorisation and participation of the Myanmar Government.

(iii) **Please indicate which concrete measures are being taken by your Excellency's Government to fulfil its obligations under the principle of non-refoulement prohibition of collective expulsion.**

21. Malaysia is not a State Party to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees ("Refugees Convention and Protocol"), the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1966 Covenant on Civil and Political Rights and therefore are not bound by the obligations imposed thereunder. Despite not being a State Party to these treaties, the Government continues to provide assistance to asylum seekers and refugees in Malaysia based on humanitarian grounds. As of 31 December 2020, there are 178,613 UNHCR Persons of Concern (POC) which comprise of asylum seekers and refugees. Out of these, 86% or 154,037 are from Myanmar and 57% of them are Rohingyas.

22. Malaysia in this regard, has taken internal measures to ensure that none of the detainees were refugees/asylum-seekers and that all of them have given their voluntary consent to return to Myanmar.

23. The Government further wishes to highlight that it receives no information nor evidence to suggest that any of the repatriated Myanmar immigration detainees are facing any danger of enforced disappearance if they are to be repatriated to Myanmar. The Government reiterates the above information with regard to the decision of repatriation of Myanmar citizens to their home country via the naval vessels of the Myanmar Government, with the authorisation and participation of the Myanmar Government.

- (iv) **Please provide information regarding the legality, proportionality and necessity of the detention of the migrants described in this letter. Please provide information on whether an individualised assessment of the need to detain them has been carried out. Please explain what legal procedures are being followed in relation to the detention and intended deportation of those migrants, and what legal avenues are provided to migrants to challenge their detention and deportation.**

24. The Government avers that any actions undertaken by the Malaysian authorities against any person found to be without proper travel documents, such as a valid entry permit and a valid pass lawfully issued to them to enter Malaysia, or to have been found in possession of forged documents, were carried out in conformity with the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670], the Immigration Act 1959/63 [Act 155], the Passports Act 1966 [Act 150] and the Immigration Regulations 1963 [LN 228/1963]. It is pertinent to emphasize that the Government reserves its absolute sovereign right to carry out all legal measures to ensure that its national security, public order, territories, morality, rights and freedom of Malaysian citizens and non-citizens are protected. The implementation of these laws takes into consideration Malaysia's obligations both domestically and internationally.

25. In this regard, the Government wishes to clarify that the detention of the Myanmar immigration detainees were not done arbitrarily and is in accordance with the provision under section 34 of Act 155. Sections 32(1), 33(1) and 56(2) of Act 155 further provide for the removal of illegal immigrants by order of the Director-General of Immigration. Under section 3(2) of Act 155, the Director-General of Immigration has the power of general supervision and the power to make directions on all matters relating to immigration throughout Malaysia.

26. The Director General of Immigration had reasonable reasons to repatriate all 1,086 detainees for committing various offences under the Act 155 and the Immigration Regulations 1963 [LN 228/1963], such as overstaying or misusing their social passes and not having valid travel documents. They had obtained temporary valid travel documents issued by their country of origin and voluntarily agreed to return to their country of origin.

27. The Government had complied with all the required procedures in the repatriation process. Further, section 59A of Act 155 excludes judicial review in any court of any act done or any decision made by the Minister or the Director-General, except in regard to any question relating to compliance with any procedural requirement of Act 155 or the regulations governing that Act or decision.

(v) **Please provide information regarding all prevention measures taken in response to the COVID-19 pandemic in immigration detention facilities, in order to protect the physical and mental integrity of the detained migrants, the staff and the wider community.**

28. The Government wishes to impress upon the SR and Working Group on Arbitrary Detention that Malaysia has always adhered to the Standard Operating Procedures (SOP) issued from time to time, by the Malaysian National Security Council in combatting and preventing the spread of COVID-19 virus. The COVID-19 prevention SOPs are enforced in all immigration detention centres. In order to protect the health of officers and detainees, all detainees are required to undergo COVID-19 test in the Ministry of Health facilities before being admitted to immigration detention centres.

29. To prevent the spread of COVID-19 cases, the Government has adopted precautionary measures by issuing guidelines for the management of COVID-19 in detention centres, based on the technical advice provided by the International Committee of the Red Cross. These guidelines, including maintaining social distancing, have been circulated to the Assistant Medical Officers stationed at all immigration detention centres.

30. In addition, each detention centre is assigned to the nearest public health clinic in order to ensure the continued well-being of the detainees. All detainees are also subjected to a mandatory COVID-19 swab test before being placed in detention centres. Every detainee who displays COVID-19 symptoms is given access to a thorough health screening to ensure their well-being and to prevent the spread of the virus.

31. All positive cases, regardless of their migration status are referred to hospital for treatment. The Government has designated three centres to specifically treat illegal immigrants and migrant workers who have tested positive for COVID-19, namely the Sungai Buloh Hospital and the Kuala Lumpur Hospital, as well as the Malaysia Agro Exposition Park Serdang which has been transformed and equipped with health treatment facilities.

CONCLUSION

32. The Government emphasises that the repatriation of the 1,086 Myanmar immigration detainees on 23 February 2021 were done pursuant to its domestic laws and were exercised carefully taking into consideration the Government's domestic and international obligations.

33. The Government will continue the constructive engagement with the OHCHR, and is fully committed to continue its efforts in promoting and protecting human rights

in the country while undertaking inclusive, whole of government and society approach to prevent the spread of the COVID-19 pandemic in Malaysia.

Government of Malaysia
31 March 2022
