



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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BANGLADESH

IAA reference: IAA18/05914

Date and time of decision: 15 January 2019 17:55:00

A Wilson, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Muslim of Bengali ethnicity from Bangladesh. He arrived in Australia [in] June 2013. On 16 November 2016 he lodged an application for a safe haven enterprise visa (SHEV).
2. On 1 November 2018 a delegate of the Minister for Immigration refused to grant the visa. The delegate accepted that the applicant was a low level supporter of the Bangladesh National Party (BNP) in Bangladesh, and a low level supporter and member of the BNP in Australia, and that he had attended a protest in April 2018. The delegate did not accept that the Sarbohara Party was affiliated with the Awami League (AL), that members of these political parties threatened the applicant for many years, or that they attacked him in 2006. Nor did the delegate accept the protest the applicant attended in Australia was highly publicised.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The review material includes information about several money transfers between the applicant and an individual in Bangladesh. The delegate did not discuss this information with the applicant during the SHEV interview or refer to it in the protection visa decision record. I do not consider the information has any bearing on the applicant's claims for protection.
5. The applicant's representative provided a submission to the IAA on 27 November 2018 (the IAA submission). Apart from the issue discussed below, the IAA submission restates some of the applicant's claims that were before the delegate, addresses the delegate's decision and issues arising and to that extent I regard it as argument rather than information and have considered it. The IAA submission also cites extracts from the February 2018 DFAT Country Information Report on Bangladesh, the 2016 International Crisis Group report on "Political Conflict, Extremism and Criminal Justice in Bangladesh", and the January 2018 report by the Bangladeshi Human Rights organization Odhikar. These reports were before the Minister when the Minister made the decision under s.65 and are not new information.

### Applicant's claims for protection

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6. The applicant's claims can be summarised as follows:
  - In around [year] he became a member of the BNP and between 2003 and 2006 he was the BNP [office bearer 1] in his local ward in Barisal.
  - He received many threatening phone calls from Sarbohara Party / AL members.
  - Towards the end of 2006 Sarbohara Party / AL members attempted to kill him and his [Relative A], who was a local BNP politician, by attacking his [Relative A's] house in Barisal. The perpetrators were arrested and imprisoned but were released after the AL came to power in 2008.

- After 2006, and until his departure for Australia in May 2013, he was infrequently involved in BNP activities and largely lived in the capital Dhaka, only occasionally visiting his mother in the village in Barisal for short periods.
- Since 2015 he has been a member of the BNP Australia and has participated in meetings and demonstrations.
- He fears if he returns to Bangladesh he will be seriously harmed by the Sarbohara Party / AL members who previously threatened him.

## Refugee assessment

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7. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

### Well-founded fear of persecution

8. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. On the basis of the applicant’s documentary and oral evidence I accept: that he is a Muslim of Bengali ethnicity; that he was born in Barisal district; that he attended primary school, high school and college; and that he is single.
10. On the basis of copies of a birth certificate in English and a nationality and character certificate in English provided by the applicant, I accept that his name is as claimed and that he is a national of Bangladesh. There is no other evidence before me to suggest that he has a right to enter and reside in any other country apart from Bangladesh. I find that Bangladesh is his receiving country for the purpose of this review.
11. The applicant claimed he became involved with BNP politics towards the end of college, and he joined the BNP in around [year]. He chose the BNP because of a family connection and because he liked their policies and believed they would be better for Bangladesh. In support of these claims he provided: a letter dated [in] November 2016 from the BNP’s [specified]

Union stating he was the ward [office bearer 1] from 2003 to 2006, and a letter from the BNP's [specified] Upazilla that is undated, but includes a reference to the year 2018, repeating the information in the 2016 letter. At the SHEV interview the applicant stated the 2016 letter is the preferred one as it has the correct signature. The applicant claimed he was gradually given more responsibility in the local BNP branch. He had various jobs including advertising for the branch, participating in meetings and canvassing for votes. However it became very unsafe to be involved in politics in Bangladesh, especially against the AL, and police brutality escalated. He was harassed by AL members who made threatening phone calls to him. Needing to get away from his home area he began helping his brother in his [products business] in Dhaka. The reason for the harassment was because his [Relative A], who was also a Member of the [specified branch] in Barisal, had stood for the BNP in a local election and had won.

12. At the SHEV interview the applicant stated as BNP [office bearer 1] his role was to communicate to the general public about the news and activities of the party and to prepare mail and posters and documents. He also stated he was harassed during his final year at college because his [Relative A] was a member of the BNP [specified branch]. The opposition party against his [Relative A] was the Sarbohara Party. They were very active in their area and involved in killing people. They were against the applicant as they thought he would become as involved in politics as his [Relative A] and they started to harass him. They used to call him and threaten to abduct or kill him over the telephone. He feared if they got him alone somewhere they would kill him. The Sarbohara Party is now associated with the AL and one of them is now the AL chairman in the upazila.
13. The applicant claimed in 2006 AL people came to kill his [Relative A] and after that things started to get much worse for everyone in the family involved with the BNP. [A number] of the assailants were captured and taken to the police station with the help of the neighbours and they were sentenced to [term] gaol. His [Relative A] is now in his [age range] and has stopped his involvement in politics. The applicant lived in Dhaka for about two years when he felt unsafe in his area and has not been back to his village since he left, not even when he came to Australia, because he takes the threats seriously. He also claimed the harassment of him became much worse after the AL won power. In a post-interview submission he claimed his [Relative A] has suffered [specified conditions], and has lost his memory. Despite searching relatives found nothing useful pertaining to the 2006 attack in his [Relative A's] papers.
14. At the SHEV interview he clarified the Sarbohara Party people were not in power but when the caretaker government came in they attacked the house. When asked whether anything had happened to him after he moved to Dhaka, he stated they used to call him, although he changed his phone number. He does not know how they got his new number.
15. If returned to Bangladesh he fears being tracked down by the AL / formerly Sarbohara Party members who threatened him previously. It will not matter how much time has passed since they last saw him, because they will pursue him just the same. He felt unsafe in his own locality and so moved to Dhaka. He was continually threatened by telephone and told they knew where he lived and they would come and get him. The police will not protect him against the activities of the AL and police brutality towards BNP supporters is horrifying.
16. Country information indicates the AL and the BNP have dominated politics in Bangladesh since independence. It is stated the relationship between the two parties is characterised by longstanding enmity and that the approach taken by both parties is to treat politics in a confrontational 'winner takes all' fashion. The ruling party's affiliated organisations have

historically controlled all public institutions while that party has been in power, and both the AL and BNP have exploited the state machinery to suppress government opponents. Politically motivated violence in Bangladesh tends to peak during periods of heightened political unrest, including during elections, strikes, and blockades. The political conflict between the AL and BNP has resulted in high levels of violence and a brutal state response. The current AL government's excesses against political opponents and critics include enforced disappearances, torture and extra-judicial killings. DFAT has assessed that senior BNP members face a high risk of politically motivated arrest, legal charges and travel bans. Active members of opposition political parties and auxiliary organisations who participate in demonstrations also face a high risk of arrest and physical violence, both from security forces and ruling party activists. Ordinary members of opposition political parties and auxiliary organisations who do not engage in political activities and demonstrations face a low risk of arrest, although this may vary according to location and timing.<sup>1</sup>

17. Although he provided no independent evidence of his existence or political career, I accept the applicant's [Relative A] was a local BNP politician in Barisal. I am also willing to accept that from around [year], when he was finishing college, the applicant was a member of the BNP and that for around three years until 2006 he was a ward [office bearer 1]. Given the history of political violence in Bangladesh, and particularly the rivalry between the BNP and AL,<sup>2</sup> I accept the applicant may have received some threatening phone calls while he was politically active with the BNP. Although I also note his own evidence from the SHEV interview that, although the opposition party did not like his role between 2003 and 2006 nothing happened to him as the BNP was in power.
18. However I do not consider the applicant was a committed BNP activist or held a position of significance in the party in his local area. Despite claiming he was involved in preparing BNP posters and documents for several years, and indicating he had attended college and so is well educated, when asked at the SHEV interview to outline some of the BNP policies that he said had attracted him to the party, the applicant responded in a vague, general, and superficial way. He could only refer to the BNP leader not liking the politics of torture and favouring economic development and job growth, and cite a list of generic aspirational goals including social security, democracy, freedom of speech, and quality-of-life, rather than identify any specific policies of the BNP relevant to his area that he had purportedly communicated. I also note the applicant was travelling several hundred kilometres in each direction between his village and the capital during this period, while he was helping his brother in his Dhaka [products] business for periods of up to several months at a time, which would have limited his capacity for political involvement in the village. Additionally, when asked at the SHEV interview whether he held any sort of leadership position in the BNP in Bangladesh, the applicant stated that 'being a member is already a position. It is not important to be a leader but I support the party. It is important how much I work for the party'. In my view, the applicant's political involvement was primarily linked to his relative's holding an influential local position in the BNP.
19. Although the applicant did not provide any court documents confirming the incident, I accept as plausible that in late 2006 persons politically opposed to his [Relative A], who had affiliations with the Sarbohara Party and / or the AL, attacked the house the applicant and his

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169. International Crisis Group, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646. UK Home Office, "Country Policy and Information Note Bangladesh: Opposition to the government", January 2018, OG9EF767910.

<sup>2</sup> International Crisis Group, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646. DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169.

[Relative A] were in but that the perpetrators were apprehended and gaoled for a period before being released several years later. Country information before me indicates there was widespread politically motivated violence before the scheduled 2006 polls and that leftist extremist groups, such as the Sarbohara Party, were active in southwest Bangladesh in the mid-2000s, including in Barisal division where the applicant is from. Sources also refer to many residences of both BNP and AL leaders coming under attack in Barisal in late 2006<sup>3</sup>.

20. However having regard to the country information, and the applicant's statement of claims saying the perpetrators were trying to kill his [Relative A], I find his [Relative A], rather than the applicant, was the target of the attack and that at that time and thereafter the applicant was of little or no interest to the local political opposition. I also note that after this event the applicant relocated more permanently to Dhaka, several hundred kilometres distant and was, on his own evidence, only infrequently involved with the BNP after it lost power in 2006 and also seldom visited the village. I further note he has not claimed that he or his [Relative A] were approached by the perpetrators of the 2006 incident after they were released from gaol.
21. I do not accept the applicant was threatened continually by Sarbohara Party / AL political opponents, particularly after he began living almost permanently in Dhaka after 2006. I consider it implausible that his politician [Relative A] would be able to continue his involvement with the BNP until his retirement without apparent difficulty, as the applicant stated at the SHEV interview, while the applicant with a much lower political profile, and who was absent from the village, and who was seldom involved with the BNP after 2006, would continue to be of interest to the Sarbohara Party / AL. I also find it improbable that local political opponents would have the interest or capacity to somehow track him down after he changed phone numbers and locate him in a populous city like Dhaka. It also seems far-fetched that if they were interested in harming him, and they knew where he lived as he has suggested, that they would not have approached or mistreated him in any way in the six further years he remained in the capital. I also note the applicant's evidence at the SHEV interview that he never had any issues with the police, which would also suggest he was of no interest to the Bangladeshi authorities at any point. I consider that when the applicant relocated to Dhaka and drastically reduced his involvement with the BNP after 2006 he was not of ongoing interest to either the Sarbohara Party or the AL or anyone else.
22. At the SHEV interview the applicant claimed soon after his arrival in [City 1] in 2015 he became involved with the BNP Australia. He attended their meetings in [a named suburb], including an event to celebrate 40 years since the establishment of the BNP and a prayer meeting for the imprisoned BNP leader. He claimed his current role is to help the President, leader and members of the party. Although when asked by the delegate, he stated he did not hold any leadership position in the BNP Australia, that position is not important to him, rather what is important is what sort of involvement he has with the party. Referring to photographs of people participating in a demonstration behind banners, he claimed he was involved in protests when the AL leader and Prime Minister, Sheikh Hasina, visited Sydney. He claimed they were protesting against current conditions in Bangladesh where people are abducted or killed. He was unsure but thought photographs of the demonstration may have been shown on the ABC news. In a post-interview submission it was contended that some of the photographs from the demonstration in Sydney against the current AL leader were distributed around media outlets in Australia and Bangladesh and that the applicant is easily

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<sup>3</sup> Country of Origin Information Section (COIS), "Bangladesh CI181016103217188 – Purbo Sarbohara Party – Politically motivated violence - Barisal", 18 October 2018, CR837DFFB367. International Crisis Group, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646.

recognisable in the photographs. In support of these claims he also provided: a hyperlink to an online article (in Bengali not English as stated in the post-interview submission) and more photographs of the April 2018 demonstration against the Bangladeshi prime minister; a hyperlink to a video of the demonstration on Facebook; other photographic evidence of the applicant's involvement with the BNP in [City 1]; an undated BNP Australia membership application form; and a letter from the BNP Australia dated [in] September 2018 stating from March 2015 he worked with the BNP youth wing as [Office Bearer 2] and that he participated in various antigovernment rallies and demonstrations to protest undemocratic and inhumane torture on political leaders and activists and he has been involved with community activities.

23. When asked by the delegate why he did not mention his involvement with the BNP Australia in the November 2016 SHEV application, he stated he did not think it was necessary. His representative, who was present at the SHEV interview, stated it may have been because she did not think to ask him about any political involvement in Australia given he is the first Bangladeshi she has known who has been politically active here. When asked why the BNP Australia membership receipt is undated, the applicant stated he had not noticed this but that the issuer had probably made a mistake. He stated the receipt provided a telephone number if the delegate wished to check his membership.
24. I accept the applicant is a member of BNP Australia and that he has participated in some of their activities, including attending a public demonstration against the prime minister of Bangladesh in 2018. I have some doubt however that he has been a member of BNP Australia since 2015. According to the corrected list of addresses he provided in a post-interview submission the applicant has only lived at the address that appears on the undated BNP Australia membership form since February 2017, which would suggest his membership dates no earlier than 2017. Furthermore the only events he attended whose dates can be verified – the demonstration against the prime minister and the 40<sup>th</sup> anniversary of the foundation of the BNP – occurred in 2018. And while I am willing to accept the applicant may have nominally filled a role titled [Office Bearer 2] for BNP Australia's youth wing for an unspecified period, I note and prefer his own evidence at the SHEV interview that he did not hold any leadership role in the organisation. I accept there was some coverage of the 2018 demonstration against the prime minister in the Australian media and online media sites. And while I accept the applicant participated in the demonstration, I do not consider that he played a prominent role or featured in the media coverage in any way. In any event, the information before me suggests that only high profile individuals who have engaged in political activities overseas may be of interest to Bangladeshi authorities<sup>4</sup> and I do not accept that the applicant falls into this category.
25. Given I have found the applicant has had some involvement with the BNP in both Bangladesh and Australia, I have considered whether he will re-join the BNP and participate in BNP activities if he returns to Bangladesh and whether he will suffer harm as a result. I accept there have occurred attacks on and arrests of some BNP leaders and activists in the lead up to the December 2018 Bangladeshi national election<sup>5</sup>. However I note the applicant's own evidence at the SHEV interview was that he was only infrequently involved with the BNP in the more than six years he remained in Bangladesh after 2006. And at the SHEV interview he did not articulate what his reduced involvement with the BNP during this period entailed. He was evasive when questioned about it by the delegate, in my view suggesting any participation was minimal. In addition, I have found that the applicant's involvement with the

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<sup>4</sup> DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169. DFAT, 'DFAT Country Information Report', 5 July 2016, CIS38A80121206.

<sup>5</sup> Odhikar, 'Human Rights Monitoring Report on Bangladesh, Reporting Period 1-31 August 2018', 1 September 2018, CIS7B839419556.

BNP in Australia has been limited in duration, of a low level nature, and highly unlikely to attract the adverse attention of the authorities or others in Bangladesh. The applicant has not claimed that he would seek, or have the opportunity, to re-involve himself with the BNP or any other party, if he were to return to Bangladesh. I also note that his politician [Relative A], who he stated largely inspired him to join the BNP and who he previously supported, has retired from politics and is in poor health. Having regard to the information before me, I find that the applicant would not actively participate in BNP activities like demonstrations if he were to return to Bangladesh. In these circumstances I am not satisfied there is a real chance the applicant will suffer harm from the Sarbohara Party / AL or Bangladeshi authorities because he was involved with the BNP in Bangladesh many years ago and the BNP in Australia more recently.

26. Although the applicant made no claims in these regards, the delegate considered whether he was at risk of harm as a returning asylum seeker and whether he could safely and legally access the area of Bangladesh to which he would return.
27. DFAT reporting indicates that the Emigration Ordinance Act (1982) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the Act. And that Bangladeshis require a valid passport and visas (depending on the destination country) to depart from Bangladesh. DFAT has also observed it is unaware of any cases in which authorities have enforced these provisions. And DFAT has indicated it has no evidence to suggest that recent returnees to Bangladesh have received adverse attention from authorities or others. DFAT has assessed that most returnees, including failed asylum seekers, are unlikely to face adverse attention regardless of whether they have returned voluntarily or involuntarily. They have noted that authorities may take an interest in high profile individuals who have engaged in political activities outside Bangladesh, including people convicted of war crimes in absentia<sup>6</sup>. In addition, international non-government organisations oversee and facilitate the return of many asylum seekers to Bangladesh and provide re-integration assistance to them<sup>7</sup>.
28. I accept the applicant left Bangladesh illegally without a passport. I also accept that if the applicant were to return to Bangladesh it may be suspected that he has sought asylum overseas. In the IAA submission his representative claimed the delegate accepted the applicant would return to Bangladesh as a failed asylum seeker and risk a prison sentence of up to one year. While the former part of this statement is correct, the latter is not. The delegate referred to DFAT indicating that people returning to Bangladesh were unlikely to face adverse attention on their return, and stating they had no evidence to suggest that recent returnees from likeminded countries had received adverse attention from authorities or others. The protection visa decision record did not refer to information supporting the imposition of any prison sentence on returnees. In any event, I acknowledge that the country information I have set out above indicates it is an offence to depart from Bangladesh illegally although the penalty is not specified. I have considered the representative's submission that a lack of reports of returnees being imprisoned does not mean it has not happened. Nevertheless, there is a substantial body of reporting on human rights abuses in Bangladesh yet there is no country information in the review material to support that the Bangladeshi authorities enforce those potential departure offences against returning Bangladeshi asylum seekers.

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<sup>6</sup> DFAT, "Country Information Report – Bangladesh", 5 July 2016, CIS38A80121206. DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169.

<sup>7</sup> IOM, "Bangladesh", 1 August 2014, CIS29397.



29. Unlike the delegate who found the applicant would return to Barisal, I consider the applicant would return to Bangladesh's capital Dhaka, where his siblings now live and where he lived on and off between 2003 and 2006 and where he lived permanently, apart from rare and short visits to Barisal, for a further six or so years prior to his departure from Bangladesh in 2013. Country information indicates apart from a couple of sensitive regions, which do not include the capital, citizens may travel to and reside where ever they wish in Bangladesh<sup>8</sup>. I am therefore satisfied that the chance of any harm in accessing Dhaka is remote. Also I have not accepted that when he departed Bangladesh in May 2013 the applicant was of adverse interest to either the Sarbohara Party or the AL or the Bangladeshi authorities. Additionally he will be returning to Dhaka where his siblings have lived in his absence overseas and are established. In all the circumstances I am not satisfied there is a real chance the applicant will suffer any harm because he departed Bangladesh illegally, because he has claimed asylum and / or spent a period of time in Australia, whether on return to Bangladesh or subsequently in the reasonably foreseeable future.

#### **Refugee: conclusion**

30. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

#### **Complementary protection assessment**

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31. A criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

32. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
33. I have concluded that the applicant does not face a real chance of harm from the Sarbohara Party / AL or the Bangladeshi authorities as a result of his membership and support of the BNP in Bangladesh and Australia; as a result of leaving Bangladesh illegally; or as a returnee or asylum seeker. As 'real risk' and 'real chance' involve the application of the same standard<sup>9</sup>, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

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<sup>8</sup> DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169.

<sup>9</sup> *MIAC v SZQRB* (2013) 210 FCR 505.

**Complementary protection: conclusion**

34. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

**Decision**

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The IAA affirms the decision not to grant the referred applicant a protection visa.

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

*Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.