



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA19/06488

Date and time of decision: 15 May 2019 16:35:00
A Wilson, Reviewer

Decision

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

Visa application

1. The referred applicant (the applicant) claims to be a national of Bangladesh. He arrived in Australia [in] March 2013. On 18 May 2016 he lodged an application for a safe haven enterprise visa (SHEV). On 23 February 2017 a delegate of the Minister for Immigration refused to grant the visa. On 13 March 2019 the Federal Circuit Court of Australia quashed the decision of the IAA of the 22 November 2017, requiring it to reconsider and re-determine the application according to law.
2. The delegate accepted that the applicant worked in his cousin's [businesses]. However the delegate did not accept that his cousin was a Jamaat-e-Islami (JI) leader, that the applicant assisted his cousin with JI activities, that the applicant killed an Awami Jubo League¹ cadre, or that the applicant's father was killed by the Awami Jubo League.

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) (the review material).
4. The review material included the written record and the sound recording of the March 2013 entry interview with the applicant. At the SHEV interview the applicant and his representative had argued that the interpreting during the entry interview was poor, that there were errors in the written record of the entry interview, and they suggested that the delegate have regard to the sound recording. The delegate went on to rely, in part, on what the applicant had said during the entry interview to reject his claims that his cousin was a JI leader, that he assisted him, and that in a fight he had killed someone seeking his cousin. Although from the Protection Visa Decision Record it was unclear whether the delegate had or had not listened to the entry interview sound recording.
5. On judicial review, the Minister conceded that the sound recording was not before the delegate of the Minister when the delegate made the decision under s.65. The sound recording is therefore new information. Given the delegate's reliance on what was said at the entry interview, and the applicant's dispute of the reliability of the record of that information, I am satisfied that there are exceptional circumstances to justify considering the new information.
6. On 16 April 2019 the IAA invited the applicant to comment on information from the sound recording of the entry interview that may be the reason, or part of the reason for affirming the decision of the delegate. No comment was received from the applicant by 14 May 2019.
7. I have obtained new information from the most recent Department of Foreign Affairs and Trade (DFAT) country report for Bangladesh which was published on 2 February 2018². Over twenty six months have passed since the delegate made her decision and this report supersedes the 2016 report which was before the delegate and which is now almost three years old. The new DFAT report was prepared specifically for the purpose of determination of protection obligations. It contains information which is relevant to the applicant's claims to

¹ The Bangladesh Awami Jubo League is the youth wing of the ruling Awami League (AL).

² Department of Foreign Affairs and Trade (DFAT), 'Country Information Report: Bangladesh', 2 February 2018, CIS7B83941169.

fear harm. I am satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
- in late January 2010 he started working in his cousin's [shop]. Although he didn't know it until sometime later his cousin was a JI leader.
 - in August 2011 and in November and December 2012 he acted as a go-between for his cousin, helping him to arrange JI meetings.
 - [in early] January 2013 a protest that the JI had planned for the next day was banned by the local authority and it was announced that the market where his cousin's shop was located would be closed.
 - [in early] January the police came to the shop and asked where his cousin, the JI leader, was. They also told the applicant to close the shop, but he did not do so.
 - later that morning a Jubo League cadre, S, came to the shop and asked the applicant where his cousin was. When he said he didn't know, S slapped his face, beat him, and tried to stab him but he hit S in the head with a metal rod and escaped.
 - he went to a female cousin's house and her husband arranged for him to have medical treatment. The next day he went home and his father told him the police had come to the house searching for him because he had killed S.
 - the following day he met his cousin, the JI leader, who confirmed that S was dead and who advised him to hide because the police had filed a murder charge against him.
 - after staying at several relatives' houses for a couple of days he met another relative who was involved in a business that sent people overseas. He called his cousin, the JI leader, who said he would pay his travel expenses and who confirmed that the Jubo League was looking for the applicant. In early February 2013 he departed Bangladesh.
 - he fears if he is returned to Bangladesh he will be murdered or arrested for political reasons.

Refugee assessment

9. 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

10. 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.
11. On the basis of the applicant's documentary and oral evidence I accept: that he is a Sunni Muslim of Bengali ethnicity; that he was born and lived most of his life in Jessore district; that he completed primary school and several years of secondary school before withdrawing in grade [deleted]; that he worked on his father's farm for several years; and that he is single.
 12. On the basis of a Bangladeshi birth certificate in English and a Bangladeshi citizenship certificate in English provided by the applicant, I accept that his identity is as claimed and that he is a national of Bangladesh. There is no evidence before me to suggest that he has a presently existing right to enter and reside in any country apart from Bangladesh. I find that Bangladesh is his receiving country for the purpose of this review.
 13. The applicant claimed in late January 2010 he started working in his cousin's [shop]. Although he was initially unaware of it, after some months he learned that his cousin was a 'great leader' of the JI and that his shop was the 'temporary office' of the JI. While managing the shop, and sometimes overseeing the work of [workers] at his cousin's [business], the applicant also, at his cousin's request, invited JI members to attend meetings in late August 2011, in late November 2012, and in early December 2012. At the SHEV interview the applicant explained that at these meetings participants made plans about how to free the 'big' JI leaders. He was never a JI member himself and he was never involved in their discussions. He only carried out his cousin's instructions. His knowledge of JI was 'very shallow' and he did not know very much about them. He also stated that his cousin was a 'leader of that bazaar only not a great leader'.
 14. The applicant claimed [in early] January 2013 the JI protest that had been planned for the following day was banned by the local authority who also declared that the market would be closed. On the morning of [the next day] the applicant's cousin told him to tell the market traders to remain in their shops, while his cousin went to the bus stand. The police came and asked where his cousin was and he replied he didn't know. The police told him the local authority had declared the market closed. Later a Jubo League cadre, S, came and asked where his cousin was and again he replied he didn't know. S told him he did know and slapped his face, punched him and started beating him. Then S's friends joined him and started beating the other shop employees and S tried to stab him. To save himself he hit S in the head with the metal rod (used for closing the shutter of the shop) and he escaped. He went to his female cousin's house and her husband took him to a local doctor for treatment. That day the police and Awami League hooligans destroyed a JI office, attacked its members, and arrested many of the leaders. The next day he went home and his father told him police had come to the house searching for him and told his father he had killed S. The following [day], he met his cousin in the back of his house. His cousin confirmed S was dead, and advised him to hide as the police had filed a murder charge against him for killing S. The next day he went to an uncle's house in Khulna and then he went to an aunt's house in [a nearby

village]. He recalled a relative who was involved in a business that sent people overseas and rang him. Then he called his cousin and he assured the applicant he would look after his expenses. His cousin also confirmed that the Jubo League was looking for him. The applicant departed Bangladesh [in] February 2013.

15. In support of these claims the applicant provided: a medical certificate dated [in] December 2016 issued by a doctor in Jessore confirming that [in early] January 2013 the applicant presented with a laceration on his right hand little finger that he alleged occurred when he was assaulted with a sharp object; a first information report [in early] January 2013 stating the applicant, and three other persons, were accused of pre-planning to cause murder; a statement of the same date by a police officer indicating a fight occurred between S, the Jubo League leader, and four of his colleagues, and the applicant and three workers at his cousin's store and that a witness told the police officer the applicant hit S in the head with an iron rod and killed him; a charge sheet dated [late] March 2015 noting the applicant has absconded but his three work colleagues were to face trial; a brief of the same date by a second police officer that largely repeats the first police officer's 2013 statement but adds that the Jubo Chatra League leader, S, and the Jamate Shibir and Chatra League, which is the JI's student wing³, faced off at the front of the market and that the applicant was the 'right hand' of the JI leader and cannot be arrested because he went to '[a named country]'; a form of order sheet dated [late] March 2016 issuing a 'W/A' against the applicant who it is noted had absconded and requiring the three other accused persons who were on bail to next attend the court [in] May 2016. In the SHEV application the applicant also indicated he would provide an Affidavit from the Ameer [leader] of the Jessore JI, although no such document is included in the review material.
16. At the beginning of the SHEV interview the applicant's representative stated on his behalf that there was a mistake in Part C of the written record of the entry interview, and that it incorrectly reflected that the applicant had said a political case was made against him because he was *in the AL*, whereas what the applicant actually said was that the case was made against him because he was *in the JI*. His representative attributed this error to poor interpretation. Furthermore, at the end of the SHEV interview, the applicant's representative stated that the applicant told him during the break that the entry interview interpreter was not a Bengali but was a Burmese Rohingya and that he didn't really understand him, that they had a lot of difficulty communicating, and that the interview took only one hour and fifteen minutes. His representative suggested to the delegate that without having recourse to any recording of that interview it could be that a number of misinterpretations had occurred and that the written record of the interview was inaccurate.
17. Notwithstanding the applicant's correction referred to above, during the SHEV interview the delegate put to the applicant that she had concerns about his claimed involvement with the JI because of differences between what he said in the SHEV application and related statement of claims and what he said at the entry interview. In response, the applicant stated that when he arrived on Christmas Island he was afraid that if the Australian authorities heard he had a murder case against him they would send him back to Bangladesh. Also when he came to Australia he was not mentally well and he could not figure out what to say or do. He said he told the entry interviewer that a strike day was declared through the microphone at the market and that everything had to be closed. When he tried to explain to the interviewer that this happened because of the JI he was told to tell his story briefly and so he said it was because of JI meetings that the police called a strike. The delegate then read to the applicant that at the entry interview he had said there was a strike because a man from JI, named

³ DFAT, "DFAT Bangladesh Country Information Report July 2016," 5 July 2016, CR0D9DEFA364.

Delwar Hossain Sayeedi, had been arrested and was to be ordered to be hung so the government called a strike. But that country information before the delegate indicated that Sayeedi was only sentenced to death on 28 February 2013 which was after the strike. In response, the applicant stated that at that time he did not remember the names of the leaders. The process had already started and he just remembered Sayeedi's name by chance. He just said the leaders had been arrested and imprisoned but the interpreter did not interpret what he said correctly. He did not talk about hanging just that the leaders had been imprisoned and that the process had started. The applicant also said that he remembered clearly that he said the police called the strike. However, for the reasons given later I do not accept the explanations given by the applicant as to why the entry interview is unreliable.

18. Country information before me indicates that the JI is the largest Islamist party in Bangladesh. It also states that many JI leaders and activists participated in Pakistani military operations during the 1971 independence war and have been implicated in war crimes. Since independence the JI has participated in government in coalition with other political parties in Bangladesh, although not in the most recent AL led governments. This history underpins JI's vocal opposition to the International Crimes Tribunal (ICT) that was established in 2010 to investigate and prosecute persons responsible for genocide, crimes against humanity, war crimes other crimes committed under international law in 1971. Country information further reports that JI has periodically held major strikes and violent demonstrations across the country, particularly against the ICT, that have resulted in numerous deaths, mainly at the hands of the security forces, and large scale property damage. In response the authorities have arrested thousands of JI supporters. The country information further reports that the 28 February 2013 conviction and sentencing to death of the JI Vice President, Delwar Hossain Sayeedi, sparked attacks by JI supporters on Hindu houses, businesses, and temples across the country. To date the ICT has indicted 42 people. Five of the six who have been executed have been from JI. Human rights groups assess that ICT proceedings fall short of international fair trial standards.⁴
19. I am willing to accept the applicant worked for a period for his cousin in his shop and sometimes oversaw [workers at] his cousin's [business]. However, for a number of reasons I do not accept that the applicant's cousin was a local JI leader; that the applicant assisted his cousin to organise JI meetings over several years; that [in early] January 2013 the applicant killed S, a Jubo League cadre who was seeking his cousin; or that the applicant is wanted by either the Jubo League or the Bangladeshi authorities.
20. Firstly, the applicant did not provide any supporting documentation from the JI after stating he would do so. As a consequence his cousin's claimed role with the JI is not supported by any evidence, apart from the applicant's assertion. Secondly, there are a number of significant discrepancies between the accounts he gave in the 2016 SHEV application and statement of claims and the SHEV interview as to the circumstances that caused him to leave Bangladesh, and the accounts of these events he gave to Department officers when he arrived in Australia in 2013. In the SHEV application the applicant provided no employment history for Bangladesh, although in the statement of claims he said he worked for his cousin from late January 2010 until early January 2013. In the statement of claims and the SHEV interview he attributed the attack on him by S, who he said he knew and who he said was an Awami Jubo League cadre, to his association with the JI through his cousin, the JI leader. By contrast, in both the written record and sound recording of the entry interview the applicant

⁴ Minority Rights Group International, "Under threat: The challenges facing religious minorities in Bangladesh", 17 November 2016, CIS38A80122747. DFAT, "DFAT Bangladesh Country Information Report July 2016," 5 July 2016, CROD9DEFA364. DFAT, 'Country Information Report: Bangladesh', 2 February 2018, CIS7B83941169.

indicated he worked for his cousin from 2007 until 2011 and that from 2011 to 2013 he was unemployed; and he omitted any mention of his cousin's involvement with the JI, or with any political group for that matter, and indicated in his responses to a series of questions that neither he nor any family members had been associated or involved with any political group or organisation or involved in any activities or protests against the government, and no political groups were operating in the area he lived. He also said that he did not know the person who attacked him, and he indicated that the false case was made against him because he was one of the Awami League. In the bio-data interview the applicant stated that he left Bangladesh because he opened the shop in the market and he and others were beaten by the JI. He said JI had announced a strike to protest against the government's arrest and mistreatment of someone, and that JI were upset that he and others had opened their shops on that day. After that police came to arrest him so he fled. The implication in both the early interviews was that he feared harm from the JI, not that he had any involvement with the JI.

21. At the SHEV interview the applicant provided a number of explanations to account for these apparent difficulties – including misinterpretation during the entry interview, an initial fear of disclosing that he had killed someone, and mental ill-health. I am mindful that bio-data and entry interviews are often relatively brief and are designed to gather information from the applicant on a range of issues. In isolation they may only be of limited value. I also note that the entry interviewer did ask the applicant to state 'in a few sentences' why he left Bangladesh. However, I also note that following his initial statement about what he'd experienced the interviewer asked him a number of follow up questions in an attempt to tease out more about the circumstances in which he left the country; and at the close of the interview she asked him whether there was anything else he would like to say that they had not covered to which he stated 'no'.
22. I have listened to the entry interview sound recording and for a number of reasons I am not persuaded that the applicant was misinterpreted when he was asked why the false case was made against him. Firstly, the applicant can be heard at the relevant point referring to the Awami League, not the JI. Secondly, at the outset of the entry interview the applicant confirmed that he understood the interpreter. Also the interviewer gave him a warning that if the information he gave during a future interview was different from what he told her in the entry interview this could raise doubts about the reliability of what he had said. Additionally, while in my view the entry interpreter's English expression was not perfect, it is apparent the applicant understood the interpreter and vice versa, and that they were able to communicate satisfactorily. Concerns about the interpreting were only raised at the SHEV interview. I note neither the applicant nor his representative has provided an alternative accredited translation of part or all of the entry interview sound recording, identifying errors between what the applicant said and the written record. Having regard to the information before me, I am of the view that at the time of the SHEV interview the applicant realised there were contradictions and omissions between what he said in the 2016 SHEV application and statement of claims and what he had said three years earlier, and that he sought to obscure them by blaming the interpreter.
23. While I accept as plausible that an individual may feel reluctant to mention that he had killed someone, it seems unbelievable that, if true, the applicant did not mention his cousin's role as a local JI leader at all in the entry interview, when it now forms the basis of all his claims. I do not accept that he feared divulging his cousin's political activism or his association with that. Nor do I accept that the differences and omissions between the SHEV application and statement of claims and the SHEV interview and the earlier interviews can be explained by mental ill-health on the applicant's part. Apart from the applicant's assertion, there is nothing in the information before to suggest that he was psychologically impaired at that time. The

entry interview was conducted more than two weeks after the applicant's arrival in Australia. During it he did not mention that he was suffering from any psychological or medical issues. In the audio recording of the entry interview the applicant spoke calmly and rationally and in my view did not sound distressed. In addition, in the bio-data interview conducted a bit over a week after the entry interview the applicant indicated he did not have any health concerns and the interviewer recorded that he did not observe anything that might suggest that the applicant may have suffered torture or trauma and he concluded that the applicant exhibited no significant vulnerabilities.

24. While the timing of the claimed JI meetings, purportedly organised by the applicant's cousin with the applicant's assistance, is broadly consistent with country information before me concerning the establishment of the ICT in 2010 and the ensuing arrest of some JI leaders and the beginning of agitation about that by the JI, apart from the applicant's assertion, the timing of other specific events – that is the cancelled early January JI protest about the imprisonment and prosecution of JI leaders, the fight between the applicant and the Jubo League cadre, and the police and AL's attack on a JI office and the arrest of many of its members - seems to be at odds with independent country information cited above which indicates the violent unrest associated with the ICT trials, and in particular with the conviction of the JI Vice President, occurred in Bangladesh in late February and early March 2013⁵, several months after the applicant claims and after he had departed Bangladesh.
25. Finally, while the applicant has provided medical, police and court documents that on their face corroborate his claims, these documents do not overcome the serious concerns I have about the plausibility of those claims as outlined above. Noting country information on the easy availability of fraudulent documents in Bangladesh⁶, and that these documents appear to be contradicted by several other documents provided by the applicant that attest to his good character, including a citizenship certificate issued in March 2016 by the local chairman around the time the murder charge against him was purportedly being considered in court, and the poor quality of the English expression in what are purported to be official documents, I am not satisfied as to the authenticity of the documents and I place no weight on them.
26. At the SHEV interview, when the delegate asked whether anything had happened to his cousin, brother or father since he had been in Australia, the applicant stated when he first arrived in Australia nothing really happened but later, in around 2014, the Jubo League threatened his father. They came to the house and said 'your son has escaped but you're still here so now you have to give us money'. He sent his father \$1,000-\$2,000 to give to them and nothing happened to his family. Then towards the beginning of 2016 they came again and demanded more money from his father. His father said he couldn't pay them because he didn't have any money and he told them he didn't want to give them money. They kidnapped his father and after two days they killed him and hung him from the tree near their house. By way of explanation of this new claim the applicant added that he was never asked this question before so he never said anything before. And in support of the claim he provided a [money] transfer receipt dated [early] April 2014 for the amount of \$2,500 sent by someone other than the applicant to the applicant's brother. When asked by the delegate why his name was not on the receipt, the applicant stated the transfer was not made by him but rather by a friend he had borrowed the money from.

⁵ Minority Rights Group International, "Under threat: The challenges facing religious minorities in Bangladesh", 17 November 2016, CIS38A80122747.

⁶ Immigration and Refugee Board of Canada, 'BGD105263.E Bangladesh: Reports of fraudulent documents (2011-2015)', 20 August 2015, OGFDFC61A41. DFAT, "DFAT Bangladesh Country Information Report July 2016," 5 July 2016, CROD9DEFA364.

27. I am willing to accept that in 2014 the applicant sent a sum of money to his family via a friend. DFAT has consistently reported that it is common for expatriate Bangladeshis to send remittances home to support their families⁷. However, given I have not accepted that his cousin was a JI leader, that he was associated with the JI, or that he killed a Jubo League cadre, I do not accept that his father paid that money to the Jubo League because they threatened him about the applicant disappearing. Nor do I accept that in early 2016 the Jubo League kidnapped and killed the applicant's father. I do not find his explanation at the SHEV interview, that he had never thought to mention these incidents previously because he had not been asked about any impact on his relatives, persuasive. If true, it is implausible that he would not have mentioned these significant events in either the SHEV application lodged in May 2016 or the related statement of claims lodged in July 2016, both of which were prepared with the assistance of his representative. I also note that in the SHEV application the applicant indicated that both his father and brother were alive and residing in Bangladesh but that his mother had died; and that early in the SHEV interview when the delegate was questioning him about his family background he spoke about his brother living with his parents and his father's business interests seemingly indicating his father was still alive. It was only when the delegate pointed out that in the SHEV application he had indicated his mother was deceased that the applicant then said that both parents had passed away.
28. Overall, I am not satisfied there is a real chance the applicant will suffer harm from the Awami Jubo League or the Bangladeshi authorities, or anyone else, for the reasons he has claimed.
29. While he made no claim to fear harm for this reason, in the SHEV application the applicant recorded that he did not obtain a travel document and that he departed Bangladesh illegally by boat in 2013. The delegate also considered whether he would suffer harm as an asylum seeker and returnee to Bangladesh, although the applicant made no claim in this regard.
30. Country information before me indicates the Bangladesh Emigration Ordinance Act (1982) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the Act. Bangladeshis require a valid passport and visas (depending on the destination country) to depart the country. However, DFAT has also reported that it is not aware of any cases in which authorities have enforced these provisions. They state that Bangladesh accepts both voluntary and involuntary returnees but have generally insisted on a case-by-case, community level police check to verify the identity and Bangladeshi citizenship of returnees before authorising their return and issuing travel documents. The International Organisation for Migration's Assisted Voluntary Returns and Repatriation program assists Bangladeshi returnees in cooperation with the returning country and the Government of Bangladesh. DFAT has no evidence to suggest that recent returnees from likeminded countries have received adverse attention from authorities or others. DFAT assesses that most returnees, including failed asylum seekers, are unlikely to face adverse attention regardless of whether they have returned voluntarily or involuntarily. Authorities may take an interest in high-profile individuals who have engaged in political activities outside Bangladesh, including people convicted of war crimes in absentia⁸.
31. I accept the applicant departed Bangladesh illegally. However, I have not accepted he was involved with the JI or that he killed a Jubo League cadre, that the Jubo League murdered his father, or that he was of interest to either the Jubo League or the Bangladeshi authorities. As

⁷ DFAT, "DFAT Bangladesh Country Information Report July 2016," 5 July 2016, CR0D9DEFA364. DFAT, 'Country Information Report: Bangladesh', 2 February 2018, CIS7B83941169.

⁸ DFAT, "DFAT Bangladesh Country Information Report July 2016," 5 July 2016, CR0D9DEFA364. DFAT, 'Country Information Report: Bangladesh', 2 February 2018, CIS7B83941169.

a result, I conclude that the applicant does not have a high political profile, or indeed any political profile. While the country information set out above indicates it is an offence for a citizen to depart from Bangladesh other than in accordance with the procedures laid down in the Act, it also indicates the law is not enforced and that returnees are provided with some assistance to resettle in Bangladesh. Having regard to the information before me, I am not satisfied there is a real chance the applicant will suffer any harm because he departed Bangladesh illegally or because he sought asylum overseas before returning to Bangladesh.

Refugee: conclusion

32. 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

33. 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

34. 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.
35. I previously concluded that the applicant's cousin was not a JI leader, that the applicant had no association with the JI, that he did not kill an Awami Jubo League cadre, that this group did not extort or hang his father; and that the applicant was not wanted by the Jubo League, the Bangladeshi authorities, or anyone else. And I was not satisfied that there is a real chance the applicant will suffer harm for any of these reasons. I also was not satisfied that the applicant faced a real chance of harm because he departed Bangladesh illegally; or because he is an asylum seeker and returnee. As 'real risk' and 'real chance' involve the application of the same standard⁹, 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.

Complementary protection: conclusion

36. 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).

⁹ *MIAC v SZQRB* (2013) 210 FCR 505.

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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.

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36 Protection visas – criteria provided for by this Act

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- (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.

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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.