



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA20/08506

Date and time of decision: 22 July 2020 18:53:00
M Wei, 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 June 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in August 2017. A delegate of the Minister of Immigration (the delegate) refused to grant the visa on 18 June 2020. The delegate found that the applicant did not have a well-founded fear of persecution and was not at a real risk of significant harm upon his return to Bangladesh.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. This matter was referred to the IAA by the Secretary on 23 June 2020 and on the same day, the IAA wrote to the applicant advising him of the referral. On 2 July 2020, the IAA received an email from the applicant's representative, who was appointed by the applicant on 26 June 2020. The representative indicates in the email that he intended to provide a submission within 14 days and asked the IAA to kindly wait for unspecified 'additional supporting documents' from the applicant. The IAA telephoned the representative on the same day seeking to clarify that submission should be provided within 21 days of the referral, which would end on 14 July 2020. The representative indicated that the applicant was not seeking extension of time but that he may request an extension at a later time. He indicated that he would aim to provide a submission by 14 July 2020.
4. On 9 July 2020, the IAA received a further email from the applicant's representative and a written submission was attached to the email. The submission asks the IAA to provide with the applicant more time to get documentary evidence for his case proving his membership with the Bangladesh National Party (BNP), citing that he cannot provide these documents due to the impact from COVID-19 because 'everything is closed'. It also states that that the applicant did not realise that he needed to prove his case with documents until he received the Department's refusal decision. It states that the applicant has explained that he is in touch with members of the BNP who lives in Australia and once the COVID-19 restrictions are lifted he will get confirmations from these people too. It further explains that the applicant lives in metropolitan Victoria and current COVID-19 restrictions do not allow him to get the documents he needs to prove his case even from Australia.
5. The applicant's request was considered but not granted. The IAA notes that the applicant has not specified from whom or which member of the BNP in Australia that he seeks to obtain supporting documents. It is also not evident what specific facilities it is that the applicant is asserting he requires access to, or that these facilities have in fact been closed, or that he is unable to communicate with others by telephone or email. The IAA notes that the Department had notified the applicant's refusal decision to him some three weeks ago prior to this request, on 18 June 2020. It further notes that the applicant currently has the assistance of a registered migration agent (and that he signed the document appointing his representative on 26 June 2020). The IAA also notes that the applicant was assisted in lodging his SHEV application and its associated claims and documents by his former representative (also a registered migration agent). The IAA further notes that the applicant was interviewed by an officer of the Department on 12 September 2019. During the SHEV interview, he was asked specifically if he

had any supporting documents about his membership in the BNP, he responded by saying that he did not bring those documents with him when he came to Australia and another thing was that the situation for the BNP in his area was not good and they could not do activities over there these days. The applicant was also asked at another point of time during the SHEV interview if he had evidence of his political profile in Bangladesh. In reply, he said that he was telling the delegate about his evidence. He further explained that during his involvement at the time, there was no media or online platform so there was no evidence left. Neither did the applicant claim then that he was involved in the BNP in Australia. The primary decision was not made until 18 June 2020. The applicant's representative was notified of the IAA's decision not to grant an extension on 10 July 2020 and the representative responded on the same day stating that he has passed on this information to the applicant. No further correspondence has been received.

6. The written submission, while disputing on the delegate's findings, does not raise new information.

Applicant's claims for protection

7. The applicant's claims can be summarised as follows:
 - He is Bengali and a Sunni Muslim, from a village in Chittagong district. He completed higher secondary education.
 - He was an active supporter/member of the BNP.
 - In or around 2008 he became interested in the BNP and started getting involved with some of their activities. While working in his father's [shop], he would regularly read the newspapers to illiterate customers about politics and speak favourably about the BNP.
 - He would also attend small gatherings organised by the BNP in his local and neighbouring villages, which were held at least five times a year. He would make speeches at these gatherings criticising the Awami League (AL) and speaking favourably about the BNP.
 - On occasion, he would get involved in arguments with AL supporters because of his open involvement with the BNP's activities and gatherings.
 - On about 28 February 2013, an Islamic political leader and a leader of the Jamaat-e-Islami party, Delwar Hossain Sayeedi ('Sayeedi') was convicted of committing war crimes. A protest was called by the JI immediately. The protest was planned the night before at a meeting that the applicant had attended with other supporters from JI and BNP. The applicant attended this protest on 28 February 2013.
 - The protesters were met by the police. He suffered some non-serious injury to his leg. He was also involved in a fight with AL supporters but he managed to escape and returned home.
 - After he returned home that day, a group of 20-25 angry AL supporters armed with knives, guns and sticks came to his home looking for him. He managed to escape to his aunt's place in another village to hide.
 - A few days later, his father told him that the AL supporters went to his [shop] and threatened him. His father was told that he was not allowed to open his shop until they located the applicant. The property was later taken away from his father by the landlord.
 - He later moved to Chittagong and then came to Australia by boat.

- In early 2015, his brother informed him that he was attacked in their home village by AL supporters, who demanded to know where the applicant was hiding.
- His family told him they were facing problems and could not stay at home. The AL people demanded money from them 'nowadays'.
- He fears harm in the hands of AL people and the authorities due to his affiliation with the BNP and that he would be accused of having spoken against the AL government in Australia.

Refugee assessment

8. 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

9. 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.
10. The applicant arrived in Australia [in] June 2013. An entry interview took place on 27 June 2013. The applicant was invited to apply for a protection visa on 16 August 2016 and he lodged his SHEV application on 7 August 2017. As part of visa application, a 5 page statutory declaration/written statement was provided. On 21 August 2019, the applicant was invited to attend a SHEV interview scheduled to take place on 12 September 2019. The applicant attended the SHEV interview without his migration agent.
11. The applicant has consistently claimed that he is a citizen of Bangladesh and is a Bengali Sunni Muslim, born in a village in Chittagong District in [year]. The applicant provided copy of a birth certificate and education certificates. I accept the basic personal details as provided. I find the applicant is a national of Bangladesh and that Bangladesh is his receiving country.
12. The applicant claimed that he and his family faced harm in the past and he also fears harm in future due to his claimed affiliation with the BNP. While he claimed in the visa application that

he was an active supporter of the BNP, he appeared to claim that he was a member of the BNP and he was keen to gain a leadership role in the party before he left Bangladesh. For the reasons discussed below, I am not satisfied that the applicant has presented a set of credible protection claims.

13. In the visa application, the applicant stated that he would attend 'small gatherings' organised by the BNP in his local and neighbouring villages. These gatherings would be held at least 5 times a year. He would make speeches criticising the AL and speak favourably about the BNP at these gathering.
14. The applicant was asked at the SHEV interview to talk about the small gatherings he attended. He needed prompts in giving answers. His evidence was also changing. He initially responded that he did not understand the question asked. When the relevant part of his written statement in the visa application was read to him, he gave examples such as the BNP's foundation day, the BNP leaders' birthday and victory day and then said that after 2008 the BNP was not in power. When he was asked what happened and were the gatherings stopped, he replied 'yes, they stopped the gatherings because whenever we organised these gatherings, opposition people went over there stopping us'. When the interviewing officer sought to confirm whether it was correct he said that the gatherings stopped in 2008, the applicant said that 'after 2008 that type of gatherings stopped'. Afterwards, he sought to correct his earlier statements saying 'actually after 2008, the gatherings started' and that they used to organise these gatherings whenever it is possible at that time. When the applicant was asked to confirm that he was saying that the gatherings commenced from 2008, he did not answer the question asked and stated that the election took place in 2008 and that the AL took power in January 2009, suggesting that he was trying to work out the timing. When he was again asked from which year he got involved in small gatherings, he said 'after that incident I started attending those'. Only after he was asked again which year he attended the gatherings, he then said it was since 2008. Given the significance of the December 2008 election, as it was since then that the AL came to power,¹ I find it is concerning that the applicant has provided conflicting answers as to when he started to attend the BNP gatherings.
15. While the applicant stated in the visa application that he spoke at these 'small gatherings', when he was asked at the SHEV interview how big the audience that he used to speak to, he initially said that the audience could range from 20 to 500 people and he also said that they used to organise some home based meetings which sometimes were attended by 10-12 people. He also said that the home meetings used to be held 'in front of our homes'. When asked how it would be possible to fit 100-500 people in front of the homes, he said that they used to organise the meeting where the BNP supporters were the majority but also said that they were not allowed to use microphone or loud speaker. When he was asked several times how many people he would address in these small meetings, he said sometimes 20 and sometimes 100, saying that the target was to organise 100-150 people but sometimes 20 people attended and sometimes more than 20 people attended. He also said immediately after that he would address at those meetings sometimes 200 attended and that he could not remember the exact numbers. His evidence was also that he only spoke at smaller meetings because he did not held 'a big position' at that time and that he used to organise this type of meetings. When he was asked how he would prepare his speeches, he referred to that he spoke against the ruling party engaged in illegal things and corruption and the former BNP leader introduced the multi-democracy to the country. When asked if he had any

¹ UK Home Office, "Country Policy and Information Note Bangladesh: Opposition to the government", January 2018, OG9EF767910; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

documentation or evidence about the speeches he gave, he said these were verbal speeches and nothing was in writing.

16. When asked if he had any supporting evidence about his membership in the BNP, the applicant said that he did not bring these documents with him when he came to Australia. He added that another thing was that the situation for the BNP is not good in his area and is not good over there and they cannot do activities over there these days. When asked him to describe his reputation in the BNP, his evidence was that he had a very good reputation because of the way he organised people and the way he invited people to the BNP. He said that his leader at that time told him that he should keep up with his good work and would get a party position or title in future when one became available but he left before an opportunity came.
17. When he was asked to describe some of the activities he performed for the BNP, he said that he had mentioned earlier at the SHEV interview that he spoke about the wrong things done by the AL, such as illegal things and corruption with tenders and construction projects and that he had mentioned that in future 'we' would do good things. When asked, he said that he was involved in the BNP for 5 years in a voluntary capacity.
18. When he was further asked how frequently he was involved in the BNP activities, he said whenever they called him, he would work with them. When asked again how frequently that would be, his evidence was that there were five to six different occasions, such as party day, victory day or other days and that he used to attend these main events; he also used to attend these meetings organised for temporary issues. When asked how many protests he had attended, he initially responded that he could not tell the number but whenever the BNP organised gatherings in his area were organised that they 'invited' him, he would attend those gatherings. When asked again to give an estimate, his answer was that every year there were 2-3 protests or programs in his area and he used to attend those programs but the opposition party people used to attack them during the protest. When he was asked if he had any evidence of his political profile in Bangladesh, he said that what he had told was his evidence. He said there was no evidence left as during the time of his involvement there was no media or online platform.
19. Even I were to accept that the it is plausible that the size of the his audience in these meetings might vary and it would be difficult for the applicant to recall the number of people attended in these meetings, the applicant's evidence at the SHEV interview about his political involvement in the BNP was overall vague, unconvincing and at times confusing when details were sought in respect of his written claims. Despite of having involved in organising and speaking at BNP meetings, his evidence suggests that he was unsure where the meetings were held. This is concerning if he had organised meetings and/or made speeches at these meetings about five times a year for a period of 5 years prior to his leaving Bangladesh in 2013. His descriptions about the speeches he had given or the issues he spoke about are also very general. While he was not specifically asked, given his evidence that he started his involvement from 2008 and that a major election was held in December 2008, it is also concerning that he made no reference at all in respect of any work he did during election period, neither did he name the BNP leader who had promised him with a position in future or any BNP leader in his home area that he had worked with during a five year period.
20. The applicant also provided some confusing evidence when describing the visits from the armed AL people to his home on the day of the protest. He said that 'they were approaching in a line, I did not see them'. When he was asked again if he saw these people, he then changed his evidence stating that he 'saw a little bit of these people'.

21. The applicant claimed that his father could not open the shop after the 28 February 2013 incident. However, he has provided differing evidence as to what happened to his father's shop and when his father closed the shop.
22. In the visa application, he stated that a few days later (after the 28 February 2013), his father called and told him that the local AL supporters went to his [shop] and threatened him. The AL supporters warned his father that he was not allowed to open his shop unless he handed the applicant over to them. They also told his father that he was not allowed to open his shop until they found the applicant and that when they found him, they would kill him. His father told the AL supporters that he would inform them about the applicant's whereabouts if he came to know it. The applicant further stated in the visa application that his father sought the AL supporters' consent to open his shop in the meantime but the men refused. When he was asked at the SHEV interview to talk about a bit more about what happened when the AL supporters came to visit his father's shop, despite being prompted, he did not refer to this incident, rather his evidence was that his father 'did not open the shop' when they attacked him on 28 February 2013 as his father feared that the AL people 'would come and attack'.
23. The applicant also changed his evidence as to when his father closed the shop during the course of the SHEV interview. At the beginning of the interview, when the applicant was asked about his parents' occupation, he said that his father used to have a shop and he used to look after the shop when he was over there. He then said 'since I came to Australia, we could not open the shop because of some problems'. He then corrected and said 'not since I came to Australia, actually after 28 February when the incident happened.' Later at the interview, when the applicant was asked to talk about the incident when the AL supporters came to visit the shop, as referred to above, he said that his father did not open the shop when they attacked him on 28 February 2013. However, about two minutes later, when he was asked about how his family survived when the shop was closed, he said that his father could not open the shop after he arrived in Australia. I consider it is not likely a coincidence that the applicant had stated twice during the SHEV interview that his father closed the shop after he arrived in Australia.
24. Towards the very end of the SHEV interview, when asked what he thought would happen to him if he were to return to Bangladesh, he claimed that his family told him that they were facing problem there and could not stay home. He claimed that AL people demanded money from 'us' and they would torture him if he could not give them money. When he was asked if they demanded money from him when he was in Bangladesh, he replied 'no'. The applicant's evidence at the start of the SHEV interview was that his parents have only one residence and never changed house. The applicant's parents' continuing residence in the same address seriously undermines this recent and quite vague claim.
25. The applicant also claimed in the visa application that in early 2015, his brother was attacked in his local village by AL supporters who demanded to know where the applicant was hiding and who also threatened that they would kill the applicant if they found him. The applicant made no reference to this incident at the SHEV interview. While the applicant was not questioned on this particular incident, he had made claims that his family was facing problems and he was also invited to add any further evidence towards the end of the interview.
26. I note the applicant had raised the claim briefly that he was a BNP supporter and he attended a protest on 28 February 2013 to protest Sayeedi's conviction verdict in his entry interview, shortly after he arrived in Australia. However, raising these claims earlier does not convince me that his claims are true when weighing all the evidence before me. When his claims were tested at the SHEV interview, the applicant appeared to require repeated questioning and prompts for the interviewing officer to elicit meaningful details about his claims. While the

applicant has displayed some basic general knowledge of Bangladesh politics, his evidence in respect of his political involvement in Bangladesh was overall very general and unimpressive. It did not impress me that he was speaking from personal experiences.

27. The applicant's evidence was also that before he attended the protest on 28 February 2013, he was never sought out by AL people and any problem he had was limited at the level that he argued with them. His evidence was that he spoke to his shop customers about his political views as they used to ask him about political things. He also said that the AL people who came to his home seeking to harm him following the protest were locals and neighbours who used to come to his home sometimes for different occasions or different jobs. On his evidence, 'they became angry (with him) after the 28 February 2013 incident'. His evidence was that these people used to come to his shop as well before the decision of Sayeedi in February 2013 and that after the decision was announced these people started to dislike 'us' and they could not tolerate 'us'. When asked why he would be particularly targeted after the protest given his evidence that hundreds of people were at the protest and he was in the middle and not the front, he said that the reason was due to the speeches he made in public, as the opposition people were angry with him believing that the new generation would be attracted by his speeches. He said other reasons behind his being targeted were that he was very honest and people used to trust him because of his activities and that he never took money from the BNP as his financial situation was good at that time. I note his other evidence was also that he had public speeches several times a year from 2008 and that he also attended 2-3 protests each year and the opposition party people used to attack them during these protests. I do not find his evidence convincing or credible that he would suddenly become a target on 28 February 2013 immediately following a protest in support of a JL leader by people who he knew well, despite he had in the previous five years been involved in speaking publicly against the ruling party to his customers, at public meetings and attended protests several times a year. I do not find that the level of adverse attention he had drawn on 28 February 2013 and afterwards is commensurate with his claimed role on 28 February 2013 and the night before.
28. I note that the applicant's statutory declaration of 5 August 2017 states that it was prepared with limited assistance from a legal clinic and there may be omissions, mistakes or misunderstanding and he would like to use the opportunity at the SHEV interview to correct any mistake and provide further details. While it is understandable that the SHEV interview would be an opportunity for the applicant to provide further details, it is unclear why the applicant would have not corrected any mistake in the statutory declaration if he was aware of any at that time. The claims in the statutory declaration were also relatively detailed. In particular, the contents of the statutory declaration were interpreted to the applicant by a qualified interpreter by phone and he had declared that he believed that his statements are true in every particular. Having listened to the SHEV interview recording, I am satisfied that the applicant was provided the opportunity to present and clarify his protection claims.
29. Overall, the applicant does not impress me as someone who has had any real engagement in politics. While I am prepared to accept he was a low level BNP supporter, I am not satisfied that he was an active supporter or member of the BNP. I consider the applicant and his other family members' involvement in the BNP at best was no more than having voted for the BNP. I am not satisfied that the applicant organised, participated and spoke at BNP gatherings or meetings or otherwise spoke against the ruling party or spoke in favour of the BNP. I am not satisfied that he attended a protest on 28 February 2013. I am not satisfied that he attended any other BNP protests or rallies in Bangladesh. I am not satisfied that the applicant was harmed or sought out by the authorities or AL people before he left Bangladesh. I am not satisfied that his family members have faced harm as he claimed. I am not satisfied that the

applicant or his family members came to the adverse interest of the AL people or anyone in Bangladesh.

30. I note that applicant stated in the visa application that he fell anxious about what AL people might do to his family and village under the heading 'My health/mental health'. The applicant provided no supporting medical evidence about any health condition. On the evidence before me, I am not satisfied he has a mental or medical condition or he requires ongoing medical treatment.
31. The country information before me indicates that the ruling AL party has, since it came power following the 2008 election targeted at government critics, activists and senior members of the opposition parties.² DFAT assesses that under the current AL government, senior members of the opposition parties, particularly the BNP, 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. This risk is elevated around times of heightened political tension, including elections. Those who are members of opposition political parties and auxiliary organisations but who do not engage in political activities and demonstrations face a lower risk of arrest, although this may vary according to location and timing.³
32. Bangladesh is also historically prone to high levels of politically motivated violence (PMV). PMV manifests in the form of violent clashes between supporters of different factions of the same party (intraparty violence), supporters of rival parties (inter-party violence), between party supporters and law enforcement agencies, and between issues-based, politically motivated protester groups and law enforcement agencies and/or party auxiliary organisations. Fatalities and serious injuries often result from these clashes. PMV tends to peak during periods of heightened political unrest, including during elections, strikes and blockades. The period leading up to the December 2018 national elections was also marked with some violence, primarily of an inter-party nature, but PMV-related deaths and casualties were significantly down and the aftermath was relatively peaceful compared with the national elections held five years earlier. Intra-party violence has become far more common than inter-party violence, particularly between AL factions and individuals.⁴
33. The applicant does not claim and has provided no credible evidence that he has had any political involvement in the BNP in Australia or has otherwise engaged in any anti-government or anti-AL activities in Australia. I am not satisfied that his involvement in the foreseeable future in the BNP if he were to return to Bangladesh, if any, would be anything more than as a non-active supporter. I consider any involvement with the BNP of the applicant, if any, would be limited to merely voting for the party at best.
34. On the information before me, I am not satisfied that the applicant or his family members have a profile to be of adverse interest to the AL or anyone else. I am not satisfied that the applicant faces a real chance of any harm from the AL, the authorities or anyone else for political or other reasons if he were to return to Bangladesh, now or in the reasonably foreseeable future.

² Human Rights Watch, "World Report 2020 Events of 2019", 14 January 2020, 20200115082903; DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438; Odhikar, "Annual Human Rights Report 2019 Bangladesh", 8 February 2020, 20200218104232; United States Department of State, "Country Reports on Human Rights Practices for 2019 – Bangladesh", 11 March 2020, 20200312085617

³ DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

⁴ Ibid.

35. The applicant also claims to fear harm on the basis of being a returning asylum seeker having left Bangladesh illegally. I accept that the applicant left Bangladesh by boat through people smugglers after paying a sum of money to the smugglers. Although the Emigration Ordinance Act (1982) makes illegal departure an offence, according to DFAT, it has no evidence to suggest that recent returnees have received adverse attention from authorities or others. Moreover, Bangladesh has a very large diaspora, and tens of thousands of Bangladeshis exit and enter the country each year, and that the vast majority of returning Bangladeshis re-enter the country without incident. 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 absentia. This is unlikely, however, for returnees without such a profile.⁵ The applicant does not have a profile of concern to the authorities, the AL or anyone else. The information before me does not support that the applicant would be imputed with an adverse profile because he has sought asylum in Australia. I am not satisfied that the applicant faces a real chance of any harm if he were to return to Bangladesh, as a returning asylum seeker who departed Bangladesh illegally.
36. I am not satisfied that the applicant faces a real chance of persecution from anyone if he were to return to Bangladesh now or in the reasonably foreseeable future.

Refugee: conclusion

37. 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

38. 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

39. 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.
40. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

⁵ Ibid.

41. I have found above that the applicant does not face a real chance of any harm. As real chance and real risk involves the same threshold, based on the information discussed above, I am not satisfied that the applicant faces a real risk of significant harm, if he were to return to Bangladesh, now or in the reasonably foreseeable future.

Complementary protection: conclusion

42. 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

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.

...

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.