



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA20/08640

Date and time of decision: 30 September 2020 17:20:00
N Micallef, 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 citizen of Bangladesh. He arrived in Australia [in] June 2013 as an unauthorised maritime arrival. On 1 August 2017 he lodged an application for a sub-class XE-790 Safe Haven Enterprise Visa (SHEV application) claiming that he will be harmed in Bangladesh on the basis of being a business owner extorted by, and unable to pay bribes to, political parties in Bangladesh, including the Awami League.
2. After interviewing the applicant on 16 July 2020, a delegate of the Minister for Immigration (the delegate) refused to grant this visa on 20 August 2020. The delegate accepted that the applicant had been subjected to extortion by some criminal elements in the Awami League as a business owner and because he was not a supporter of the Awami League. However, the delegate assessed that the chance the applicant would face serious harm in Bangladesh on the basis claimed to be remote. The delegate was not satisfied that the applicant faced a real chance of serious harm or a real risk of significant harm for any reason upon return to Bangladesh.

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. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Bangladeshi of Sunni Muslim faith, born in [year] in [a] village, in Jessor District, Khulna Division of Bangladesh, where he grew up with his family and resided until his departure from Bangladesh [in] May 2013. He is not a member of any political party.
 - He owned and ran a [shop], in [Bazaar 1]. In early 2013 men, who were Awami League (AL) supporters, began extorting money from him. They demanded he pay them [Amount 1] Taka and threatened to kill him if he did not pay. He did not earn that much money and could not pay it and told them so; but they kept returning to threaten him and demand the money, returning several times.
 - He was afraid of their threats and the power of those involved in organised crime to carry out their threats. He did not report the extortion to police as he believed that, even if the police would be willing to protect him, they would not be able to prevent the men from killing him.
 - Afraid of these threats to kill him, the applicant fled from his village, abandoning his shop (which has since been sold) and went to Dhaka and then Chittagong, from where he departed Bangladesh [in] May 2013.
 - He is a member of the particular social groups of business owners extorted by political parties including the AL, and business owners who refuse or cannot pay bribes to political parties including the AL. He will be subjected to serious harm in Bangladesh by the AL and its supporters, including beatings, serious physical injury and death.

- The men who extorted him will find him anywhere in the country, and shop owners are extorted throughout the country, and there is real chance of harm or death all over Bangladesh and therefore he would not be able to relocate anywhere else in Bangladesh. He also has no family, or resources to move, anywhere else in Bangladesh.
- The police and authorities would not be able to protect him from this harm.

Refugee assessment

6. 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

7. 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.
8. The applicant’s copy identity documents, both issued after his arrival in Australia, refer only to the applicant’s first name, not full claimed name, and he stated he was not sure why this was so. Nevertheless, noting his biographical details are otherwise consistent and there is no real contention about his identity and nationality, I am satisfied of the applicant’s claimed identity and that he is a [age] year-old national of Bangladesh. I accept that Bangladesh is the receiving country for the purpose of this review. On his evidence, apart from a married sister in another village, all his father and siblings remain living in the family home in their village where the applicant grew up and lived. I am satisfied this is where he would return to if returned to Bangladesh.
9. I accept that the applicant was not affiliated in any way to any political party in Bangladesh. He has consistently maintained that neither he nor any family members were politically involved or supporters or members of any political party in Bangladesh. He stated in the protection visa interview of 16 July 2020 (SHEV interview) that he never voted in any elections. I accept that this is so.

10. Since his arrival in Australia, the applicant has maintained his claims of being extorted in his shop by men associated with the AL making threatening demands for money. However, his evidence about these claimed events has significantly differed in material details across the different accounts he has given, including arising from his Irregular Maritime Arrival and Induction Interview of 14 June 2013 (the Entry interview), as noted by the delegate. These shifting and inconsistent accounts raise real concern about the credibility of the applicant's claims.
11. The applicant's evidence about his shop business was that he owned it and ran it until he left Bangladesh in May 2013. It was a small [store] selling things like [specified produce]. It was in [Bazaar 1] (the Union Parishad). There were other different shops around his in the Bazar including some other [produce] stores. He also carried on doing farming work on the family-owned farm. He claimed that in early 2013 men came to his shop to extort him for money ([Amount 1] Taka) and kept returning, demanding he pay up or he would be killed, but he never did pay them. They were a group of about five and two of them were called "[Mr A]" and "[Mr B]". He feared they would carry out their threats to kill him because he could not pay their demands. However, details beyond this were internally inconsistent. The areas of conflicting evidence include:
 - the applicant's SHEV interview evidence was that he ran his business from 2010 or 2011, for about three to three and half years. This conflicts with his Entry interview and SHEV statement evidence that he ran his shop from 2008, which would be for about five years.
 - the SHEV interview evidence was that the people extorting and threatening him were all members of the AL, and that he did not know which villages they lived in but they were from the same general area. In contrast, his Entry interview evidence was that these people threatening him were boys from his village, whose parents were from the AL.
 - his SHEV interview evidence was that the group returned to extort him about five to seven times, over the course of about two to two and half months before he left Bangladesh; in contrast to his SHEV statement claim that they came about three to four times over the course of two weeks or a little more.
 - his SHEV interview evidence was that the last time they came to threaten him was on 15 March 2013, a date he reiterated more than once, and a date he explained he remembered because it was so significant to his life. He described that after the threats on that day he went into hiding for about 15 days before he left Bangladesh, hiding in the houses of different people in his village. This was significantly contradictory to his SHEV statement and application evidence that the last incident had been on 30 April 2013 (and which also specifically corrected earlier Entry interview statement that it had occurred on 15 March 2013 as being incorrectly stated because of the effects on him of the boat journey), and that the men had threatened they would kill him that night (30 April) if he did not pay and so he fled his village that very same day to Dhaka and then to Chittagong, and he left Bangladesh from Chittagong [in] May 2013.
12. The contradictions between his accounts of how long he had owned his shop, and concerning the date of the last incident of threat and his subsequent actions were put to the applicant in the SHEV interview. He stated that the written claims were made a few years ago and his memory is weaker now, so the written claims must be correct, and also that with the passage of time he must have made a mistake. In assessing the applicant's evidence, I take into account issues such as the difficulties of recall over time and that an applicant's recount of an incident may vary to some degree in different accounts, and impacts of interpretation or cross cultural

communication. Of itself, a confusion concerning an exact date in the past might not be significant and might in some circumstances be explainable by passage of time. However, I consider that the significant, and as claimed, life changing events of a concentrated series of extortion attempts with threats to kill would reasonably be memorable, and I find it very difficult to believe that, if these events were true, he would not be able recall if it was a short series of events of three or four occasions over a little more than two weeks or a more protracted series of up to seven occasions over two and half months; or whether he fled his village immediately after the last threat or stayed in hiding with other people for 15 days and nights; or whether the people threatening him were from his own village or not, or whether they were AL member or just their parents. I consider these differences are significant and I do not consider such irreconcilably different accounts to be plausibly or credibly explained by a weak memory. I also consider any claimed weak memory of dates to be undermined by his adherence to a very particular date claimed, claimed as being specifically remembered, contradicted by a different particular date.

13. I have also considered a covering letter to the SHEV application, asserting that the SHEV application and statement was prepared with limited assistance and advice and advertent to possibilities that he may not have explored all his claims in these documents or understood all legal concepts and obligations. Nevertheless, I note that the applicant signed the SHEV statement having declared on it that it had been read back to him with a bi-lingual interpreter and that he agreed with its contents, and note also that the application form was completed with the assistance of a Bengali interpreter from TIS. I am not satisfied that if any assertion in the SHEV statement or form had not been made or intended to be made by the applicant at that time that it would not have been then identified and corrected at that time. I am not satisfied that discrepancy in evidence arising from the SHEV statement arose from any time or resource limitations or any other issues in preparing his SHEV application or statement. Given that the applicant reiterated in the SHEV interview the date of 15 March 2013 first raised in the Entry interview, I am not satisfied that his inconsistent evidence about the last claimed threat is satisfactorily explained by any claimed trauma or disorientation from his boat journey and note also that the Entry interview was conducted not immediately upon arrival in Australia but more than a week later.
14. Overall and together I consider the contradictory evidence raises substantial concern about the credibility of the applicant's claims. I am not persuaded by his explanations for the conflict in the evidence.
15. Moreover, there are other aspects of the claims that cause me concern.
16. I accept that criminal extortion has been known to occur in Bangladesh, including by political party activists, including those associated with the AL, noting country information that in particular the auxiliary organisation student groups of the parties (Bangladesh Chhatra League for the AL) who predominantly engage in the inter-party conflict violent street agitations that commonly occur in Bangladesh, are also used to expand influence and entrench control over resources and turf.¹ However, Odhikar indicated that predominantly these AL auxiliary groups dominated educational and business institutions, and that most of their criminal activities and violence were linked to vested interest. DFAT reports indicated that criminal violence and armed robbery was common in Bangladesh; however, it also indicated that in rural areas

¹ United Kingdom (UK) Home Office (UKHO), " Bangladesh December 2011", 23 December 2011, 3443; International Crisis Group (ICG), "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646; Odhikar, "Annual Human Rights Report 2017", 12 January 2018, CIS7B8394170; The Daily Star, "4 BCL men arrested over extortion attempt", 10/09/2016, CX6A26A6E9269; The Daily Star, "Ex-BCL man Rony sent to jail", 5 June 2018, CXBB8A1DA28715; The Daily Sun, "Seek police help to avert extortion DMP", 29 July 2013, CX312247

extortion for money with threats of violence of business owners by AL members and activists was reportedly against those affiliated with the Bangladesh Nationalist Party (BNP)).²

17. Even taking that country information into account, I note that the applicant demonstrated no evidence to support how he knew that the group members were AL members (or otherwise that their parents were, noting his conflicting claims), particularly considering he had no political involvements himself. There is no claim or evidence before me that any question of his political affiliation or any was discussed by the group. Moreover, the applicant's evidence was that he refused the extortionists' demands every time they came and never did pay them. He stated they made only verbal threats every time, and that he was never harmed. Noting the prevalence of violence reputed to the AL auxiliary groups and those who engaged in their criminal activities (including in Odhikar, ICG and The Daily Star), I find it implausible and difficult to reconcile with the country information that a large group outnumbering him, whom he purportedly feared would kill him, would simply keep walking away, empty handed, despite making threats of harm, every time they came, over the course of a couple of weeks (or months, on his shifting evidence) only to always be refused by him and that he was never instead physically assaulted or his property stolen or damaged as part of their threatening demands.
18. Given his claim to have run his shop for some years (the number of years differing in the evidence), it would be reasonable to find that he would have been acquainted with his neighbouring shop keepers and I find it very surprising that he claimed never to have approached any of them or any village elders for assistance or even advice concerning this claimed problem, or the police, as I note that extortioners did not have complete impunity in Bangladesh, even those from the AL, and police arrests and community interventions to stop them have been publicised, noting the earlier cited media articles. I find it implausible and improbable that he would not have sought any help at all if he had really been threatened as claimed.
19. The applicant claimed that his shop business had since been sold by his family, but in a very "hush, hush" manner so that the AL "hooligans" would not find out; because if they knew of the sale they would demand that money they had been asking for. He stated he had no idea how much his business sold for or what became of the proceeds money as he never asked his family. Given his claims that these local area extortion men who had targeted him would pursue him anywhere in Bangladesh for the demanded money and would pursue the sale proceeds if known, I find it difficult to believe that, if these claims were in fact true, these men would not have been able to ascertain from the applicant's absence, from any of the neighbouring shops, or from the new business owner, that the shop had been sold and pursue his family about it, or at the least make enquiries with his family about it. Yet there is no claim or evidence before me that any approach by any of these people was ever made to the applicant's family. More significantly, I also find implausible and difficult to accept the applicant's account that he never had any interest at all in and never asked how much his business sold for or what happened to the sale proceeds, given that he claimed to have invested either three or five years (depending on his shifting evidence) of his life into it.
20. Overall, I find the applicant's implausible, shifting and contradictory claims and evidence to be unpersuasive. I do not accept that he has given a credible account of his circumstances in Bangladesh or his reasons for leaving Bangladesh.

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Bangladesh 20 October 2014" 20 October 2014, CIS2F827D91369; DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169; DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

21. Although I have some doubts, I am willing to accept that the applicant owned a shop in Bangladesh. Noting his Entry interview evidence that his father and older brother, although working are dependent upon him because they do not earn enough to support themselves, and noting his evidence that the cost of his journey to Australia was [Amount 2] Taka, I consider it reasonable to find that that cost was covered by the sale of the applicant's shop business, which the applicant himself arranged to sell. However, for reasons discussed above, unlike the delegate, I do not accept that the applicant was ever subjected to any extortion or demands to pay money on threats of violence or death by any members, supporters or affiliates of the AL party or any of its auxiliary wings, or any other persons, as a shop owner in Bangladesh or for any other reason. And accordingly, I do not accept that any extortionist people or members or supporters of the AL or anybody else are seeking the applicant, or would kill him, beat him or cause him any physical injury or any other form of harm on return for non-payment of any money or for any reason, or would demand payment of any claimed money. I do not accept that the applicant has given a credible account of his circumstances in Bangladesh or his reasons for leaving Bangladesh. I do not accept that he fears harm in Bangladesh for any reasons claimed and nor do I accept that he would face any harm in Bangladesh on those claimed circumstances if he returned there.
22. I accept that the AL party remains the ruling party of the government in Bangladesh.³
23. The applicant has not indicated that he would or intends to open a new shop or become a business owner in Bangladesh if he returned there and I am not satisfied that he would.
24. Nevertheless, I give consideration to what if he were to open a shop or business in the future in Bangladesh. As indicated earlier, I acknowledge that there are reports of extortion occurring in Bangladesh, including by the student wing auxiliary organisations of political parties such as the AL, and of whom DFAT reported that they are often party activists, and which "*engage in criminal activities on occasion, including violence and extortion*".⁴ This country information before me indicates that predominantly activities of violence and criminality engaged in on occasion by AL leaders or political party activists primarily involves clashes between rival political parties, primarily between the AL and the BNP, or more increasingly with the long-incumbency of the AL government, between rival factions within the AL, including dispute over contested resources and turf and vested interests, including on university campuses. I am not satisfied that the country information before me supports that there is widespread or systematic extortion of or demand with threats of violence for bribe money of shop owners or business owners generally by political parties including the AL, or their leaders, members, supporters or activists, or any other persons. The media reports cited indicate that the police and authorities do take steps to protect citizens from such incidents that occur and to prosecute individuals apprehended, including those affiliated with political parties.
25. DFAT reported in 2018 and 2019 that in rural areas, AL members and activists have reportedly extorted business owners affiliated with BNP for money with threats of violence. However, I am not satisfied that the applicant is involved or affiliated in any way with the BNP, or any other political party, nor that that he would be perceived or imputed to be on return to

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

⁴ Including: DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438; UKHO, "Bangladesh December 2011", 23 December 2011, 3443; International Crisis Group (ICG), "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646; The Daily Star, "4 BCL men arrested over extortion attempt", 10/09/2016, CX6A26A6E9269; The Daily Star, "Ex-BCL man Rony sent to jail", 5 June 2018, CXBB8A1DA28715; The Daily Sun, "Seek police help to avert extortion DMP", 29 July 2013, CX312247; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Bangladesh 20 October 2014" 20 October 2014, CIS2F827D91369; Odhikar, "Annual Human Rights Report 2017", 12 January 2018, CIS7B8394170; Odhikar, "Annual Human Rights Report on Bangladesh 2018", 8 August 2019, 20190827144016

Bangladesh. The applicant's evidence demonstrated no leaning to any preference for any party. He stated he had never voted, but that if he were ever to vote for anybody in elections it would depend on who was the best candidate at the time. There is no claim or evidence before me that he has become politically interested or active with any political party or ideology since being in Australia. Nothing in the evidence before me satisfies me that the applicant would become politically interested in or active in any way with the BNP or any other political party in Bangladesh if he were to return. Even if he were, in any future elections to cast a vote for a candidate, I am not satisfied on any information before me that this would attract attention of or cause the applicant to become a target of the AL or any other political party or their affiliated people.

26. Overall, taking account of all the evidence and circumstances before me, even if the applicant were to open a shop or business on return to Bangladesh (of which I am not satisfied there is a real chance) I am not satisfied that the chance that he would on that basis be subjected to extortion or demands to pay bribes or money on threat of violence if he did not pay, by any political party including the AL, or any of their leaders, members, supporters or activists, or any other persons is any more than remote. I am not satisfied that the applicant would face a real chance of any harm in Bangladesh on return or in the reasonably foreseeable future on any claimed basis of being a member of any particular social groups of business owners who are extorted by political parties including the AL or business owners who refuse or cannot pay bribes to political parties including the AL.
27. The delegate assessed the chance of harm arising from the applicant's circumstances of having departed Bangladesh illegally without a valid travel document and that he would be returning as a failed asylum seeker. The applicant raised no claim for protection or fear of harm in Bangladesh on these grounds. I accept that he departed Bangladesh without a passport and acknowledge from the country information that this may amount to an offence under the *Emigration Ordinance Act (1982)* (EO Act).⁵ However, DFAT reported in 2014 that it was not aware of these penalties being enforced and there is no indication in the 2018 or 2019 reports that this has changed.⁶ There is no country information in the review material to support that the Bangladeshi authorities enforce the EO Act against returning Bangladeshi asylum seekers. Bangladesh accepts both voluntary and involuntary returnees and conducts a community level police check of returnees in order to confirm identity and Bangladeshi citizenship before authorising return and issuing travel documents.⁷ Whilst DFAT informs that authorities might take an interest in high-profile individuals, particularly those in the BNP or those who have engaged in political activities outside Bangladesh, I am not satisfied that the applicant is such a person. The country information before me does not support that returnees to Bangladesh, including involuntary returnees or failed asylum seekers, face adverse attention or mistreatment on that basis. I am not satisfied that the applicant would be returning to Bangladesh with any profile of adverse concern or interest to the AL or Bangladeshi authorities or anyone else, and I am not satisfied that the applicant would face a real chance of any harm in Bangladesh upon return or in the reasonably foreseeable future on the basis of having departed Bangladesh illegally and or having made a failed application for asylum in Australia.

⁵ The *Emigration Ordinance Act (1982)*", minlaw.gov.bd, 1982, CXBB8A1DA23900, sect.20(1); DFAT,"DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438;

⁶ DFAT, "DFAT Country Report Bangladesh 20 October 2014" 20 October 2014, CIS2F827D91369; DFAT,"DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169; DFAT,"DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

⁷ International Organisation for Migration (IOM), "Bangladesh", 1 August 2014, CIS29397; DFAT,"DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

28. On all the circumstances of the applicant and evidence before me, I am satisfied that the applicant does not have a well-founded fear of persecution in Bangladesh within the meaning of s.5(J)(1) of the Act.

Refugee: conclusion

29. 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

30. 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

31. 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.
32. 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.
33. As set out and for the reasons described above, I do not accept that the applicant was subjected to any extortion or demand to pay bribe money as a shop or business owner in Bangladesh, or on any other basis, by the AL or any persons associated with the AL or any other persons or political parties or was accordingly subjected to any threats of violence, death or harm. I do not accept that the applicant faced the harm he claimed in Bangladesh and I do not accept and am not satisfied that there is a real risk that the applicant would face harm of any kind or any significant harm in Bangladesh on the basis of those claimed circumstances.
34. I have otherwise found that there is not a real chance of the applicant being harmed in Bangladesh in the reasonably foreseeable future if he were to become a shop owner or business owner on return to Bangladesh or arising from his circumstances of departing illegally or returning as a failed asylum seeker, or any combination of those factors. Noting that the Full Federal Court⁸ has set out that the "real risk" test for complementary protection is the same standard as the "real chance" test, and based on the same information, and relying on the

⁸ *MIAC v SZQRB* [2013] 210 FCR 505

reasons set out above, I am also satisfied that there is not a real risk of the applicant facing any form of significant harm in Bangladesh.

Complementary protection: conclusion

35. 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.