



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA16/00219

Date and time of decision: 23 June 2016 16:19:25
Matthew Tubridy, 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. [In] June 2015 he lodged an application for a temporary protection visa (TPV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] May 2016. The delegate did not accept that the applicant's claim to have been a member of Jamaat-e-Islami (JI) or that on this basis he was ever harmed or threatened or had a false case lodged against him. The delegate accepted that the applicant had departed Bangladesh illegally but was not satisfied that the applicant faced a real chance of persecution or a real risk of significant harm on this basis.

Information before the IAA

2. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. I have obtained new information, specifically: country information on the candidates who stood in the 2008 national election in the applicant's local constituency and the local election outcome.¹ I require this information to properly assess the applicant's evidence in this regard and his claim to have been a member and supporter of JI. I am satisfied that that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

4. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He is a citizen of Bangladesh from Kalaroa, Sathkhira District, Khulna Division.
 - The applicant is a member of Jamaat-e-Islami (JI) in JI's [local ward]. His father and [relative] are also members and that his [relative] is the [official] of JI's [local ward]. He claims his father was a soldier during the war of 1971. Many important political leaders would come to meet with his father.
 - The applicant claims to have become involved in JI activities in the lead up to the elections of 2008. Towards the end of 2008 leaders of the Awami League (AL) filed a false case against his father for murder and terrorism to prevent his father from participating in the election. His father was imprisoned for [a time] and was tortured during his imprisonment. AL workers attacked the applicant's house and told his family that if they participated in any meetings or rallies that they would be destroyed.
 - They lost the election due to corruption. The AL won and formed a government and began to torture the opposition parties.
 - In February 2009 he was returning home from shopping when he was kidnapped by AL cadres who kept him in an unknown place and ill-treated him. His father paid a huge ransom and he was released after one week. Following this he felt scared and would have nightmares.

¹ [Information deleted]

- [In] June 2009 he was returning home from Sathkhira [location] when he was attacked by AL cadres who beat him mercilessly and left him when he was near death. Local people found him and got him admitted to the nearest private clinic. He was released after seven days. His parents went to the police station to file a case but were not able to do so. A false case was filed against the applicant to doom his political future.
- His father decided that for the applicant's safety he should be sent overseas. He was unable to obtain a passport because of the false case which had been brought against him. A local powerful [(or dalal)] businessman arranged for the applicant to travel illegally to [country] where he would be employed.
- [In] October 2009 he departed by boat for [country], arriving there in [date] October 2009. He worked in [country] illegally as a [occupation]. He was afraid of the [country] police and immigration service and of being arrested, imprisoned and tortured by them. Many of the Bangladeshis living in [country] were AL supporters. He was recognised and beaten by AL supporters who threatened to inform the [country] police of his illegal stay in [country]. Fearful of this he contacted [another] dalal who said he could get the applicant to Australia by boat. The dalal told him that Australia helps the poor and gives protection to refugees who leave their country for fear of persecution.
- He departed [country] by boat [in] September 2012, traveling to Australia via [another country].
- He has kept in contact with his family in Bangladesh. His father has informed him that in June 2015 AL cadres attacked his family's home, beating his father and burning the house. His father has told him that it is not safe for him to return to his country. He is unable to seek protection from the Bangladesh police and courts who will do whatever the AL government says.

Refugee assessment

5. 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

6. 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.
7. The applicant claims to be a citizen of Bangladesh and as evidence of this he has provided copies of documents which present as being his Bangladesh national identity card, his Bangladesh birth certificate, and a citizenship certificate issued by the [official] of the applicant's local union council. I accept that the applicant is a citizen of Bangladesh and I find that Bangladesh is his receiving country for the purposes of this review.
 8. At the 2015 TPV interview the applicant was questioned about how he became involved in JI and his knowledge of and involvement in JI politics. The delegate made it clear to the applicant that the purpose of such questioning was to establish the extent of the applicant's involvement in JI political activities. The applicant said he became involved in JI because his father, [and various relatives] are all supporters, and because it is the only Islamic party. The applicant demonstrated some basic knowledge of JI such as its being an Islamic party and that it had opposed the independence of Bangladesh by siding with Pakistan in the 1971 war.² He was able to identify the scales of justice as the JI logo and electoral symbol. When asked to name the local member of parliament at the time he was working for JI, the applicant stated that the man's name was [name] of the Awami League; and Bangladesh electoral reports list the elected candidate for [constituency] in 2008 as the AL's [name].³ The applicant correctly stated that in this constituency there was no JI candidate in [year].⁴ He correctly identified the year in which the most recent national election took place as 2014 (although he gave the day as 5 December rather than 5 January).⁵ Asked who founded JI the applicant identified Motiur Rahman Nizami (a JI leader who played a prominent role in 1971 when the movement fought for Bangladesh to remain within Pakistan, and who has recently been in news headlines as a consequence of accusations of perpetrating war crimes in 1971).⁶
 9. In the written statement of claim included in his TPV application the applicant claims to have participated in many meetings and rallies with his father and [relative]. Asked about his activities with JI at the 2015 TPV interview the applicant stated that he voted and worked for JI. Asked how he did this he said that invited people to join and vote for JI. Asked how he did this, he replied that he went to people's houses to speak with them. The applicant provided no specific details as to what he spoke about. Later, when asked if he did anything beyond this, the applicant replied that this was the main task, to pass the word. He also said that they encouraged people to read prayers five times a day and discussed with them how the country could improve according to the Koran. Asked about his father's involvement he said that his father helped with the same tasks. The applicant was questioned about his father's involvement in the 1971 conflict but he could offer no further detail than that his father was a soldier who fought against the freedom fighters. The applicant stated that his father once stood for election (but provided no details as to when, where or for what office). The applicant has provided no documentation to substantiate the claim that he has been a member of JI. Asked if he showed people a form of ID when he spoke with them about the party the applicant said that in Bangladesh you do not need that sort of thing. Asked to explain JI's current activities in Bangladesh the applicant stated only that JI are getting beaten by the other parties. The applicant offered no substantive statements that would indicate that he had any knowledge of developments like JI's August 2013 disqualification from participating in the

² DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 2.21.

³ [Information deleted].

⁴ [Information deleted]

⁵ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 2.23

⁶ "Bangladesh upholds death sentence for Islamist leader Motiur Rahman Nizami ", Guardian, The, 6 January 2016, CX6A26A6E2086.

January 2014 elections by the Bangladesh Supreme Court, or of JI's ongoing alliance with the BNP and its support for the BNP-led alliance's boycott of the 2014 national elections.⁷ Asked how many seats JI currently held the applicant estimated the answer to be about 30. He appeared unaware that JI did not participate in the January 2014 elections and that JI currently holds no seats in the national legislature.⁸

10. The applicant claims that in 2008 his father was imprisoned on false charges for [a time]. He claims his father was falsely accused murder and that the case has now been dismissed. The applicant claims that in February 2009 he was abducted by AL cadres and only released after his father was made to pay a ransom. The applicant claims that some six months later, [in] June 2009, he was assaulted on the street by AL supporters and that he sustained serious injury and required a week of hospital care. He claims that Awami League supporters then brought a false case against him and that his father decided he should leave the country. He was unable to obtain a passport because of the false case which had been brought against him and so departed the country by boat to travel illegally to [country]. At the TPV interview the applicant was asked when the case was brought against him, by whom, and what the charges were. He said that it was filed [in] June 2009 and that it was filed by the AL supporters who had attacked him and that they alleged that he had attacked them. As part of his TPV application the applicant submitted three articles reporting on the manner in which the AL government established International Crimes Tribunal which has prosecuted nine leaders of JI, including Motiur Rahman Nizami, and also several BNP leaders for alleged involvement in war crimes committed during the 1971 conflict.⁹ The articles report that the trials have been welcomed by human rights commentators as a means of addressing crimes perpetrated during 1971, but that they have also been criticised for failing to adhere to international standards and also for the use of the death penalty to punish convicted JI and BNP leaders. The articles provide no information about the situation of JI members more generally or the filing of false cases against such persons.
11. In October 2010 Bangladesh human rights monitors reported of the preceding years that crimes punishable by death penalty appeared to have been regularly abused by the filing of false cases; and that such cases may be filed out of a desire to take revenge for a personal grievance or for property gain, and that in such cases political connections can also play an important role.¹⁰ Such matters begin with the person's accusers lodging a First Information Report (FIR) with the police, following which a person must be arrested and produced in front of a magistrate.¹¹ DFAT reports that there have been occasional allegations since 2008 that high profile BNP and JI members have been victims of enforced disappearances, kidnapping and fabricated criminal charges.¹² DFAT reporting indicates that targeting of this kind is less common where low profile persons are concerned. It is reported that when low profile supporters of political parties are affected by violence or arrest this generally occurs in the

⁷ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 2.21; 3.51-3.53.

⁸ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 2.19.

⁹ "International Crimes Tribunal (Bangladesh)", Wikipedia, [https://en.wikipedia.org/wiki/International_Crimes_Tribunal_\(Bangladesh\)](https://en.wikipedia.org/wiki/International_Crimes_Tribunal_(Bangladesh)); "Bangladesh executes Jamaat-e-Islami leader Muhammad Kamaruzzaman for 1971 war crimes", ABC News, 12 April 2015, <http://www.abc.net.au/news/2015-04-12/bangladesh-executes-islamist-leader-for-1971-war-crimes/6386318>; "Bangladesh upholds death sentence for war collaborator", Daily Star, 16 June 2015, <http://www.dailystar.com.lb/News/World/2015/Jun-16/302301-bangladesh-upholds-death-sentence-for-war-collaborator.ashx>.

¹⁰ International Federation for Human Rights (FIDH) & Odhikar, "Bangladesh: Criminal justice through the prism of capital punishment and the fight against terrorism", 1 October 2010, CISDCDCAAB1835, pp.18-19.

¹¹ FIDH & Odhikar, "Bangladesh: Criminal justice through the prism of capital punishment and the fight against terrorism", 1 October 2010, CISDCDCAAB1835, p.15.

¹² DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 3.54.

context of clashes with rival supporters or police at protests.¹³ A September 2013 UK Home Office report notes instances in which JI clashes with security forces at protests have been followed by the filing of FIRs and the arrest of local JI supporters.¹⁴ DFAT has advised that supporters or members of political parties in Bangladesh are not at risk of being arrested or living in fear of violence on a day-to-day basis due to their political affiliations.¹⁵ Such persons are unlikely to be pursued as individuals outside the context of clashes at protests or the pursuit of a specific grievance, although opposition leaders, or members with high profiles, are said to face a low risk of being individually targeted for arrest and detention due to engagement in general political activities.¹⁶

12. At the 2015 TPV interview it was put to the applicant that it seemed unlikely that he would be targeted in the manner he claims given the number of persons working in support of JI. The applicant responded that he and his family are members with high profiles in their area and that this is because they have been attracting people away from the AL to join and vote for JI. It was put to the applicant that at the time he claimed to have been targeted for recruiting support, in 2009, the 2008 election was over. The applicant responded that even after the election there would be more elections and so recruitment was always occurring. The applicant has provided no documentation to support the claim that a case was brought against him in 2009 or that a case was brought against his father in 2008. The applicant claims that while in [country] he was recognised by some Awami League supporters who attacked him and beat him and threatened to give him to the police. He claims that it was for this reason that he decided to depart [country] for Australia. At the 2015 TPV interview the applicant stated that marks and scars on his body are evidence that he was attacked in this way. The applicant claims to have been informed by his father that in June 2015 his father was attacked and beaten by AL cadres who burnt the family home.
13. At the outset of the 2015 TPV interview the applicant was asked if there was any information in his application which was false or misleading. The applicant indicated that the information he had given in his TPV application was correct but that he had given incorrect information at his 2012 arrival interview. He said that at the 2012 arrival interview he had stated that he had travelled to Australia because he was poor and would like to work. He had said these things because at the time of the 2012 arrival interview he did not understand the system in Australia. He thought that if he shared information about his political activities and his fears in Bangladesh that he would be sent back. The matter was discussed again at the close of the 2015 TPV interview. It was put to the applicant that at the 2012 arrival interview he had stated that he had departed Bangladesh for [country], and then [country] for Australia, because he was poor. The applicant said that he did not depart Bangladesh for any economic reason and that in fact his parents in Bangladesh are quite wealthy. He said he was worried that he would be thought of as a bad person and that he would be returned to Bangladesh if he spoke about the charges which had been brought against him. It was put to the applicant that when asked at the 2012 arrival interview if he had any association with a political group he had answered that he did not, and made no mention of JI. The applicant responded that had said nothing about this because he did not want the government to think that he had any problems. He wanted to be seen as a fresh person.
14. The applicant's 2015 TPV application states that he was told by the smuggler he consulted with in [country] that Australia helps the poor and gives protection to refugees who leave their country for fear of persecution. This seems at odds with the applicant's claim that he did not

¹³ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 2.5, 3.51, 3.53

¹⁴ UK Home Office, "Operational Guidance Note Bangladesh", 16 September 2013, OGCOD145418, 3.9.13.

¹⁵ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 3.55.

¹⁶ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 3.55.

disclose a fear of persecution at the 2012 arrival interview because he did not fully understand the system in Australia. I am mindful that a person seeking asylum in an unfamiliar country might be reluctant to state that he or she is the subject of criminal charges for fear that the local authorities will consider the person a criminal and deport him or her on this basis. However, it was not just this aspect of his claims that was not given at the 2012 arrival interview. The applicant made no mention any association with JI or of fearing physical attack from AL supporters on this basis. The applicant claims that he did not disclose this information because he wanted to be seen as a fresh face unaffected by problems. I do not accept this claim. The fact that the applicant did not claim any involvement with a political party at his 2012 arrival interview undermines the credibility of his claim to have been a member and supporter of JI and to fear harm on this basis.

15. Further to this, the applicant's claim that he would be targeted by AL supporters for recruiting support for JI in 2009, and that his father was targeted in this regard in 2008, does not seem plausible given that, on his own evidence, the 2008 election saw his local constituency won by an AL candidate in a contest in which JI did not stand a candidate. The applicant claims to have played a significant role in organising JI support in his home area, to be committed to pursuing a political career with JI, and to be part of family of JI supporters and local leaders. But at the 2015 TPV interview the applicant was unable to provide a detailed account of his activities with JI beyond visiting people to encourage them to support JI, pray, and to discuss how the country should be governed in accordance with the Koran. He was able to name the AL candidate who was elected in his local constituency in 2008 and that JI did not stand a candidate. He could name the JI logo and electoral symbol, the name of a JI leader, and that JI is an Islamic party which opposed the independence of Bangladesh in the 1971 conflict. But although able to offer basic information of this kind he was unable to move beyond such matters when invited to discuss his JI knowledge and activities further. He could offer no substantive information of JI's current situation and appeared unaware that JI did not stand candidates in the most recent Bangladesh national election.
16. I am mindful that the applicant claims to have limited education. In his TPV application he states that due to personal and financial problems he had no high school education and completed only primary school education up to year [number]. However, it is also true that that the applicant can read and write Bengali. He is not illiterate. At the 2015 TPV interview the applicant spoke in an articulate and enthusiastic manner about his aspirations for living a life in Australia. By contrast, the applicant seemed reluctant to speak about his knowledge of JI and his activities with the party, and he provided little information on these matters even though the interviewing delegate had explained the importance of providing such information to establish the level of his involvement with JI. I note that at the 2015 TPV interview the applicant stated that marks and scars on his body are evidence that he was attacked for reason of his association with JI in [country] by AL supporters. The delegate gave no indication that the applicant did not have marks and scars on his body and I accept that the applicant does have marks and scars of this kind. However, marks and scars cannot in themselves provide evidence of the circumstances in which they were sustained, and the weight of evidence leads to the conclusion that the applicant was not a supporter of JI and that he has not been a person of interest to AL supporters. Having considered the evidence in its totality, I am not satisfied that the applicant or his family members have been members or supporters of JI. I am not satisfied that the applicant or his family members have ever been threatened or attacked or had false cases brought against them in Bangladesh or that the applicant was threatened or attacked by AL supporters in [country].

17. While I do not accept that the applicant departed Bangladesh for the reasons he claims I am willing to accept, given the extent to which Bangladesh citizens engage in irregular migration,¹⁷ that the applicant departed Bangladesh for [country] in an irregular manner, by boat and without a passport. DFAT reports that if a Bangladesh citizen emigrates, attempts to emigrate or departs Bangladesh other than in accordance with the *Emigration Ordinance of 1982*, they may face up to one year imprisonment or a fine. However, DFAT is not aware of these penalties being enforced.¹⁸ DFAT assesses that people who return to Bangladesh, voluntary or involuntary, are unlikely to face adverse attention on their return. DFAT also reports that the return of failed asylum seekers is unlikely to be reported by airport authorities to the Department of Immigration and Passports, Ministry of Home Affairs or other agencies, beyond the normal processes whereby returning nationals have their entry and exit from Bangladesh recorded.¹⁹ The International Organization for Migration (IOM) which facilitates the voluntary return of Bangladesh citizens, including rejected asylum seeker and trafficked victims, has likewise not reported any instances of mistreatment of returnees.²⁰ IOM reporting indicates that an increasing number of Bangladeshi irregular migrants are apprehended in destination countries and that such persons are viewed as victims of smuggling networks rather than law breakers.²¹ A 2013 report published by the Danish Institute for International Studies reports that it considers that there is a general lack of data on the lives of returnees, particularly in the medium and long term.²² The report, however, focuses on countries like on Afghanistan and Iraq rather than Bangladesh and provides no assessment of the situation for Bangladesh returnees or of available reporting on this matter. Given the reporting made available to me by DFAT and the IOM, I am not satisfied that there is a real chance that the applicant would be harmed for having illegally departed Bangladesh and/or for having sought asylum in Australia.
18. I am not satisfied that there is a real chance that the applicant would, if he returned to Bangladesh, be harmed by the Bangladesh authorities or AL supporters for reason of an association with Ji. I am not satisfied that there is a real chance that the applicant would be harmed by the Bangladesh authorities for having illegally departed Bangladesh and/or for having sought asylum in Australia. I have considered whether the applicant's profile as whole would result in his facing harm in Bangladesh for any other reason. Having considered the applicant's claims and profile, and the available country information, I have also found that there is not a real chance that the applicant would not face a real chance of harm upon return to Bangladesh for any other reason.

Refugee: conclusion

19. 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

20. 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

¹⁷ International Organization for Migration (IOM), "Bangladesh", 1 August 2014, CIS29397.

¹⁸ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 5.28.

¹⁹ DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369, 5.32.

²⁰ IOM, "Bangladesh", 1 August 2014, CIS29397.

²¹ IOM, "Bangladesh", 1 August 2014, CIS29397.

²² Zachary Whyte & Dan V. Hirslund, "International Experiences with the Sustainable Assisted Return of Rejected Asylum Seekers", DIIS Report, DIIS - Danish Institute for International Studies, 1 May 2013, CIS36DE0BB2295, p.9.

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

21. 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.

22. I am not satisfied that there is a real chance that the applicant would, if he returned to Bangladesh, be harmed by the Bangladesh authorities or AL supporters for reason of an association with JI. I am not satisfied that there is a real chance that the applicant would be harmed by the Bangladesh authorities for having illegally departed Bangladesh and/or for having sought asylum in Australia. I have considered whether the applicant's profile as whole would result in his facing harm in Bangladesh for any other reason. Having considered the applicant's claims and profile, and the available country information, I have also found that there is not a real chance that the applicant would not face a real chance of harm upon return to Bangladesh for any other reason. As 'real chance' and 'real risk' involve the same standard,²³ I am similarly not satisfied the applicant faces a real risk of harm upon return to Bangladesh.

Complementary protection: conclusion

23. There 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.

²³ *MIAC v SZQRB* (2013) 210 FCR 505.

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
 - (b) either:
 - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

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