



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

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**Referred application**

BANGLADESH

IAA reference: IAA19/07613

Date and time of decision: 22 January 2020 11:38:00

A Wilson, Reviewer

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**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**

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### **Visa application**

1. The referred applicant (the applicant) claims to be a national of Bangladesh. He arrived in Australia [in] January 2013. On 31 May 2017 he lodged an application for a safe haven enterprise visa (SHEV). On 28 November 2019 a delegate of the Minister for Immigration refused to grant the visa.
2. The delegate accepted that the applicant had been a Bangladesh National Party (BNP) supporter but was not satisfied that he had a well-founded fear of persecution or that there was a real risk he would suffer significant harm for that or any other reason if returned 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).
4. No further information has been obtained or received.

### **Applicant's claims for protection**

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5. The applicant's claims as set out in the May 2017 SHEV application can be summarised as follows:
  - the Awami League (AL) asked him for money from his business many times but he refused to give it to them.
  - his father was a BNP supporter and he was a BNP supporter.
  - angered by the AL's abuse of power he became more politically active, saying publicly that he supported the BNP, helping to get BNP speakers to visit the clubrooms, encouraging villagers to attend meetings, and helping organise protests.
  - he came to the notice of local AL supporters who invited him to their clubhouse and offered him a position with them. However, he declined their invitation which angered them.
  - in December 2011 AL supporters attacked the BNP clubhouse. He escaped and fled to the capital Dhaka.
  - AL supporters threatened to kill him if he returned to the village and a friend who was an active BNP supporter disappeared.
  - he travelled to [Country 1] in May 2012 and worked there for seven months before travelling to Australia. He had previously worked in [Country 1] in 2010 before returning to Bangladesh.
  - four and half years after his departure from Bangladesh a second friend who was an active BNP supporter disappeared in Dhaka, stones were thrown at his family home, and his brother was forced to stay elsewhere when he visited as people were searching for the applicant.
6. The applicant made the following additional claims at the August 2019 SHEV interview:

- in 2018, soon after returning from overseas, his brother was punched and slapped by attackers seeking the applicant.
- continuing into 2019 his mother received telephoned calls from unknown persons every three months wanting to know the applicant's whereabouts.

## **Refugee assessment**

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

### **Well-founded fear of persecution**

8. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:
  - the person fears persecution and there is a real chance that the person would be persecuted
  - the real chance of persecution relates to all areas of the receiving country
  - the persecution involves serious harm and systematic and discriminatory conduct
  - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
  - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
  - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
9. On the basis of the applicant's documentary and oral evidence I accept: that he is a Sunni Muslim of Bengali ethnicity; that he was born and lived most of his life in Tangail district in central Bangladesh; that his father was a local village councillor and union leader when the applicant was young; that he completed [education level]; that he worked as [an occupation 1] in a [specified business] in his home district for around [number] years; that he worked for two stints in [Country 1]: [in specified roles in different years]; that some family members continue to live in his home district; and that he is single.
10. In support of his identity the applicant provided a Bangladeshi Birth Certificate in English dated [in] July 2012; an undated Bangladeshi Character/Nationality Certificate written in English; and a National ID Card written in a mix of Bengali and English. He also provided two untranslated documents written in Bengali that he claimed were his Birth Certificate and Character/Nationality Certificate. For the purpose of this review, I accept that his name is as claimed and that he is a national of Bangladesh. Although the applicant lived and worked in [Country 1] in 2010 and again in 2012, there is no evidence before me to suggest that he has a presently existing right to enter and reside in any country apart from Bangladesh. I find that Bangladesh is his receiving country for the purpose of this review.

11. In the statutory declaration and representative's submission accompanying the May 2017 SHEV application the applicant claimed he ran a [product 1] business in Bangladesh. He claimed it was a good business, that he only had to work two days a week, and that he was able to live comfortably and help support his family. He also claimed the AL would go to all the businesses and ask for money. He was asked many times for money but did not comply with their demands.
12. He also claimed he was a BNP supporter and that his father had been a village councillor and union leader and a BNP supporter. Sometimes as a child he would go with his father to the BNP clubrooms when an official would come to speak to the members. When he was old enough he enrolled to vote and cast his ballot for the BNP in two elections. At the SHEV interview he said these were the 2001 and 2008 elections. He claimed he wanted a quiet life and had no ambition for a political life so he did not become a BNP member. Although he did attend some meetings at the local BNP clubhouse every now and then with four friends who were active BNP supporters. At the 2019 SHEV interview he added that his father had been a BNP member but he relinquished his formal membership of the party in around 1991. Although his father remained a BNP supporter until his death from natural causes in 2016. He also confirmed he himself did not become a BNP member or hold any formal party role although he was offered a position. However his friends held BNP positions so he was considered part of the BNP. He also said he became more active with the BNP after he was threatened.
13. In the 2017 statutory declaration he also claimed he became more involved in politics because he became angry about the AL's abuse of power and started saying publicly that he supported the BNP. He also started helping get BNP speakers to come and visit the clubrooms. He encouraged people in his village to attend the meetings and helped organise protests against the AL but still didn't have personal political ambitions. He only wanted to be involved at a grassroots level to get the information out to people. He claimed he was quite successful in bringing people to BNP meetings and this was noticed by the AL in his village. Three AL supporters from his village invited him to the AL clubrooms so he could hear their leaders speak. They even offered him a position but he declined their invitation which angered them. They told him that if he didn't support the AL he should keep his opinions to himself or trouble would find him.
14. He claimed in about December 2011 many AL supporters ambushed the BNP clubhouse and attacked everyone, although he managed to escape and ran home. When the attack was over the AL supporters called out the names of people they would harm if they showed their faces again, including his name. His friends told him the same three AL supporters were looking for him so he went and stayed with his sister and her husband in the capital Dhaka. One of the AL supporters called him and said if he ever showed his face in the village "they would know what action they had to take" which meant they would kill him. He also claimed friends called and told him that a friend who was an active BNP supporter had disappeared. He feared he could easily be traced to his sister's home in Dhaka and he believed it was a matter of time before they would find him and he would be killed. He claimed because he was active in the community for the BNP he would be seen as a threat to the AL wherever he went in Bangladesh and that anyone who is targeted by the local AL as a supporter of BNP, whether they are or not, has to either be persuaded to change their political allegiance or be killed. He left Bangladesh legally using a passport and travelled to [Country 1] in May 2012, around four months after going to Dhaka.
15. In the statutory declaration he further claimed that in March 2017 his mother told him that another active BNP supporter friend had disappeared after moving to Dhaka and opening a

small business. His mother also told him that people were coming and throwing stones at the house during the night, to hassle and frighten them, that they were trying to punish his family because they could not find him. He also claimed his brother who works in [another country] had to stay in another city when he came to visit as it was not safe for him to stay at the family house as the people who were searching for the applicant would have hurt his brother.

16. At the August 2019 interview the applicant made several additional claims. He said that in 2018, seven days after his return from [the other country] to Bangladesh, his brother was returning of an evening from a nearby market to the family home when he was punched and slapped and asked where he was hiding the applicant. His brother recognised one of his attackers as a powerful man from the area. The applicant also said that every three months unidentified callers, possibly the three AL people who previously intimidated him when he was in Bangladesh prior to 2012, telephoned his mother wanting to know his whereabouts. They last called her in June 2019.
17. When the delegate asked the applicant at the SHEV interview about the activities he had engaged in as a BNP supporter he responded he liked the BNP because they did not seek to recruit school children whereas the AL sought to involve underage people in politics. When the delegate repeated the question the applicant said in 2007 when the caretaker government came to power the BNP organised processions and meetings and his role was to collect people for those events. He organised nine to 10 motorcycles and 20 to 25 people to join the demonstrations and he also participated in processions. When asked about the duration of his support for the BNP he said he participated in this way between 2007 and 2011 and that over that five year period he participated in seven to eight rallies. He said the first rally was aimed at forcing the caretaker government to hand over power. He said once the election was held and the AL came to power the BNP demanded a fresh ballot because they believed the election had been rigged. He said he not only participated in rallies but contacted many people so they would come and join the rallies. He said the last demonstration he was involved with was in December 2011.
18. When the delegate asked the applicant whether he had been involved in BNP diaspora politics in the seven years he had been in Australia, he said he had been in touch with BNP leaders here. He said he went to Sydney in 2017 and met with people who were active in BNP politics and introduced himself and he also knew someone in Melbourne where he lived who was involved in politics. He said they had offered him the opportunity to join them however he is enjoying Australia and surviving and is satisfied with that and does not want to be involved in politics so far away from Bangladesh.
19. At the conclusion of the SHEV interview the applicant's representative stated that the applicant did not fear some authoritarian government harming him when he arrived at the airport in Bangladesh but rather feared returning to his village, that being discovered and the link being made that he was a strong BNP supporter and him being killed.
20. In August 2014 a Bangladeshi academic argued that inter-party and intra-party violence was endemic amongst all political parties in Bangladesh, although the incidence of intra-party violence was generally higher than inter-party violence. He stated that it was usually student and youth organisations associated with political parties that were engaged in violent clashes and that this was due to struggles over distribution of patronage rather than ideology<sup>1</sup>. In April 2016 the International Crisis Group observed that Bangladesh's political culture has been described by a legal scholar as "relentlessly violent", with governments exploiting the

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<sup>1</sup> CHR Michelsen Institute and Centre for Policy Dialogue, 'Political Parties in Bangladesh', August 2014, CISA447F083208.

state machinery to suppress the opposition and the opposition mobilising violent party workers to undermine the government. They noted the 2014 national poll was the most violent ever but that there had been a veneer of calm since mid-2015. Although they also said that thousands of criminal cases had been lodged against opposition members and activists<sup>2</sup>. In August 2019 DFAT reported that the BNP was one of two parties that have long dominated Bangladesh's two-party political system; the other party is the AL. They stated that the relationship between the two parties has been characterised by longstanding political and dynastic rivalry, which has increased over time and that politics in Bangladesh centres on personalities, connections, and family alliances. They also noted that Bangladesh was historically prone to high levels of politically motivated violence, that the 2014 national elections were the most violent in the nation's history but that in the lead up to the 2018 national election politically motivated violence was significantly down and the aftermath relatively peaceful. They also indicated that intra-party violence has become far more common than inter-party violence. DFAT further reported that they had not seen evidence of forced recruitment to political parties, that they considered it unlikely to occur, and they also noted that parties hold membership campaigns each year. They cited a survey indicating around 80 per cent of Bangladeshis have limited interest in politics, and those that do are not necessarily members of any party.<sup>3</sup>.

21. I accept that the applicant's father was a village councillor and union leader when the applicant was young, that his father was a BNP member until the early Nineties, and that after that his father continued to support the BNP until his death twenty five years later. Since arriving in Australia the applicant has been broadly consistent about this. I note the applicant also indicated at the SHEV interview that his father had not suffered any difficulties because of his political opinion.
22. I also accept that the applicant voted for the BNP in the 2001 and 2008 elections, attended the occasional BNP meeting with friends, and between 2007 and 2011 he arranged for some people on motorbikes to attend BNP demonstrations and himself participated in around eight rallies, apart from during the period in 2010 when he travelled to and worked in [Country 1]. He has consistently made these claims and his account of BNP demonstrations around the time of the caretaker government and the 2008 elections is broadly consistent with the country information before me<sup>4</sup>.
23. However, I am not satisfied that the applicant played a role in obtaining BNP speakers or any organising role in relation to the BNP rallies. He provided very limited information about these matters and it seems improbable that he did these things given he wasn't a formal party member and he admitted at the SHEV interview that he was unfamiliar with BNP policies. In view of country information concerning the non-involvement in politics of the majority of the Bangladeshi population and the voluntary nature of political recruitment<sup>5</sup>, and given the narrow nature of the support the applicant provided to the BNP, I also do not accept that the AL offered him a position, tried to pressure him to join them, or threatened him when he did not do so.
24. Nor do I accept that the AL attacked the local BNP clubhouse in December 2011 when the applicant was present and subsequently sought the applicant and that this caused him to flee

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<sup>2</sup> International Crisis Group, 'Political Conflict, Extremism and Criminal Justice in Bangladesh', 11 April 2016, CIS38A8012646.

<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 22 August 2019, 2019082213243.

<sup>4</sup> CHR Michelsen Institute and Centre for Policy Dialogue, 'Political Parties in Bangladesh', August 2014, CISA447F083208.

<sup>5</sup> DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 2019082213243.

to the capital Dhaka in May 2012, as he claimed in the in the 2017 SHEV application. At the 2019 SHEV interview he gave a significantly different account of events. When the delegate asked the applicant what happened in December 2011, the applicant omitted any reference to the purported raid on the clubhouse and instead said because the BNP's December 2011 rally was a big success the AL's student league offered him the opportunity to join them and when he refused them they had a verbal argument and threatened him, and that following another threat a month later he fled to Dhaka.

25. Country information before me confirms that enforced disappearances occur in Bangladesh. It also indicates that BNP activists have been among the victims<sup>6</sup>. However, on the information before me I am not satisfied that the applicant had two BNP activist friends who disappeared in 2011 and 2017 respectively as he claimed. The 2017 SHEV application included very limited information about the circumstances in which these individuals are purported to have vanished. And when the delegate asked the applicant to expand on what had happened to his friends at the SHEV interview he was unable to do so.
26. Nor do I consider it credible that the other consequences that he claimed flowed from his very limited support of the BNP occurred. I do not accept that in the seven years following his departure from Bangladesh his family's house has been stoned, his brother has been intimidated or attacked, or that every few months his mother has received telephone calls asking his whereabouts. The purported interest in him seems disproportionate to his political involvement. I also do not accept his representative's contention that he was, or would be regarded as, a "strong BNP supporter".
27. I have accepted that the applicant provided limited and sporadic support to the BNP between 2007 and 2011, apart from much of 2010 when he was working in [Country 1]. At the SHEV interview the applicant's own evidence was that he has not supported the BNP during the seven years he has been in Australia despite being aware of BNP political activity in the diaspora. Nor has he claimed he will seek to support the BNP if he is returned to Bangladesh. Having regard to the applicant's limited past involvement with the BNP, I am not satisfied that he will again support the BNP if he is returned to Bangladesh. I find that his lack of political involvement will not be because of fear but rather because of his self-declared lack of political ambition and his preference for business. I am not satisfied that there is a real chance the applicant will suffer any harm because of his past support for the BNP now or in the reasonably foreseeable future.
28. I accept that the applicant operated a successful [product 1] business in Bangladesh between late 2010 and early 2012. I also accept that when he departed Bangladesh for [Country 1] in May 2012 he did so legally using a passport in his own name. He has consistently made these claims since arriving in Australia.
29. Although country information supports that extortion occurs in Bangladesh<sup>7</sup>, I do not accept as credible his claim that AL supporters tried to extort money from him during the period he operated his business. His accounts of the unsuccessful extortion attempts varied significantly over time. In the 2017 statutory declaration he referred to "many attempts" happening over an unspecified period and claimed that the AL approached all businesses. At

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<sup>6</sup> Asian Federation Against Involuntary Disappearances, 'Disappearance of justice - Brief information and present status of victims of enforced disappearance', 30 January 2018, CIS7B839411714. Odhikar, 'Human Rights Monitoring Report on Bangladesh - 1-31 October 2018', 2 November 2018, CIS7B8394110363.

<sup>7</sup> UK Home Office, 'Report of a Home Office Fact-Finding Mission – Bangladesh', 18 September 2017, OG6E7028864. DFAT, 'DFAT Country Information Report Bangladesh', 2 February 2018, CIS7B83941169. DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 2019082213243.

the 2019 SHEV interview he said there were two extortion attempts, the first in December 2012 and the second in January 2013, and he attributed the extortion attempts to his support for the BNP.

30. On the information before me it is unclear what the status of the applicant's [product 1] business is. In any event, if he is returned to Bangladesh and he still owns the business, or if he were to establish a new business, I accept it is possible that he may be asked to pay extortion money. Country information before me indicates that Bangladesh is routinely rated as a highly corrupt country where extortion occurs driven by a range of factors, including criminal and political motives.<sup>8</sup> I also accept that if any future extortion occurs it may have a financial impact on his business. However the country information before me does not suggest that extortion in Bangladesh is such that it causes businesses to close. I also note that prior to establishing his own business the applicant worked as [an occupation 1] for over a decade for a business that he said when he arrived in Australia his father owned. While any such extortion demands may be unpleasant for the applicant if they occur, I am not satisfied that such treatment rises to the level of serious harm. I am also not satisfied there is a real chance the applicant will be denied the capacity to earn a livelihood of any kind, where the denial threatens his capacity to subsist.
31. Overall, I am not satisfied the applicant has a well-founded fear of persecution in Bangladesh.

#### **Refugee: conclusion**

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

#### **Complementary protection assessment**

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

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

34. Under s.36(2A), a person will suffer 'significant harm' if:
  - the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.

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<sup>8</sup> UK Home Office, 'Report of a Home Office Fact-Finding Mission – Bangladesh', 18 September 2017, OG6E7028864. DFAT, 'DFAT Country Information Report Bangladesh', 2 February 2018, CIS7B83941169. DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 2019082213243.

35. I have accepted that the applicant may be forced to pay extortion money if he recommences operating his [product 1] business or establishes a new business in Bangladesh. However I am not satisfied that any extortion would be the result of an intention to cause pain and suffering that can be reasonably regarded as cruel or inhuman, severe pain or suffering or extreme humiliation. Nor is there a real risk of the death penalty, torture or the arbitrary deprivation of life. I am not satisfied on the evidence that if he is returned to Bangladesh, and if he is extorted, the applicant would be at real risk of being subjected to significant harm.
36. I have otherwise concluded that the applicant does not face a real chance of harm for any of the reasons claimed. As 'real risk' and 'real chance' involve the application of the same standard<sup>9</sup>, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

**Complementary protection: conclusion**

37. 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).

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

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

## **Applicable law**

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### **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.