



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

**Decision and Reasons**

**Referred application**

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BANGLADESH  
IAA reference: IAA20/07889

Date and time of decision: 12 March 2020 15:13:00  
M Wei, Reviewer

**Decision**

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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 February 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in June 2017. A delegate of the Minister of Immigration (the delegate) refused to grant the visa on 13 February 2020. The delegate found that the applicant did not have a well-founded fear of persecution and was not at a real risk of significant harm upon his return to Bangladesh.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He is Bengali Sunni Muslim, from a village in Jamalpur district, born on [date].
  - He was involved with the Bangladesh Nationalist Party (BNP). He was a member and [held a senior position] of the BNP in his ward.
  - The Bangladesh Rifles (BRD) harassed him for having long hair in 2007.
  - The Awami League (AL) and the Islamic Chhatra Shibir (ICS) used to harass him to join their respective political party.
  - He was physically attacked by the AL members or supporters.
  - He left his village and lived in other parts of Bangladesh between 2007 and 2013.
  - He was involved with the BNP in Australia.
  - He fears that he would be killed if he were compelled to return to Bangladesh.

### Factual findings

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4. The applicant arrived in Australia in February 2013. Soon after his arrival, he took part in a case assessment and biodata interview on 1 March 2013 and about two weeks later, an entry interview on 13 March 2013. The applicant was invited to apply for a protection visa in April 2016. He lodged a SHEV application in June 2017. The applicant attended a SHEV interview on 30 January 2020. The applicant confirmed at the SHEV interview that he received help from a 'lawyer' when preparing his visa application and that his written claims in the visa application was his own claims and that his lawyer read them back to him in his language. I am willing to accept this was the case.
5. The applicant has consistently claimed that he is a citizen of Bangladesh and is of Bengali ethnicity. He is from a village in Jamalpur district. The applicant provided copy of a birth certificate and a certificate from his Union chairman certifying that he is of good character. I accept the basic personal details as provided. I find that that Bangladesh is his receiving country.

## Political involvement in Bangladesh

6. The applicant claims that he was a member of the BNP and a [Position 1] of the BNP of his ward. He was asked about his involvement in the BNP at the SHEV interview. He said that he started supporting the BNP in 2005 and became a member of the BNP in the same year. When the delegate asked the applicant how he was able to become a member of the main political party at the age of [age], the applicant said that age was not a big factor to join the party and that 'you have to be 12 or 13 years old to become a member'. He again said that in Bangladesh you have to be over 18 years old to vote but to become a member you have to be 12 or 13 years old. The applicant's evidence is not consistent with the country information before me which indicates that persons need to be 18 years old or over to be eligible for BNP membership. <sup>1</sup> I consider this information seriously undermines the applicant's claim that he became a member of the BNP in 2005. Given the applicant also claimed that he held the position of a [Position 1] in his ward, his lack of knowledge about the BNP membership age requirement is concerning.
7. When the applicant was asked if he had voted for the BNP, he said he did not. When asked why he did not, he replied that there was no election in Bangladesh while he was living there. Country information indicates the 2008 parliamentary elections were held on 29 December 2008, following a two year rule by a caretaker government. <sup>2</sup> This was the last election held before the applicant left Bangladesh in 2013. When this country information was put to the applicant, he then said that maybe he did not remember. Country information also indicates that the BNP lost to the AL in the 2008 elections and the AL came to power after that. I consider the 2008 election would be a significant event for BNP members, supporters, or someone who held a [senior] position in the locality. I do not consider it is plausible that the applicant would have forgotten about the 2008 election if he were involved in the BNP as he claimed. He could not remember if he had voted for the BNP and his initial evidence that he did not vote for the BNP cast serious doubt that he was a BNP supporter, member or party leader.
8. When asked how he earned that position, he said that used to attend every meeting and used to visit different places. He said he attended altogether [number of] meetings in Bangladesh. When it was put to him it did not sound that he went to a lot of meetings given he claimed to have involved with the BNP from 2005 until 2013, he responded that there were meetings twice in a year. He was asked given there were not many meetings, there would be other members who also attended the meetings and why he was made to be the [Position 1]. He responded that everybody else did not actually attend the meetings. When asked what was discussed at the meetings, he said that the meetings were about how to get close to people. When asked what else was discussed, he replied no. The applicant did not mention that he held such a position when his involvement as a member and supporter was being discussed at the SHEV interview. He only claimed so after he was asked specifically if he held any position in the party. The applicant appeared to require constant prompts from the delegate. His evidence as to how he was made a [Position 1] of the BNP in his ward and his involvement in the BNP meetings is unpersuasive.
9. The applicant also claimed at the SHEV interview that he faced harassment from both the AL and the ICS who had asked him to join their respective party. His evidence at the SHEV

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<sup>1</sup> Canadian IRB: Immigration and Refugee Board of Canada, "BGD105262.E Bangladesh: Bangladesh Nationalist Party (BNP), including its structure, leaders, membership and membership documents, factions, associated organizations and activities", 31 August 2015, OGFDFC61A40

<sup>2</sup> International Republican Institute, "Bangladesh Parliamentary Elections December 29, 2008: Election Observation Mission Final Report", 20 July 2009, CISE1310071510

interview was that in Bangladesh there were two main political parties, the AL and the BNP, both 'normally' asked other people to join them. He claimed that the ISC began to harass him to join them, demanding money from him and threatening to kill him from 2005, but he decided to join the BNP in 2005. Country information indicates that ICS is the student wing of Jamaat-e-Islami (JI).<sup>3</sup> The applicant's claim that he was subject to forced recruitment is not supported by the country information before me. According to DFAT, it has not seen evidence of forced recruitment to political parties and considers it unlikely to occur. It states that parties hold membership campaigns each year, through which parties recruit large numbers of members.<sup>4</sup> DFAT's this assessment is supported by other country information before me, which also suggests that AL supporters and those who were 'faithful' and 'loyal' to the AL would get membership.<sup>5</sup> The applicant's evidence in the SHEV interview as to the force recruitment he was subject to has been very vague and general. This claim was not referred to in his visa application either.

10. At the SHEV interview, the delegate asked the applicant whether there were any particular incidents that led to his departure of Bangladesh in 2013. The applicant did not claim initially that he was physically assaulted for political reasons apart from claiming that both the AL and the ICS had been harassing him to join their respective party. He also said 'no' when the delegate asked him whether anything else happened to him apart from the harassment. It was only when the delegate asked him to confirm again that both the AL and the ICS did not do anything else to him apart from asking him to join, he then replied 'no, nothing, once I was assaulted'. When asked for details about this assault, he said the incident occurred in the beginning of 2007 when he was on his way to a BNP meeting. He stated that a fight erupted between the AL people and BNP people as the AL people were trying to stop the BNP people in attending the meeting. He claimed that he and some other BNP people were injured and required medical treatment and he could not attend the meeting even though the meeting was held as scheduled. When he was asked if he faced any other assaults, he said no. When the delegate sought his comments that he stated in the visa application that the AL workers/supporters tried to kill him several times –once they beat him mercilessly on his way home from a party meeting and another time they attacked him and others during a peaceful party rally and he was left on the road, he said that he had nothing to say. The applicant's initial response that he was not physically assaulted by the AL people and his failure to refer to the two incidents he mentioned in the visa application, despite being prompted by the delegate several times, then claiming that he was harmed on a different occasion and his vague evidence do not impress me that he was speaking from a personal experience.
11. The applicant also claimed at the SHEV interview that he left his village in 2007 due to the problems he claimed to have faced and that he lived in places such as Dhaka city and Chittagong. However, at an earlier point of time during the interview, when asked how he financially supported himself from 2008 -2013 (in the context where he stated that he did not work after closing his shop in 2008), he said that he used to live in the family home and but 'go to different places' and 'do different work' with party people because he was politically involved. He did not claim at that point during the interview that he went in hiding. While his visa application vaguely says that he tried to live in hiding but was being found when he returned home, he provided no details as to where he hid or for how long. I consider his evidence that he was in hiding for the majority of his adult time while living in Bangladesh

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<sup>3</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

<sup>4</sup> Ibid.

<sup>5</sup> Daily Sun, The (Dhaka), "Rajshahi AL to launch membership drive", 2 November 2011, CX277017; Daily Star, The (Bangladesh), "AL, BNP Prepare for Next Polls - Searching for new members", 8 July 2017, CXC90406620893; the Independent Bangladesh, 'AL membership drive gains pace', 25 October 2017 CXC90406620890

does not sit well at all with his other claim that he held the position of a [Position 1] of the BNP in his ward.

12. Although the applicant did not claim that he left Bangladesh for political reasons in the biodata and case assessment interview, I take notice that he had claimed in the entry interview that he was a supporter of the BNP and was threatened (but was not physically harmed). However, in light of the concerns discussed above, I am not satisfied he has presented a set of credible claims as to his involvement in the BNP and the problems he faced from the AL or ICS. I am not satisfied that he was a supporter, a member or a leader of the BNP. I do not accept that he ever voted for the BNP. I am not satisfied that he ever attended BNP meetings or rallies. I am not satisfied that he was ever harassed by the AL, the ICS or JI to join their party. I am not satisfied he was beaten or otherwise harmed by the AL, the ICS/JI or anyone else for political reasons.

### **BDR**

13. The applicant claimed at the SHEV interview that he used to be harassed by the BDR. He said that in 2007 or 'a bit before 2007', the BDR used to go everywhere beating up young people or anyone having long hair. He claimed that on one occasion the BDR made him stand in a [place] and only left him alone after he promised to cut his hair. The delegate observed that the applicant did not have long hair when he attended the SHEV interview. Neither did the applicant's photograph attached to his arrival interview record or the passport photo provided with his SHEV application indicate that he had long hair at the relevant time.
14. Country information before me indicate that the BDR was a paramilitary border force and was renamed as the Border Guard Bangladesh (BGB) following a mutiny at their headquarters in 2009 due to grievances over different facilities for army and border guards. The information indicates that the BDR/BGB is responsible for border protection and there is no suggestion it harasses people with long hair or otherwise harasses ordinary Bangladeshis.<sup>6</sup>
15. The applicant provided no convincing evidence that he had long hair in 2007 or that he was harassed by the BDR. I am not satisfied these claims are credible. I do not accept them.

### **Shop owner**

16. The applicant claimed at the SHEV interview that he used to own a [shop] in his village, which was in partnership with another person. He said that he opened the shop in 2004 and closed in 2008 due to financial losses. I note that delegate stated in her decision that the shop was closed in 2007. I note the applicant's evidence at the SHEV interview was quite clear that the shop was closed in '2008, sometimes in 2008'. He also said the ICS used to demand money from him telling him that he had to join them. As discussed above, I do not accept that he was harassed by the ICS. I note that applicant indicated in his visa application that he worked [for] a business [from] 2006 to 2007 (he did not indicate that he was a shop owner) and that in 2007 he worked in [a particular industry], also from 2007 until he left Bangladesh he was unemployed and supported by his family. He also indicated in the visa application that he was in high school from 2004 to 2005. I consider it is not insignificant that the applicant did not disclose in the visa application that he was a co-owner of a retail business for about four to

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<sup>6</sup> Xinhua (net) also News.cn also China View, 31 March 2009, "Bangladesh forms committee to reconstitute border force after mutiny", CX223634; Reuters, "Bangladesh court sentences 152 to death for 2009 mutiny", 5 November 2013, CX315304; Asian Human Rights Commission, "Odhikar report on human rights violations in the Indo-Bangladesh border", 8 February 2005, CX113619

five years from 2004 to 2008. It is also of concern, that for part of that period, he was either a high school student, doing different work or unemployed as per his visa application. The applicant provided no convincing evidence to support that he was co-owner of a retail business, apart from a mere assertion made at the SHEV interview. I am not satisfied that he was ever a shop owner/co-owner.

17. I am not satisfied that the applicant came to the adverse interest of the AL, the ICS/JI or anyone else before he left Bangladesh. I consider he came to Australia for economic reasons.

#### **BNP Australia**

18. The applicant was asked at the SHEV interview if he had been involved with any political party in Australia. The applicant responded that he was involved with the BNP. When asked if he had any document to show the delegate, he said 'right now I don't have document'. He said that he had joined most of the BNP meetings. When asked what was discussed at those meetings, he said that they were general discussions about the country situation in Bangladesh and ceremonies such as Zia Rahman's birthday/death anniversaries or prayers. In light of my findings above that the applicant was not involved with the BNP in Bangladesh, I am not prepared to accept this assertion which lacks any convincing details. I am not satisfied that the applicant has been involved with the BNP in Australia.

#### **Brother**

19. The applicant also claimed in the SHEV interview that his brother, who used to be [a specified occupation] in a [Workplace 1] in their town, left his job and went to [another country] because of serious problems he faced. When asked when his brother left Bangladesh, he said 'three to four years ago'. When the delegate sought to confirm his brother left in 2016 or 2017, he said it was in 2016. When asked why his brother left Bangladesh, his evidence was that his brother was not involved in any politics or with any political party, the AL wanted him to join their party and they threatened to put his brother in jail by putting banned materials belonging to the ICS (such as those that contain instructions on how to make explosives) in his [Workplace 1] (as such he would be arrested and jailed). The applicant does not claim that his brother was subject to AL's harassment while he was still in Bangladesh and it is unclear when and why the AL started to take an interest in his brother. As noted above, the country information before me does not support that the AL has engaged in forced recruitment. I am not satisfied that his brother faced forced recruitment by the AL or was otherwise harassed, threatened or harmed by the AL or any one in Bangladesh. I do not accept his brother left Bangladesh due to any adverse interest from the AL people or anyone else.

#### **Self-harm**

20. The applicant was asked towards the end of the SHEV interview what he feared if he were to return to Bangladesh, he claimed that he would die and that 'people may kill me and I may decide to kill myself'. He explained that he might kill himself if he were compelled to return to Bangladesh by the Australia government 'out of frustration' (over his asylum being rejected). I note that applicant told the delegate that there were no issues with his health when he was asked at the beginning of the SHEV interview. Neither is there any medical evidence before me suggesting that the applicant has had suicidal ideation, self-harm thoughts or other mental health issues. While I consider the applicant is likely upset and disappointed over an unsuccessful visa outcome, I am not satisfied that he would genuinely

consider self-harm. I am not satisfied that he would engage in self-harm if he were to return to Bangladesh now or in the reasonably foreseeable future.

## Refugee assessment

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21. 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

22. 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.
23. While Bangladesh is historically prone to high levels of politically motivated violence (PMV), PMV manifests in the form of violent clashes between supporters of different factions of the same party (intraparty violence), supporters of rival parties (inter-party violence), between party supporters and law enforcement agencies, and between issues-based, politically motivated protester groups and law enforcement agencies and/or party auxiliary organisations. Fatalities and serious injuries often result from these clashes. PMV tends to peak during periods of heightened political unrest, including during elections, strikes and blockades. DFAT notes, in rural areas, AL members and activists have reportedly extorted business owners affiliated with the BNP, threatening them with violence if they do not comply with demands for money.<sup>7</sup> The country information referred to above also does not support that the AL or other political parties engaging in forced recruitment.
24. Given his non-political involvement in the past, I am not satisfied that the applicant will seek to involve himself in politics if he were to return to Bangladesh. In light of his overall profile, I am not satisfied that the applicant has a profile to be of adverse interest to anyone. I am therefore not satisfied that the applicant faces a real chance of any harm from the AL, the ICS/JI or anyone if he were to return to Bangladesh, now or in the reasonably foreseeable future.

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<sup>7</sup> [Deleted]

25. The information before me indicates that the applicant left Bangladesh for Australia for economic reasons, though he had not indicated that he fears harm for this reason if he were to return to Bangladesh. In any event, I am also not satisfied that he faces a real chance of harm on this basis. The applicant's evidence was that he was unemployed for a number of years and that he relied on family support before he came to Australia. Despite this, he paid USD\$[amount] to a smuggler for his trip to Australia in 2012. He worked previously in Bangladesh [for] a retail shop and also worked in [a particular industry]. The applicant is working in Australia [in that industry]. Although the majority of labour force participants in Bangladesh are engaged in informal and low income work and that informal work for men may involve [work in that industry].<sup>8</sup> The applicant's skills and experience acquired in Australia would place him in a much better position than where he was before he left Bangladesh and perhaps many others. The country information also indicates that poverty rates have been falling steadily for decades, though those living at the margins of society, including ethnic minorities, sexual or gender diverse individuals and people living with disability, are more likely to be affected.<sup>9</sup> There is no suggestion that the applicant could not live in his family home, where his parents continue to live. I am not satisfied that the applicant will be unable to access informal work or find similar work as he is doing in Australia. I am not satisfied that the applicant will not be able to find employment or accommodation such that he would face a real chance of harm on return to Bangladesh now or in the reasonably foreseeable future.
26. The evidence before me indicates that the applicant left Bangladesh by boat through people smugglers. Although the applicant has not claimed to fear harm for having left Bangladesh illegally or as a person who has sought asylum abroad, this was nevertheless considered by the delegate. In any event, the information before me does not support that there is a real chance that the applicant would face any harm on returning to Bangladesh for reasons of having departed Bangladesh illegally and/or sought asylum abroad.
27. DFAT reports that the Emigration Ordinance Act (1982) (EO Act) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the EO Act and that penalties of up to one year imprisonment or a fine may apply.<sup>10</sup> DFAT's report from 2014 indicates that DFAT is not aware of any incidence of enforcement of these provisions and there is no indication that this has changed.<sup>11</sup> This view is supported by the International Organisation for Migration's report which indicates that irregular migrants like the applicant are typically regarded as victims of people smuggling networks rather than law breakers.<sup>12</sup> Also according to DFAT, Bangladesh has a very large diaspora, and tens of thousands of Bangladeshis exit and enter the country each year. DFAT assesses that most returnees, including failed asylum seekers, are unlikely to face adverse attention regardless of whether they have returned voluntarily or involuntarily. Authorities may take an interest in high-profile individuals who have engaged in political activities outside Bangladesh, including people convicted of war crimes in absentia. This is unlikely, however, for returnees without such a profile.<sup>13</sup> I am not satisfied that the applicant faces a real chance of any harm if he were to return to Bangladesh, as a returning asylum seeker who departed Bangladesh illegally.

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> DFAT, "DFAT Country Information Report Bangladesh", 20 October 2014, CIS2F827D91369; DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

<sup>11</sup> Ibid.

<sup>12</sup> International Organisation for Migration, "Bangladesh", 1 August 2014, CIS29397

<sup>13</sup> DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438



28. I am not satisfied that the applicant faces a real chance of any harm from anyone if he were to return to Bangladesh now or in the reasonably foreseeable future.

#### **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**

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

#### **Complementary protection: conclusion**

34. 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**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***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.