



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA20/08001

Date and time of decision: 22 April 2020 12:02:00
M Wei, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a national of Bangladesh. He arrived in Australia in July 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV), Subclass 790 in April 2017. A delegate of the Minister of Immigration (the delegate) refused to grant the visa on 5 March 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

3. The applicant's claims can be summarised as follows:
 - He was born in Sandwip, Chittagong.
 - Towards the end of his high school, in Chittagong, he became involved with an Islamic political party called Jamaat-e-Islami (JI).
 - In the 2001 election, he and his friends helped JI with the election campaign by putting posters.
 - In 2002, after finishing school he moved from Chittagong to Dhaka to be with his family.
 - He became engaged with JI again from 2003 in Dhaka.
 - He started working for [a] factory from 2004.
 - He supported the Bangladeshi Nationalist Party (BNP) from 2004 to 2005.
 - He supported JI during the 2008 general election by putting up posters and attending meetings.
 - In 2009, after the Awami League (AL) won the election, AL supporters started targeting active supporters of JI. They chased him on the road one day. He ran away. Two of his friends were killed in knife attacks by the AL supporters. After that, he did not go back to his house but stayed with friends and sometimes went to Chittagong.
 - In 2010, he was struck by a car in Sandwip while walking along a road. One of his [body parts] was badly injured. He was hospitalised for about four months before returning to his family in Dhaka. He then ceased his involvement with JI out of fear.
 - While in Dhaka, he learned from his friends in Sandwip that AL supporters in Sandwip falsely accused him and his friends of damaging their committee building. AL supporters reported the matter to the police and were looking for him.
 - He fears harm from the supporters of the AL.

Factual findings

4. The applicant has consistently claimed that he is a citizen of Bangladesh and is a Bengali Muslim. The applicant provided copy of a birth certificate, a nationality certificate and a school certificate. I accept the basic personal details as provided. I find the applicant is a national of Bangladesh and that Bangladesh is his receiving country.
5. The applicant provided a number of documents and photos concerning his health as a result of a motor vehicle accident [in] June 2018 in Australia, including medical certificates, certificates of capacity/fitness, x-ray images and test results etc.. The evidence was that the applicant fractured his [body parts] in the motor vehicle accident when he was hit by a car while riding on a motorbike. He was treated in hospital for three months and has since been on pain relief medication and receiving physio treatment. Post-accident he experienced [body part] pain and had an operation in September 2019 due to [a medical condition].
6. The applicant attended the SHEV interview on 29 January 2020 with the presence of his then representative. The delegate observed that the applicant attended the SHEV interview in crutches. The applicant told the delegate that he was still in pain and experienced side effect to his [body part] from the medication he took and that he might need further surgery on his [body part]. The applicant confirmed that he was fit to continue the SHEV interview mentally and emotionally.
7. The most recent certificate of capacity /fitness dated 9 January 2020 indicates the applicant was 'recent(ly)' admitted to hospital with [body parts] pain. The medical evidence indicates that the applicant needs to continue with physio treatment as an outpatient, need psychologist and pain specialist and need follow up in a [body part] clinic. It also states that the applicant has no current capacity for any work until 4 February 2020.
8. It is unclear if the applicant saw or has been seeing a psychologist and there was no evidence from a psychologist was provided. There is no indication that the applicant has a mental health condition. I note the applicant, when was asked about his claims at the SHEV interview, said a few times that he has poor memory after the accident. He however provided no medical evidence in support. No medical evidence has been provided as to his prognosis or the extent of his recovery. On the evidence before me, I accept that applicant is still going through rehabilitation, receiving medical treatment and is on medication. I am however not satisfied that he is suffering from a mental health condition or he has memory loss as a result of the accident. Having listened to the SHEV interview recording, the applicant appeared to be lucid, responsive and able to stay focused during the SHEV interview. I am not satisfied that the applicant's participation in the SHEV interview was compromised due to his health.
9. The applicant claimed that he experienced harm in Bangladesh because he was a member and supporter of JI and a supporter of the BNP. The applicant claimed in the visa application that he became involved in JI in Sandwip towards the end of his high school and he became involved in JI in Dhaka from 2003. At the SHEV interview, the applicant claimed that he became interested in politics from 2000. He said that he joined JI in 2000 and became a member the same year. He said that he did not remember that he received any membership card but remembered that his name was written on a little piece of white paper which was kept in the JI's office. When he was asked if he had to apply for membership, such as filled in a form or paid a fee, he responded that he did fill in a form and paid 20 Taka. When asked how long it took to have his membership application approved, he said he was not sure but could be one year. The applicant was asked if he was required to do anything while waiting for his application

to be approved. He replied that he was only asked to distribute pamphlets and posters for the party.

10. The delegate also asked the applicant at the SHEV interview to talk about why he was drawn to JI. Despite that he was giving several opportunities to expand his answers, he was only able to say that he supported JI because of their honesty and sense of humanity and that they helped poor people. When he was asked what he found about the JI ideology compared to other political parties, he replied that he used to follow the good and honesty of the party and that he never followed 'the corruption and bad things of the party'. The applicant's answers as to how many JI meetings he attended also varied from 'could be ten or could be twenty', 'sometimes twice a month', ten to twenty in three or four months to that he could not remember but it could be 'more than a thousand'. When asked if he knew what happened to JI in 2013, the applicant replied that he could not remember much as his life has changed, and that he did not have any contact with anybody from the party. He then added 'it is in the media'.
11. Country information indicates that JI is the largest Islamist party in Bangladesh. JI is committed to the creation of an Islamic state with a sharia legal system, and to the removal of 'un-Islamic' laws and practices.¹ Country information also indicates that it is extremely difficult for a JI recruit to become a full member (from being initially an associate member to a party worker and then a full member) and it requires dedication, passing examinations on Islamic texts and observing a strict behaviour code. Recruits have to fill in a daily personal report card, recording how many times they prayed in the mosque and how much of the Quran they read.² Country information is also that on 5 February 2013, the Bangladeshi International War Crimes Tribunal sentenced JI's assistant secretary A Mollah to life imprisonment for war crimes, which led to mass demonstrations in the days followed in Dhaka and that protesters had demanded a death penalty for Mollah. Also in the same month, on 27 February 2013, the vice president of JI, D Sayeedi was sentenced to death, for which JI supporters responded with violent clashes with the police.³ The country information further indicates that JI as a political party was also banned from participation in the 2014 election on the basis of its anti-secular views and that some JI members contested a small number of seats in the 2018 election under the Jatiya Oikya Front banner.⁴
12. Despite having claimed to be a JI member and supporter for over a decade, the applicant displayed little understanding as to JI's membership structure or what JI represents for. His evidence about his JI involvement has been largely vague. He also varied his evidence during the SHEV in response to the delegate's various questions and prompts at times. While his evidence indicates that he will not be interested to re-join JI in future, his claims for protection are based his claimed past JI profile. Yet, he appeared to be indifference to or did not know what happened to senior leaders of JI in the month that he left Bangladesh or later. This is particularly concerning given the applicant did not leave Bangladesh until 28 February 2017, after the sentencing of two senior JI leaders. I note that the applicant had briefly referred to in his entry interview in 2013 that he was enrolled with JI. However, his overall evidence does not impress me that he had personal involvement in JI. This is also so, in light of his problematic evidence concerning other claims as discussed below.

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

² New Millennium, "Political Islam and the Elections in Bangladesh", 1 June 2013, CIS27813

³ Tazreena Sajjad & Anders C. Härdig, "Too many enemies: Mobilization, marginalization, and political violence", 22 January 2016, CIS38A8012299

⁴ DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

13. At the SHEV interview, the applicant also claimed that he was a BNP supporter. He claimed he started to support the BNP from 2004 to 2005 for one to two years. His evidence was that he did not actively supported the BNP, but provided the support though JI by following JI 'seniors' and that when the seniors supported the BNP, he 'provided them with tea and snacks'. I accept it is plausible that a JI supporter might have also supported the BNP through JI given JI and the BNP were an alliance in both 2001 and 2008 elections.⁵ The applicant's evidence that he supported the BNP only in 2004 to 2005 (not during election periods) by providing tea and snacks to JI senior members was unpersuasive.
14. The applicant stated in the visa application that after the AL' electoral victory around 2009, their supporters started targeting active supporters of the JI. One day when he was on the road in Dhaka some AI supporters saw him and chased him. He managed to escape and after he did not like to stay at home. He stayed with friends and sometimes he went to Chittagong. He also stated that two of his friends were killed in knife attacks by the AL supporters.
15. While the applicant did not indicate that he faced any problem prior to 2009 due to his political involvement in the visa application, he provided differing evidence at the SHEV interview. At the SHEV interview, the applicant was asked when the AL supporters started to give him problems. He initially stated that it was mainly from 2010. When the delegate sought to confirm with him that the problems started from 2010, he then said they started before 2010. When his varying evidence was put to him, he then claimed that he faced threats from the AL supporters soon after he joined the JI, i.e., in 2000. When asked what they did to him, he claimed that the AL supporters used to threaten him and confront him whenever they saw him on the street and sometimes they became physical. When he was specifically asked what happened in 2009 and his written claims about the 2009 incidents were read back to him, the applicant stated it was correct that happened. He however could not provide any further details, claiming that he lost his memory after the car accident and also citing the lapse of time. I have not accepted that the applicant suffered memory loss after his more recent motor vehicle accident in 2018. I have taken into account that the applicant was trying to recall something happened a long time ago. While the incidents occurred a while ago, the applicant received assistance from a registered migration agent in preparing his visa application including his written claims in 2017. While chasing by AL supporters maybe something minor on its own, the killing of two friends around the same time by the same people who he claimed were trying to harm him and from whom he also claimed to fear harm, and these incidents that had led to his escape from his home, in my view, is not minor.
16. Country information is that Bangladesh is historically prone to high levels of politically motivated violence, which tends to peak during periods of heightened political unrest, including during elections and strikes. Country information also indicates that Bangladesh was under the rule of the military backed caretaker government in 2007-2008 (until the AL came to power following the election win in 2008) due to the violent pre-election protests.⁶
17. I find it is concerning that he did not claim in the visa application lodged in 2017 that he faced any problem from the AL supporters prior to 2009, despite claiming that he supported JI in 2001 and 2008 elections by putting up posters for JI and attendance of JI meetings. His evidence in the SHEV application was that he started to face problems from the AL supporters after the AL won the 2008 election. While he claimed at the SHEV interview that he faced from the AL supporters prior to 2009, his evidence was that AL supporters threatened him whenever

⁵ Tazreena Sajjad & Anders C. Härdig, "Too many enemies: Mobilization, marginalization, and political violence", 22 January 2016, CIS38A8012299

⁶ DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438; Tazreena Sajjad & Anders C. Härdig, "Too many enemies: Mobilization, marginalization, and political violence", 22 January 2016, CIS38A8012299

they saw him and when 'he passed on the street'. I do not find the applicant's evidence compelling or convincing.

18. The applicant claimed that he was hit by a car while walking on the side of a road in Sandwip, Chittagong and his [body part] was badly injured. He was hospitalised for about four months and had surgery and had a metal plate implanted in his [body part]. His evidence was that he did not see who hit him, but other people who witnessed this incident told him that the car struck him belonged to AL' supporters. While he stated in the visa application that he did not report the matter to the police fearing what the AL supporters might do to him and that he did not believe the police would have helped, his evidence at the SHEV interview was that JI senior members reported the accident to the police but the police did not take any action. While the applicant was not too sure whether he was walking or on the motorbike at the time (his was riding a motorbike when he hit by a car in Australia in 2018), he reiterated that the injured [body part] was his [specified body part] and that he was in hospital for four months. As noted by delegate, the applicant did not provide any document in support. While I am prepared to accept that the applicant was hit by a car in 2010, he provided no convincing evidence that it were AL supporters who were behind the wheels or he was targeted.
19. The applicant claimed the supporters of AL in Sandwip falsely accused him, among some friends of his, of damaging the AL committee building. His evidence in the visa application was that: this occurred after he returned to Dhaka following his being discharged from the hospital and he heard this from his friends in Sandwip. The AL reported the matter to the local police and that their supporters were looking for him. He also heard from his cousin in Sandwip that his cousin had received a letter from the police addressed to the applicant. He was charged by the police with causing damage to property and that the police were looking for him. So he stayed with friends in different locations because he was afraid of being found.
20. When the applicant was asked to talk about this incident at the SHEV interview, he stated that this incident occurred in 2010. He also claimed that his friends told him that the police were looking for him and that he was moving from places to places, sometimes in Dhaka and sometimes in Chittagong. He also claimed in the SHEV interview that he did not work after the injury. When the delegate put to him that he had stated in the visa application that he was able to resume part-time at the [factory], he then replied 'yes, sometimes, but not continuously, sometimes'. I note apart from stating in the written statement that he resumed work at the [factory] from around 2012, in the same application he further stated that he worked in Dhaka from 2004 until February 2013 constructing [products] (in response to questions on the application form).
21. I have taken into account that the applicant referred to in his entry interview that he faced political problems in Bangladesh because he was enrolled with JI and that he put their posters on the wall. I note he also referred to that there was a false case against him. This evidence was brief and general. I also note that in the entry interview he stated that the false charge against him was for robbery which is inconsistent with later claim that the charge was causing damage to the AL committee building.
22. Having consider the evidence overall, I consider the applicant's evidence as to his involvement in JI and the claimed problems he experienced in the hands of the AL people was overall unconvincing and unsatisfactory. I also consider it is significant that the applicant remained in Bangladesh for over two years after motor vehicle incident and after a false charge was filed against him. He did not claim that he faced further problems, despite that the AL and the police were looking for him. Although he claimed that he was in hiding, his other evidence was that he resided in his home in Dhaka for a period to recover from his injury and that he was also

able to resume his part-time work in the [factory] from 2012. I do not accept that he was ever in hiding. I am not satisfied that the applicant was ever a JI member or supporter. I am not satisfied that he was a BNP supporter. I am not satisfied that the applicant ever came to the adverse attention of AL or anyone in Bangladesh.

Refugee assessment

23. 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

24. 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.
25. The applicant has not expressly claimed that he would face harm upon returning to Bangladesh due to his health or that he could not access any ongoing health care or medication required. This was nevertheless considered by the delegate. While the evidence is that he continues to require medical treatment for his rehabilitation and he is receiving physio treatment and is on pain relief medication, there is a lack of medical evidence as to his prognosis and any specific medications he requires. I note that the Bangladeshi Constitution stipulates that the provision of health care is a government responsibility. In practice, however, the private sector and non-governmental organisations provide a significant portion of health services. Health care facilities in Bangladesh are generally poor in quality.⁷ According to the Centre for Research and Information in Dhaka, there are over 600 hospitals in the country, including 482 primary care hospitals at sub-district level and below, 65 secondary hospitals at district level, 15 medical & dental college hospitals and specialist facilities such as chest, infectious diseases and leprosy hospitals. The Government has established 16,438 community clinic and health centres and 30,000 satellite clinics for child and maternal healthcare. Bangladesh has a significant pharmaceutical industry and exports medicines to other country as well. While some cancer medicines, among others are imported, but principally, Bangladesh is self –sufficient when it

⁷ DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

comes to medicines. World Health Organisation reported that medicines and treatment at a public hospital are mostly free for poor people. The World Bank also observed that Bangladesh has made remarkable progress and committed itself to achieving universal health coverage by 2032.⁸ I note the applicant had received hospital treatment about 10 years ago for his then accident. He did not suggest that he did not receive proper or adequate care then. He appeared to have recovered well given he was able to resume to some part time work in the [factory] after the accident in Bangladesh and also worked in Australia in a [workplace] doing [job tasks] work from September 2015 until he had the motor vehicle accident in June 2018 working about 40 hours per week.

26. On the evidence before me, I am not satisfied that his ongoing medical needs could not be met in Bangladesh. Additionally, I am not satisfied that any limitation/difficulty in accessing health care, if there were any, which is due to lack of services, amounts to persecution within the meaning of s.5J(1), as it does not involve systematic and discriminatory conduct.
27. 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, supporters of rival parties, 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.⁹
28. The applicant does not claim that he would seek to engage in politics. In light of his past history, I am also not satisfied that he would do so if he were to return to Bangladesh. I am not satisfied that the applicant has a profile to be of adverse interest to anyone. I am not satisfied that the applicant faces a real chance of any harm from the AL or anyone if he were to return to Bangladesh, now or in the reasonably foreseeable future.
29. 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 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.
30. 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. DFAT states that it has no evidence to suggest that recent returnees have received adverse attention from authorities or others.¹⁰ The International Organisation for Migration's report also indicates that irregular migrants like the applicant are typically regarded as victims of people smuggling networks rather than law breakers.¹¹ 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

⁸ UK Home Office, "Bangladesh: Medical and Healthcare Issues", 1 January 2019, 20190805134111

⁹ DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

¹⁰ Ibid.

¹¹ International Organisation for Migration, "Bangladesh", 1 August 2014, CIS29397

returnees without such a profile.¹² 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.

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

Refugee: conclusion

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

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.
35. 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.
36. Based on the information discussed above, I am not satisfied there is a real risk that the applicant could not access the medical needs he requires. Additionally, I am also not satisfied that any difficulty or limitation he may face in accessing health care, if any, amounts to significant harm. I am not satisfied the treatment he may face involves death penalty, arbitrary deprivation of his life, torture, degrading treatment or punishment, cruel or inhuman treatment or punishment. I am not satisfied that there is an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering or an intention to cause extreme humiliation.
37. I have found above that the applicant does not otherwise face a real chance of any harm. As real chance and real risk involves the same threshold, based on the information discussed

¹² DFAT, "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

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

38. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.