



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA20/08170

Date and time of decision: 26 May 2020 16:56:00
S Ryan, 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 and arrived in Australia [in] February 2013. On 13 July 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 8 April 2020 and referred the matter to the IAA on 15 April 2020.

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 and raised in [Village 1] in Chittagong Province of Bangladesh. He is of Bengali ethnicity and follows the Sunni Islam religion.
 - He has been a member of the Bangladesh National Party (BNP) since 2009 and whilst in Bangladesh was a leader in the local area committee of the political party, working as [Position 1] of the student wing. His [brothers] are also prominent members of the BNP.
 - He was assaulted by political opponents and/or government supporters in 2009 and received multiple injuries.
 - His family was forced to flee [Village 1] after their home was destroyed by a large mob associated with their political opponents in 2009. Their farming land was also confiscated.
 - He participated in an anti-government political protest [in] February 2010 that resulted in property damage and violent confrontation with Bangladeshi security forces. He is the subject of two arrest warrants on the basis of his participation in that protest.
 - After these events he and his family were forced into hiding in different parts of Bangladesh. His family have remained in hiding since that time as the government's persecution of its political opponents has intensified.
 - His [brothers] have been subjected to physical assaults by government officials and are wanted people.
 - If he returned to Bangladesh he will be detained and tortured by the government.

Factual findings

Identity and Background

4. The applicant's identity is not a matter at issue in this assessment. He has provided a copy of his Bangladeshi birth certificate and has given consistent evidence concerning the basic elements of his identity throughout the Entry Interview and the protection application processes. I accept

that the applicant is a national of Bangladesh and I have assessed him against Bangladesh as the receiving country.

5. The applicant was born in [year] in [Village 1] in the [District 1] in the Chittagong Province of Bangladesh. He has [siblings], all of whom are substantially older than him. The applicant advised during the Entry Interview that he attended high school in [Village 1] up until December 2009. He moved to the village of [Village 2] in the same district in January 2010 and then worked as a [Occupation 1] in a [business] in [Village 2] until December 2012. His parents left [Village 1] in 2010 and have lived with his older [sibling] in the village of [Village 3] since that time.
6. The applicant left Bangladesh in January 2013 and I accept his claim that he departed by boat and bypassed Bangladesh's formal immigration procedures. In order to return to Bangladesh he would need to apply for a Bangladeshi passport from Australia, and I accept that the circumstances of his illegal departure in 2013 may be apparent to Bangladeshi authorities at that point.

Health conditions

7. In May 2017 the applicant was referred by his migration agent for a psychological assessment. The applicant has provided assessments produced on the basis of two interviews in May 2017 and a further consultation with the same psychologist following the SHEV interview in March 2020. The applicant was found to be presenting with clinical levels of anxiety and depression in 2017 and the psychologist confirmed in the more recent assessment that his conclusions in the earlier report remain relevant to his current state.
8. The applicant stated on a number of occasions during the SHEV interview in March 2020 that his memory and ability to recall past events in Bangladesh were affected by his mental health difficulties and that he had been advised by his psychologist that he should try not to recall those events. The medical evidence provided by the applicant does not give any indication that his psychologist or any other medical professional has assessed the applicant's memory or cognitive ability, or suggest that it has been affected by his mental health condition. Nevertheless I am willing to accept it is possible that the applicant's mental health condition may have had some effect on his ability to recall precise dates and events during the SHEV interview, and I make some allowances in this respect.
9. The applicant has had the assistance of a qualified legal representative throughout the SHEV application process and who, in addition to assisting him prepare his SHEV application, attended the SHEV interview and provided post-interview written submissions to the delegate which set out his claims and supporting evidence. Considering all of these circumstances, I am satisfied that the applicant was on notice of the key determinative issues in his case and that he has had real and meaningful opportunities to put forward his claims for protection and address the matters in issue.
10. The applicant reported to his psychologist in 2017 that he suffered severe [pain] suffered from an injury sustained in his home in Australia and that these injuries necessitated ongoing physiotherapy treatment. He made no other mention of any physical ailments in the SHEV application form, the SHEV interview or the post-interview written submission. He has not indicated he has ongoing injuries, claimed to fear harm on account of [his] pain, or otherwise indicated that these or any other physical injuries form any part of his protection claims. I accept this is the case.

11. I accept the psychological assessments contained in the two reports provided by the applicant. However I attach only limited weight to the information in these reports as evidence corroborating the applicant's claim to have a well-founded fear of persecution in Bangladesh, noting that the psychologist's opinions with regard to the dangers faced by the applicant in Bangladesh appear to be assessments based solely on the applicant's own account of his circumstances. In assessing whether there is a real chance of the applicant being harmed in Bangladesh I have had regard to a much wider range of information than appears to have been considered in these reports.

Evidence given the Entry Interview

12. The applicant participated in an Entry interview conducted by the Department of Home Affairs (the Department) on 13 March 2013. The evidence he gave concerning the circumstances that led him to leave Bangladesh is substantially at odds with the claims for protection he has subsequently put forward in the SHEV application.
13. During the Entry Interview the applicant was asked whether he or any member of his family were associated with any political groups or associations, or whether they were involved in any activities or protests against the government and he responded 'no'. He was asked whether the police and security or intelligence organisations impact on his day to day life and he indicated they were involved in the confiscation of his family's land but did not mention that he had hidden from the Bangladeshi police for three years or that he was wanted by police and was the subject of multiple arrest warrants. The applicant was also asked about the presence of political groups in his area and he responded by mentioning one political group, Jamaat-e-Islami (Jamaat) and confirmed he had no involvement with them. He mentioned that his family's home and land in [Village 1] was forcibly taken from them and that the family was threatened when they objected. The interview then asked the applicant whether he had ever been beaten or tortured and he replied "*They tried to beat me but they could not*".
14. In the 2017 written submission and during the SHEV interview the applicant sought to explain the responses he gave during the Entry Interview. He claimed that these statements were made in error and were due to his being stressed at the time and his lack of English speaking ability. The applicant also asserted that he had been very scared during that interview and he was fearful that if he revealed his situation this would be passed on to Bangladesh authorities and would endanger his family in Bangladesh, and that he would be returned to Bangladesh.
15. I take into account the fact that the Entry Interview is not intended to provide a full exploration of a persons' claim to asylum, although it does in part seek to elicit a person's reasons for departing their country and other matters that may be regarded as pertinent to a protection claim. I also take into account that the interview took place after the applicant's undoubtedly arduous journey by boat to Australia, a journey he has described as distressing.
16. Having reviewed the audio record of this interview I consider it was conducted in calm and friendly manner. I note that the Entry Interview was conducted more than three weeks after he had arrived in Australia and there are no indications that the applicant was in a state of distress or was otherwise suffering from any ill effects of his journey to Australia. For reasons given earlier I do not accept that the applicant's mental health has materially affected his capacity to provide evidence during the Entry Interview. The interview was conducted with the assistance of a Bengali interpreter and it is evident from the natural flow of the interview and detailed nature of his responses that the applicant understood the interpreter and the questions he was being asked.

17. The interviewer spent considerable time asking the applicant about his circumstances in Bangladesh, his manner of travelling his reasons for leaving and the reasons he did not want to return. In that interview the applicant provided specific and detailed responses to these questions and the interviewer did not interrupt him at any point and, at times, asked him to provide more detailed answers.
18. While I have considered the applicant's explanation that he was fearful of providing information about his experiences in Bangladesh, I note that during the Entry Interview the applicant was willing to disclose that the political group Jamaat, the Bangladeshi police and local authorities were all involved in the harassment of his family and destruction of his family home, that these groups had repeatedly threatened him with violence, and that he had left Bangladesh due to his fear of persecution by those same parties.
19. Given the extent of these discrepancies and omissions, the centrality of his and his family's association with the BNP to his protection claims, as well as the matters that he did mention, I do not accept that the applicant's complete omission of any part of his claim to be a member of the BNP, or his omission of having been involved in anti-government protests and to have been charged with crimes in Bangladesh can be plausibly attributed to the his being stressed at the time, his lack of English, his stress from the journey to Australia or his fear of Bangladesh authorities.

BNP associations and activities

20. I have serious concerns with respect to the credibility of the applicant's claim that he and his brothers were prominent members and activists with the BNP. The applicant has claimed that his family is publicly known to be associated with the BNP and that he and his brothers have been politically active members of some prominence. The applicant provided evidence which asserts he was [Position 1] of the BNP Student Wing in [District 1] and continues to be a member of the BNP.
21. I share the delegate's concerns with the respect to the paucity of the applicant's evidence during the SHEV interview concerning his personal involvement in the BNP. From the evidence he gave it appears that his understanding of the BNP's political positions, activities and objectives are very limited. The applicant claimed his brothers had held formal posts in the BNP, however when asked about his brothers during the SHEV interview he stated he could not recall their roles, and then sought to downplay his own involvement and knowledge of the BNP declaring his older brothers had been more involved in the party than he, and that younger members like him just followed the instructions of the older members. His responses concerning his own activities were very basic and were not at all congruous with the depth of knowledge one would expect from a person claiming to have been a leading committee member of the BNP, and one whose prominent and ongoing association with the BNP has come at great personal cost to him and his family.
22. I consider it telling that, when repeatedly invited by the delegate he was unable to meaningfully describe any element of the BNP's political goals or policies, other than to regain power by forcing the government to hold elections. It is also concerning that, when asked by the delegate about Bangladesh's national elections, the applicant indicated the last election he witnessed before leaving Bangladesh was an election held in 2006. Even making allowances for the possibility that the applicant's mental health condition may have affected his ability to recall precise dates, it is difficult to understand how a committed BNP activist would be unable to recall that Bangladesh had held a national election held in 2008, the same year he claimed to have formally joined the BNP. I note this would have been a particularly meaningful and tumultuous

event for BNP members and supporters as it was the election in which the BNP lost power to the Awami League.

23. The delegate put the applicant on notice during the SHEV interview on a number of occasions that she had concerns with his claim to have been a BNP member as result of the inconsistencies in the information he had provided in the SHEV application and his answers in earlier interviews, and I am not satisfied that any of the answers he provided persuasively explains these discrepancies.
24. During the 2013 Entry Interview the applicant was asked "*Were you ever beaten or tortured?*" and responded that he had not. This is inconsistent with his claims in the SHEV application that he suffered a number of physical assaults on account of his involvement with the BNP. He claimed to have been assaulted by government supporters with batons and a knife during a BNP anti-government rally in early 2009 and sustained multiple injuries. He has also claimed to have been involved in and to have been treated for injuries [in] December 2009 after being violently assaulted. It is not clear to me from what incident the applicant is purporting these injuries were incurred as I note he has not claimed to have been involved in any protests or altercations [in] December 2009, and has never claimed to have suffered any injuries as a result of the attack on his family's property.
25. I have had regard to the handwritten letter purporting to have been produced by a medical professional on 12 April 2017 attesting to having treated the applicant for injuries [in] December 2009. I have also considered the letters from the BNP and from his legal advocate and the police affidavit naming the applicant in an allegation of participation in an unlawful protest and attacks on police. Considered on their face, these letters appear to have corroborative value in substantiating his claim to have been a member of the BNP and to be a person of interest to the Bangladeshi authorities on account of his participation in violent BNP rallies. However, noting the country information before me concerning the high prevalence of fraud in documents of this nature in Bangladesh, I have some reservations as to the authenticity of these documents.
26. The documents have only limited corroborative value, and do not overcome my significant concerns with regards to the applicant's account of his involvement in the BNP during the SHEV interview, and the fact that he gave evidence during the Entry Interview that neither he nor any member of his family had any involvement with any political party and that he had not been beaten or tortured in Bangladesh.
27. On the information before me I am not satisfied that the applicant was a leader, or a member or an active supporter, or associated in any other way with the BNP whilst he was in Bangladesh. I am not satisfied that he took part in anti-government protests in Bangladesh or that he has been charged by the Bangladesh police for his involvement in such activities.

Attacks on the family home

28. The applicant has claimed that in 2008 and 2009 he and his family were the target of harassment by groups of people who were associated with another faction in the BNP, other political parties (Jamaat and the Awami League), as well as police and local authorities in [Village 1]. He claims that he and other members of his family were attacked and beaten up regularly over a long period, and that the harassment of his family culminated in a mob attack in which they were chased off their land and their house was destroyed. He has claimed the attackers had various motivations, including the desire to confiscate their land to use it for a mosque, and because other parties had a vendetta against the applicant's family on account of their association with the BNP.

29. I note that the applicant has been consistent in claiming his family were forcibly evicted from their land in [Village 1]. I also take into account that the basic aspects of this claim, that the applicant's family had owned land in Chittagong and were forcibly removed from their land against their will, are plausible. DFAT note the prevalence in Chittagong of forced land appropriation, communal disputes over land ownership and usage, and the lack of effective legal mechanisms to resolve local land disputes fairly. The applicant claims to be of the majority Bengali ethnic group and follows Sunni Islam, the state religion in Bangladesh. I note that DFAT's report suggests that forcible, extrajudicial and/or violent land appropriations are predominantly matters affecting Bangladesh's ethnic and religious minorities, although I accept this does not preclude the possibility that persons being targeted for other reasons, such as political affiliation.
30. In considering the evidence provided by the applicant concerning this incident, I am not satisfied that the applicant's claims are credible. He has given multiple accounts of the timing and circumstances of the attack on his house which are highly inconsistent with each other.
31. During the Entry Interview the applicant stated that he lived in [Village 1] and attended High School there up until December 2009, and that around this time he left [Village 1] and began living and working in [Village 2]. During the Entry Interview he did not indicate exactly when his family's home was attacked, but given he had also stated he was present at that incident in which his family was forced to leave [Village 1], it can be deduced he was claiming that this event took place in December 2009.
32. In the 2017 written submission accompanying his SHEV application he claimed in response to Question 91 of Part C that his house was burnt down in December 2009, and then this account is contradicted in the submission prepared by his legal representative that is attached to the 2017 SHEV application. In that statement he asserts there were two arson attacks on his family home soon after he had participated in a BNP protest rally in February 2010.
33. During the 9 March 2020 SHEV interview he gave evidence that his family home was attacked and destroyed in April or May 2009 and that he was with his parents and other members of the family home at the time of the attacks. He claimed that a mob of 50 or 60 people approached the house and began to ransack it and gave a specific account of how he and other members of his family had fled via the back of their property. This is contradicted by the subsequent account he provided in the 18 March 2020 written statement in which he states he was not at the property at the time of the mob attack on his family's house.
34. Considering the substantial inconsistencies between these accounts, the lack of any corroborative evidence substantiating any part of this purported incident, and taken with my finding that he gave non-credible evidence concerning his family's involvement with the BNP, I am not satisfied that the applicant's family were the targets of a campaign of harassment to forcibly acquire their land in [Village 1], or that they were forced to flee home after it was attacked by a mob and destroyed.

Refugee assessment

35. 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

36. 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.

37. For the reasons given above I have found that I am not satisfied that the applicant was not a member or otherwise associated in any way with the BNP whilst he was in Bangladesh. I have also found that I am not satisfied that he has been involved in anti-government protests or that he is a person of interest to the Bangladesh police for this reason. I am not satisfied that the applicant is known or suspected by Bangladesh authorities or by any other political groups to have a current association with the BNP, nor am I satisfied that the applicant would be imputed to have such association or to hold any particular political opinion on return to Bangladesh. I am not satisfied that he faces a real chance of harm on these bases.

38. For the reasons given above I am not satisfied that the applicant's family home in [Village 1] was attacked by a mob and destroyed or that the applicant's family left the village for this reason. Given this finding I am also not satisfied that he would be face any form of harm from Bangladeshi authorities or from persons or organisations he has claimed were involved in such an attack. I am not satisfied that on return to Bangladesh he faces a real chance of harm on this basis.

39. The applicant did not raise a claim that he feared harm on account of having made an asylum claim in Australia; however this was considered by the delegate. There is no information before me that indicates that the applicant's claims, or the fact that he has made an application for asylum, have been disclosed to any person in Bangladesh. Nor is there any information suggesting this information would become known as a result of his return to Bangladesh.

40. I have accepted that the applicant's illegal departure in 2013 may be apparent to Bangladeshi authorities upon his return. DFAT confirms that Bangladesh authorities facilitating travel documents for returnees undertake individual checks to verify their identity and I accept that these circumstances will make it apparent to Bangladeshi authorities that the applicant's manner of departing Bangladesh bypassed procedures provided in the Emigration Ordinance Act. Bangladeshi law provides for penalties of up to one year imprisonment or a fine of 5000 taka for persons departing in the circumstances similar to the applicant. However I note DFAT reports that it is not aware of these penalties being enforced, and that this assessment is also supported by the International Organisation for Migration report which observes persons in the applicant's circumstances are typically regarded as victims of people smuggling networks rather

than law breakers. I consider it to be only a remote possibility that these penalties would be applied to the applicant.

41. DFAT advise that most returnees, including failed asylum seekers, are unlikely to face adverse attention, and those cases that do include high profile individuals who have engaged in political activities outside Bangladesh, or have been convicted of serious crimes. Considering the applicant's low profile, the evidence before me does not suggest he would be targeted by Bangladeshi officials for any of these reasons. This, of course, does not preclude the possibility of a person not fitting these profiles facing adverse attention from authorities for another reason. However, considering the particular circumstances of the applicant, I am satisfied that the likelihood of the applicant facing adverse attention from Bangladeshi authorities is remote.
42. The applicant did not put forward a direct claim to fear harm upon return to Bangladesh on account of his mental health, however this was nevertheless assessed by the delegate. I accept the findings in the psychologist's reports, noting the March 2020 assessment confirms the applicant suffers from anxiety and depression and has symptoms consistent with post-traumatic stress syndrome. Contrary to the claim made by the applicant's representative that the applicant has been treated by a psychologist for several years, the psychologist's letter confirms the applicant has not undertaken any psychological therapy in Australia, and his interaction with the psychologist has been limited to attending his office for two assessments, in July 2017 and in March 2020.
43. The March 2020 psychologist report indicates that the applicant is managing his symptoms by periodically visiting his GP and taking prescribed antidepressant, sleep and migraine medications. The psychologist attributes the applicant's condition, at least in part, to the effects of the stress of the immigration processes and the uncertainty of his immigration status in Australia, as well as his difficulties settling in Australia. I note the report does not indicate a prognosis for recovery if the applicant were returned to Bangladesh, at which time the uncertainty regarding his status in Australia would be resolved and where he would be reunited with his family and other social supports.
44. DFAT observes that Bangladesh has an extensive public health service system that, in principle, covers all of its citizens with a range of services at no cost. However DFAT also note that, in practice, users of health services in Bangladesh predominantly finance most of their own medical expenses. The UK Home Office 2019 report cites sources observing that mental illness in Bangladesh is highly stigmatized and mental healthcare is limited, but is nonetheless improving. Mental healthcare is offered by both government and private facilities, and the UK Home Office confirmed the existence of treatment options available for PTSD and depressive disorders and observed that a broad range of pharmaceutical medicines for the treatment of mental health issues are accessible.
45. While the country information does clearly indicate there would be limitations in medical services a person with mental health problems in Bangladesh can access, on the evidence before me, I am not satisfied that a person in the applicant's circumstances, a person who suffers from Depression, Anxiety and PTSD and treats these conditions with antidepressant, sleep and migraine medications, is at significant risk of mistreatment or discrimination such that it would amount to a real chance of harm.
46. Leaving aside the considerable uncertainty regarding the applicant's health condition upon return to Bangladesh, and the services and level of care he would require, none of evidence before me suggests the applicant would be denied access to such services for reason of his being affected by a mental health condition or for having departed Bangladesh illegally after having

sought asylum in Australia, or for any reason other than the challenges faced by a developing country like Bangladesh in terms of funding its health facilities. There is no evidence before me to indicate the relative lack or reduced access to health services in Bangladesh involves any intention to inflict harm.

47. DFAT characterise Bangladesh's overall security situation as 'volatile' and notes the prevalence of communal violence in the form of politically motivated violence, and other forms of violence relating to criminal activity and Islamist terrorist groups operating in Bangladesh. DFAT also note credible accusations of violent, extrajudicial actions taken by Bangladesh's security forces against criminal gang members, opposition political activists, and Islamist militants.
48. In this context I have considered whether the applicant faces a real chance of harm through his exposure to these forms of violence in Bangladesh. The information indicates that those civilians at a particular risk of harm are persons who are members of, or who are closely associated with political parties, extremist Islamist groups, or criminal gangs. There is no credible information before me that the applicant has ever been involved in any political activity, or that he is an imputed or actual supporter of any political party in Bangladesh.
49. I am satisfied that he would not become involved in any type of political activities or events upon return to Bangladesh and that this would not be due to any fear of harm, but rather a lack of any genuine interest. I am also satisfied that he has never been a member of an extremist Islamist group or criminal gang, and nor would he seek to join such a group upon return to Bangladesh. The information before me does not suggest that, for the foreseeable future, violent incidents involving the harming of unrelated bystanders occur in Bangladesh to the extent that the chance of harm rises to a real one.
50. I am not satisfied that the applicant faces a real chance of harm for reasons of having a mental illness, or for having left Bangladesh illegally and sought asylum in Australia, or on account of the general security situation in Bangladesh.

Refugee: conclusion

51. 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

52. 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

53. 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.

54. I have concluded above that the applicant does not face a real chance of any harm on any of the bases claimed. As 'real risk' and 'real chance' involve the application of the same standard, 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

55. 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.