



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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BANGLADESH  
IAA reference: IAA20/08671

Date and time of decision: 9 October 2020 08:49:00  
M Currie, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Bangladeshi citizen of Bengali ethnicity and an adherent of the Sunni faith. He arrived in Australia in June 2013 and lodged an application for a Safe Haven Enterprise Visa (SHEV) in August 2017. In September 2020, a delegate of the Minister for Immigration decided under s.65 of the Migration Act 1958 (the Act) to refuse the visa, finding that Australia did not owe protection obligations to the Applicant. On 10 September 2020, the applicant's matter was referred to the Immigration Assessment Authority (IAA).
2. My task is to consider the applicant's claims for protection afresh. As this is a *de novo* decision, I am not bound by any earlier findings by the delegate.

### Information before the IAA

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

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a Bangladeshi citizen, of Bengali ethnicity who adheres to the Sunni faith. He was born in [month] [year] in [Village 1], in the Tangail District of the Dhaka Division of Bangladesh where he lived with his family. In February 2004, the applicant married, he has one son, born in [month] [year]. In Bangladesh, he worked [in a shop]. His parents, wife and son all remain in [Village 1] in Bangladesh.
  - In Bangladesh, the applicant faced a range of problems associated with the political scene in that country. Politics can be confrontational and violent in Bangladesh. The two major political parties in Bangladesh, the Awami League (AL) and the Bangladesh National Party (BNP) attempted to recruit him as a member and pressured him to support the party. He declined to join or support either party. This led to him facing harm in his country.
  - In early 2012, while the applicant was shopping in the market, when he was approached by members of the AL who asked him to contribute financially to support the party. The applicant declined, citing a lack of money. He was slapped on the face, and had his money stolen.
  - In mid-2012, one evening the applicant and two friends were walking down the road, when they were approached by members of the BNP. The BNP men grabbed him, though his friends ran away. The BNP members beat the applicant, they used bad language and slurs against him.
  - In early 2013, while he was working in [the] shop, members of the AL entered the shop and demanded that he attend a nearby AL rally. He refused and so they demanded that he make a financial contribution to the party in lieu of attending. Again, the applicant refused, and the AL men dragged him from the shop, and beat him with sticks. Then they damaged the shop, and the goods. He was tied to a nearby tree and beaten further. Later, after the AL men had departed, he was assisted to a nearby hospital, had his wounds

treated and was provided with pain medication. He had no major injuries but was in pain for around three months following this incident.

- The applicant did not report these incidents to the Police, as he believes that the police department in Bangladesh is controlled by whichever party is in power and is disinclined to investigate political matters. He feared that instead of investigating his case, the police would harass him.
- In May 2013, the applicant departed Bangladesh and travelled to Australia. Members of the AL in his local area continue to seek him and visit his family home asking about him.
- The applicant fears that if returned to Bangladesh, he would face harm from the AL and the BNP who would continue to harass him for political reasons. He believes that these parties would harm him for his refusal to join or support them financially.
- The applicant fears harm from members of a local gang who assaulted him in Bangladesh.
- The applicant says he could not relocate to other parts of Bangladesh, since the AL is powerful throughout the country.
- The applicant departed Bangladesh illegally, without a valid travel document. If returned to Bangladesh, he fears his illegal departure, and his attempt to claim asylum in Australia, would lead to him facing harm in his home country.

### **Factual findings**

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5. As part of his SHEV Application, the applicant has provided copies of a number of identity documents in order to establish his identity. This includes a copy of a Bangladeshi Birth Certificate (with translation which was issued in his name. He has also provided a copy of Character Certificate issued in his name which records his personal details. These documents support the applicant's verbal identity claims. I have reviewed this material and I also observe the applicant spoke Bengali during his Protection Visa Interview. The applicant has established his identity to my satisfaction. I accept that he is a Bangladeshi citizen, of Bengali ethnicity who adheres to the Sunni faith, as he claims. I accept that he was born on [date] in [Village 1], in the Tangail District of the Dhaka Division of Bangladesh. For the purposes of this decision, I find that Bangladesh is his receiving country.

### **Life in Bangladesh, political harassment, gangster**

6. Though the applicant describes himself as apolitical, his protection claims, revolve around events relating to politics in Bangladesh. He says that at various times, members of the two major political parties in Bangladesh have attempted to recruit him, but he has declined to join or financially support either party. His refusals have led to him being beaten and being robbed.
7. In the Statement of Claims which accompanied his 2017 SHEV Application the applicant cited three examples of the kind of political harassment he faced:
  - In early 2012, while the applicant was in the market shopping, he was approached by members of the AL who asked him to make a financial contribution to the AL. The applicant is not interested in politics and declined, citing a lack of money. As consequence of his refusal to donate money, he was assaulted by the AL men, was slapped on the face, and had his money stolen.
  - In mid-2012, the applicant and two of his friends were walking down the road in the evening, when they were approached by a group of BNP Activists. The BNP men who

grabbed him, but his friends were able to run away. The BNP men beat the applicant, they used bad language against him.

- In early 2013, while he was at work in [the] shop, members of the AL entered the shop and demanded that he attend a nearby AL rally. The applicant refused to attend, and so the AL men demanded that he make a financial contribution to the party instead. Again, the applicant refused. The AL men dragged him from the shop and beat him with sticks. He was tied to a nearby tree and beaten further. Then the men damaged the shop, and the goods being sold. The applicant was taken to hospital, had his wounds treated. Though he had no major injuries, he was in pain for around three months. After this incident, he decided that he was no longer safe in Bangladesh and made his arrangements to travel to Australia.
8. The applicant's SHEV Application indicates that his principal fears all related to the AL, and that organisations ability to coerce him, and find him.
  9. At his 2020 Protection Visa Interview, the applicant provided a different account of what had happened to him in Bangladesh. He said that:
    - His life was in danger because he had come to the attention of a local gang. In May 2013, the Gang leader had been employed by the BNP and other parties which opposed the ruling AL to provide supporters to attend anti-Government rallies. The applicant refused to attend the rally in support of the BNP and so the Gang leader threatened him. He said he had been chosen to attend rallies by the Gang leader, as he was a well know figure in his village who participated in sports and community work.
    - Around 10 days later, the gang leader sent some men to the shop wear he worked around closing time. After the applicant had left the shop, the men harassed and beat the applicant. He ran away and was able to escape.
    - Several days later, the Gang leader sent armed men to the applicant's house at night to harm him. The applicants father saw the armed men at his house, and the men left, as they did not want his father to make in any noise. After this incident the applicant decided he was no longer safe. He travelled to Chittagong (in the south) and hid there while he made arrangements to depart for Australia.
  10. As summarised above, during his Protection Visa Interview, the applicant's principal fears related to his interactions with, and threats from the gang leader, who wanted him to attend BNP rallies. When asked at interview whether he faced any other problems in Bangladesh, the applicant indicated to the delegate that he did not.
  11. Following the applicants explanation of what had happened to him at interview, the delegate indicated to the applicant that his claims had appeared to shift substantially between his 2017 SHEV Application and his 2020 Protection Visa Interview; that the source of his principal fears had shifted from the AL in his 2017 Statement of Claims to the Gang leader in his 2020 interview; and that his revised account of what happened contradicted his earlier claims. The delegate asked the applicant to explain his shifting and revised account.
  12. In response the applicant was, in my view, unpersuasive. He tried to reconcile the accounts he had provided in 2020 with his earlier 2017 account but was unable to do so convincingly. I have real doubts about the applicants claims. I note that the applicant has not provided any independent corroborative evidence in support of any of these events. Though the applicant has variously asserted he has been targeted by the AL and the BNP, and a Gang, the incidents described by the applicant do not appear to be widespread, or organised. Rather, they seem

to be an opportunistic and ad-hoc. Even if I accepted all his claims, I note that according to his own evidence, after each event, the applicant was able to resume his life, without any ongoing issues arising. The applicant's father remains in his village and has not faced problems like this, nor has his brother, who still resides in Bangladesh. He does not report that his father or his brother, or any other relative, or any person he knows, face any problems being targeted by either the AL or the BNP or a gang. The applicant himself says that he is apolitical, and the incidents he describes occurred after he refused to support the AL and the BNP, not because he was suspected of supporting rival parties. Country information before me indicates that most Bangladeshi's have a limited interest in politics and the majority are not members of any particular political party.

13. On the whole, I was not persuaded by the applicant's account or his explanations for his shifting claims. While I have serious doubts about his claims, I am willing to accept that the applicant was pressured to attend a single BNP protest in 2013, but I do not accept his remaining claims. I do not accept that he had any interactions with the AL, or the BNP. I do not accept that he faced any problems in 2012. I do not accept that the AL or the BNP attempted to extort money from him, or that he went to hospital. I do not accept that the applicant was ever threatened by the lead of a criminal gang, or that a gang sent gang members to his workplace, or his home. I do not accept that the applicant was ever personally targeted, or that he had a particular political profile of interest to either party.
14. I note that the applicant has explained that in Bangladesh, political parties have a national reach, and he would not be safe anywhere in his country, since they could find him. It would seem then, that on his own account, if either the AL, or the BNP or anybody else wanted to find or harm the applicant they could have done so at any time while he resided in Bangladesh. This did not happen, despite the applicant living in the same village of [Village 1] for his entire life prior to his departure. Furthermore, this village is where his family remains, and other members of his family have not had any problems like those described by the applicant. In light of these factors, I conclude that the three events the applicant has cited, have largely been fabricated by him. I do not accept that the applicant personally was ever of interest to the AL, or the BNP or by a gang, except on one occasion when he was encouraged to attend a rally. I do not accept that he was ever personally targeted for political violence by the AL, or the BNP or any other party, or a gang due to his refusal to attend or due to his imputed political opinion. I do not accept that he was a well-known member of the village due to his involvement in sport, or community work. I conclude that the applicant has exaggerated his account to have been personally of interest to the AL and the BNP and a Gang in order to improve his chances of obtaining a Protection Visa in this country.
15. Having made this finding, I am not persuaded that the applicant is telling the truth about AL visits to his family after his departure. I do not accept that the AL looked for this applicant at any time. I do not accept that the AL sent persons to his family home to make inquiries about him after his departure.

### **Refugee assessment**

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16. 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

17. 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.
18. During his life in Bangladesh, this applicant was born and raised in [Village 1] Village in the Tangail District of the Dhaka Division. His family, including his parents, and his wife and son continue to live in [Village 1]. I conclude that if returned to Bangladesh, the applicant would return and reside in [Village 1] with his family.

### *Imputed political opinion, Gang*

19. According to the applicant, if he returns to Bangladesh, he would face ongoing threats of harm from political parties in the country. He says that the AL, and the BNP would attempt to recruit him, and because he has no interest in politics he would refuse. He fears he would face retribution and be imputed to be a supporter of rival political parties. He fears that his refusal of joining either party and refusal to support them financially, would lead to him facing harm, and potentially, being killed. He says that if he returned to Bangladesh he may come to further attention from the Gang.
20. Country information before me indicates that Bangladesh is a parliamentary democracy. However, historically, the politics of the country have been turbulent. After achieving independence from Pakistan in 1971, the first two Prime Ministers were assassinated, and the country was ruled under a state of emergency or martial law between 1974 and 1990<sup>1</sup>. A state of emergency was also declared in 2008 and an interim government, with backing from the Bangladeshi military, instituted reform program which curtailed some political and civil rights in an attempt to curb corruption and violence<sup>2</sup>.
21. The unicameral National Parliament and the largely ceremonial presidency both have five-year terms<sup>3</sup>. The constitution vests political power in the office of the Prime Minister<sup>4</sup>. The AL and

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<sup>1</sup> Devine, J, Economic and Social Research Council, 'Governance, democracy and the politics of wellbeing', 1 September 2007, CIS1ACBC92107

<sup>2</sup> Devine, J, Economic and Social Research Council, 'Governance, democracy and the politics of wellbeing', 1 September 2007, CIS1ACBC92107

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

<sup>4</sup> Department of Foreign Affairs and Trade (DFAT) – "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

the BNP are the two principal political parties in Bangladesh and dominate local politics<sup>5</sup>. DFAT reports that the AL has traditionally been broadly secular, liberal, rural-based and broadly in favour of relations with India, while the BNP has traditionally been more accommodating of political Islam, conservative, and urban-based<sup>6</sup>, though the parties do not necessarily strictly adhere to these policy platforms<sup>7</sup>. Since independence both parties have held terms of office. Both the AL and the BNP are large national organisations, with administrative elements going down to village level<sup>8</sup>. The AL has been in power since 2009<sup>9</sup>, and won the last election held in 2018<sup>10</sup>. The relationship between the two parties is characterised by a longstanding political and dynastic rivalry, which has increased over time. Both parties derive their legitimacy from their claim to be the true heirs of Bangladeshi nationalism<sup>11</sup>.

22. Relations between the major parties in Bangladesh have historically been tense and violent political disturbances do occur, particularly around election time<sup>12</sup>. The UK Home Office also reports that political violence and intimidation do occur in Bangladesh around election time<sup>13</sup>. The parties dominate politics and their hostile relationship has been described as a “*vitriolic, often violent, winner-takes-all contest*” with little room for compromise or bipartisanship between the parties<sup>14</sup>.
23. Politically motivated violence and violent political demonstrations mar politics in Bangladesh<sup>15</sup>. Both the AL, and the BNP, when in power, are said to restrict the activities of rival parties including arresting opposition supporters and using police to intimidate opposition parties<sup>16</sup>. DFAT’s most recent report indicates<sup>16</sup> that while the AL remains in power in Bangladesh, senior members of opposition parties face a high risk of politically motivated arrest, legal charges, and travel bans. Active members of opposition political parties and auxiliary organisations (see relevant sections) who participate in demonstrations also face a high risk of arrest and physical violence, both from security forces and ruling party activists. This risk is elevated around times of heightened political tension, including elections<sup>17</sup>.
24. Major parties in Bangladesh are said to hold membership campaigns each year, through which parties recruit large numbers of members, but a 2018 survey by the Asia Foundation, found

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<sup>5</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>6</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>7</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>8</sup> Devine, J, Economic and Social Research Council, 'Governance, democracy and the politics of wellbeing', 1 September 2007, CIS1ACBC92107

<sup>9</sup> UK Home Office, 'Report of a Home Office Fact-Finding Mission - Bangladesh', 18 September 2017, OG6E7028864

<sup>10</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>11</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>12</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369

<sup>13</sup> UK Home Office, 'Report of a Home Office Fact-Finding Mission - Bangladesh', 18 September 2017, OG6E7028864

<sup>14</sup> Devine, J, Economic and Social Research Council, 'Governance, democracy and the politics of wellbeing', 1 September 2007, CIS1ACBC92107

<sup>15</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>16</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438; Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369; UK Home Office, 'Report of a Home Office Fact-Finding Mission - Bangladesh', 18 September 2017, OG6E7028864

<sup>17</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

that approximately 80 per cent of Bangladeshis have a limited interest in politics, and those that do are not necessarily members of any party<sup>18</sup>. DFAT has not seen evidence of forced recruitment to political parties and considers it unlikely to occur<sup>19</sup>.

25. Overall, I do not find the applicant's political claims to be persuasive. While I have accepted that he was once pressured to attend a rally, he refused. I have found his refusal did not lead to further consequences for him. I do not accept that he has a profile of interest to the AL or the BNP or a Gang. The applicant describes himself as apolitical and is not now, or ever been a member of a political party. I conclude that if returned to Bangladesh, the applicant would return as person with limited interest in politics in Bangladesh, like the majority of citizens and with no political affiliation. I do not accept he would be imputed with adverse political option by either the AL or the BNP. I do not accept that he would be targeted by either party. I am not satisfied that the applicant would face a real chance of harm from the AL, or the BNP, or any other political party, or a gang if returned to Bangladesh.

*Illegal departure, attempt to claim asylum in Australia*

26. The applicant says that if he is returned to Bangladesh, he would face harm due to his illegal departure, and his attempt to claim asylum in this country.
27. Country information before me indicates that it is an offence in Bangladesh to depart other than in cooccurrence with procedures laid down in the *Emigration Ordinance Act (1982)*<sup>20</sup>. Nevertheless, tens of thousands of Bangladeshis exit and enter the country each year<sup>21</sup>. DFAT assesses that it is unlikely that the authorities have the capacity to check people, and the vast majority of returning Bangladeshis will re-enter the country without incident. If, however, those returning have a particular political profile, it is likely that their entry into Bangladesh will be noted. DFAT is not aware of any instances of returnees being detained at the country's borders in relation to political activities conducted abroad.
28. Previous DFAT reports indicated that a person who returned to Bangladesh having departed without a Passport or in breach of the *Emigration Ordinance Act (1982)* could face a fine, or imprisonment for up to 12 months, but noted that these penalties were not enforced<sup>22</sup>. However, DFAT reports from 2019 assess that returnees, including failed asylum seekers, are unlikely to face adverse attention from the authorities, regardless of whether they have returned voluntarily or involuntarily<sup>23</sup>.
29. Bangladesh accepts both voluntary and involuntary returnees. Bangladeshi authorities have generally insisted on a case-by-case, community-level police check to verify the identity and Bangladeshi citizenship of returnees before authorising their return and issuing travel documents. The International Organization for Migration's Assisted Voluntary Returns and Repatriation program assists Bangladeshi returnees in cooperation with the returning country

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<sup>18</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>19</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>20</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>21</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438

<sup>22</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369

<sup>23</sup> Department of Foreign Affairs and Trade (DFAT) – “DFAT Country Information Report Bangladesh”, 22 August 2019, 20190822132438



and the Government of Bangladesh. DFAT has no evidence to suggest that recent returnees have received adverse attention from authorities or others<sup>24</sup>.

30. This applicant has in his possession his Bangladeshi Birth Certificate and a Character Certificate issued from his local political division which affirms his good character and record. I conclude that if returned to Bangladesh he would be able to establish his identity and Bangladeshi citizenship. Beyond his political claims, which I have already dealt with, the applicant has not made any claims that he would be of any interest to the police in Bangladesh. In his SHEV Application the applicant indicated that he was not charged or awaiting any legal action in his home country. I conclude that the applicant would be able to pass a police test. In light of the country information, I am not satisfied that the applicant would face a custodial sentence, or any interest from the authorities upon return to Bangladesh. I am not satisfied that the applicant would face a real chance of harm arising from his illegal departure, or his attempt to claim asylum in Australia.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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32. 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**

33. 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.
34. 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.
35. I have found that this applicant would not face a real chance of any harm arising from any of his claims for protection. As 'real chance' and 'real risk' have been found to meet the same standard, it follows that he would not face a real risk of significant harm for any of the reasons

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<sup>24</sup> Department of Foreign Affairs and Trade (DFAT) – "DFAT Country Information Report Bangladesh", 22 August 2019, 20190822132438

he has advanced. I am not satisfied he would face a real risk of significant harm for any other reason.

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

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

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

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

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

### 5K Membership of a particular social group consisting of family

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

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

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

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

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

#### **5L Membership of a particular social group other than family**

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

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

#### **5LA Effective protection measures**

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

...

#### **36 Protection visas – criteria provided for by this Act**

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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