



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

**Decision and Reasons**

**Referred application**

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BANGLADESH

IAA reference: IAA17/03045

Date and time of decision: 26 March 2018 17:11:00

Matthew Tubridy, 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 an referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a national of Bangladesh. [In] March 2016 he lodged an application for a Safe Have Enterprise visa (SHEV). A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] June 2017, and the Department of Immigration and Border Protection (the Department) referred the matter to the IAA [in] July 2017.

### 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).
3. On 20 July 2017 the applicant's representative provided a submission to the IAA. Insofar as this has engaged in argument with the delegate's decision based on information which was before the delegate I have had regard to it. Additionally, the submission referred to the applicant's having provided a Bangladesh National Party (BNP) membership letter as part of his SHEV application. However, on the evidence before me the applicant provided no such document nor did he give any indication in his SHEV application, or his amended SHEV application, or at his SHEV interview or in any of his submissions to the Department that he has ever possessed such a document. The applicant's claim to have such a document is new information. The applicant has provided no reasons as to why this information was not provided to the delegate before she made her decision or why it should be considered credible personal information. The submission has argued in broader terms, on the applicant's behalf, that it has been difficult for the applicant to acquire documents from Bangladesh while he has been here in Australia owing to his own circumstances and those of his family members. However, given that the applicant managed to provide the Department with a number of identity and educational documents (all sent from to him from Bangladesh) I am not persuaded that the applicant has been affected by difficulties of this kind. The applicant's claim to be a member and supporter of the BNP was at the heart of his claims and he could not have been unaware of the need to substantiate this claim with any documentary evidence he might be able to provide. Given this, the applicant has not satisfied me that he could not have provided this new information (that he is possession of a BNP membership letter) to the delegate before she made her decision. Further, the fact that he has never provided any such BNP membership letter seriously undermine his current claim that he has such a letter and that he provided this evidence to the delegate. Given this, the applicant has not satisfied me that this new information amounts to credible personal information. Furthermore, given that I am not satisfied of the credibility of the applicant's claim to possess a BNP membership letter, and given that I can identify no exceptional circumstances of any other kind which would justify the consideration of this information, I am not satisfied that there are exceptional circumstances to justify the consideration of this new information.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - He is a national of Bangladesh, a Sunni Muslim and an ethnic Bengali who originates from [Village 1] in [County 1] of Comilla District in Bangladesh's Chittagong Division.

- He worked in a [store] with [Relative 1]. He and his family supported the BNP, and the applicant was a BNP member, and this resulted in their business, and the businesses of other BNP supporting relatives, being targeted for donation requests (which were effectively extortion demands) by Awami League activists, and that this led to a confrontation in which [Relative 1] was assaulted after which there was a clash with the applicant and his family on one side and the Awami League activists on the other. A few days later, [in] 2012, the applicant's [Relative 2], was murdered when [Relative 2] was returning home at night from the bazaar after finishing his daily business. [Relative 3] filed a first information report (FIR) at the local police station accusing the Awami League activist who had been collecting donations of being the perpetrator. However, as the police are currently the puppets of the ruling Awami League regime they did not take much action against the perpetrator without an eyewitness. No one wanted to be the witness to the murder as everyone was fearful of the Awami League thugs.
- [In] October 2012 the applicant departed Bangladesh to avoid arrest, torture and serious harm and substantive human and political rights abuses from the Awami League extremists who would have harmed him in this way because of his support for the BNP and the circumstances explained above. His representative has submitted that many of the BNP political activists, supporters, leaders and also people with no political background, have fallen victim in the hands of the present Awami League regime.

### **Refugee assessment**

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5. 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**

6. 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.
7. The applicant claims to be a national of Bangladesh, a Sunni Muslim and an ethnic Bengali who originates from [Village 1] in [County 1] of Comilla District in Bangladesh's Chittagong Division.

These claims are not in dispute and I accept that the applicant is a national of Bangladesh and I find that Bangladesh is the applicant's receiving country for the purpose of this review.

8. [In] March 2016 the applicant's former representative lodged the applicant's signed SHEV application which included written protection claims. These submitted that the applicant had been involved in the BNP, had received a death threat from a local Awami League worker, and that the Awami League had tried to kill the applicant several times, had once beaten him mercilessly when he was attacked while on his way home from a BNP meeting and another time at a BNP rally. He and his family had gone to the police and lodged a general diary complaint against the Awami League worker but the police refused to take this; saying they could not take any complaints against supporters of the governing Awami league. [In] January 2017 the applicant notified the Department that he had appointed a new representative and he provided an amended SHEV application form along with other material which included an 'amended statement' from the applicant which, while maintaining that he had been a BNP supporter, presented new claims about the events which had affected him in this regard. In his amended statement the applicant submitted that because of his family's support for the BNP they were targeted for extortion by the Awami League following the election of December 2008, and that this led in [2012] to a confrontation between [Relative 1] and the Awami League, an assault upon [Relative 1] by the Awami League and then a fight breaking out, after which [later in] 2012 [Relative 2] was murdered and the applicant decided to depart Bangladesh. It was also submitted that the applicant's previous representative had 'missed out' putting forward the applicant's genuine claims and the applicant requested that the amended forms should replace those previously submitted. I have acceded to the applicant's request that the [January] 2017 material should replace the [March] 2016 material, and I have drawn no adverse conclusions from the manner in which the applicant's [March] 2016 claims are inconsistent with his current claims. However, for other reasons I have serious doubts about the applicant's claim to have been a supporter and a member of the BNP, and to have been part of a family which supported the BNP, and to have suffered past harm from Awami League activists.
9. At the SHEV interview the applicant submitted that he had joined the BNP in 2008 and had been a member until he departed Bangladesh in 2012. He also stated that all of his family and his extended family were supporters of the BNP. Asked about the nature of his involvement the applicant said that he would attend meetings and also processions (rallies) at the conclusion of which the BNP leaders would make speeches. Asked what the BNP leaders would say, the applicant said that during elections the leaders would name the persons who were running for election and say things to make these people win and would tell them that they were all brothers. The applicant did not himself name who the local BNP candidates were in his area for the national election which occurred in 2008 nor did he volunteer any information in his written claims or at any other time which would indicate that he had any awareness of who these persons were. At the SHEV interview he stated that on the day of the 2008 national election he told voters which symbol to vote for in order to cast their vote for the BNP candidate. He did not, however, volunteer any information about what the BNP's election symbol was. Asked what was discussed when he attended BNP meetings the applicant said that they were told that the main thing was to keep yourself safe and your family safe so the ruling party could not harm them. While security matters may well have been a concern to BNP supporters following the Awami League's December 2008 election victory the BNP's principal political concerns during the years after 2008 and up to 2012 were to protest against the Awami League's arrest of a number its leaders on charges of having perpetrated war crimes during Bangladesh's war of independence. The other principal concern for the BNP during this period was the Awami League government's June 2011 removal of the Bangladesh constitution's provisions for a non-partisan caretaker government to oversee election periods.

Over the years which immediately preceded the applicant's October 2012 departure these matters resulted in widespread organised political action on the part of the BNP membership base; notably the 'road marches' of late 2011 and early 2012, and also the BNP's refusal to participate in any elections from 2013 onwards.<sup>1</sup> The applicant, however, gave no indication at his SHEV interview or in his written claims that he was aware of any of these matters. Further, the applicant has provided no documentary evidence from the BNP to support his claim to have been a member of the BNP. Given this, and given the applicant's unconvincing evidence regarding his support for the BNP, I have serious doubts about the credibility of the applicant's claim that he was a supporter and a member of the BNP.

10. Further, the applicant provided inconsistent evidence about when the Awami League's extortion demands began. In his written claims the applicant submitted that the Awami League's extortion demands began after the Awami League victory in the general election of December 2008. However, at the SHEV interview the applicant indicated that that the Awami League's extortion of [Relative 1]'s business had intensified after the December 2008 election victory but had been occurring prior to this. Besides being inconsistent with his written claims such a claim seems doubtful given that over the years prior to the December 2008 election Bangladesh had, since the end of the rule of the BNP government in October 2006, been under the rule of a military backed caretaker government which had suspended elections and extended its duration to pursue an anti-corruption campaign against both the BNP and the Awami League (during which time the activities of both the BNP and the Awami League were severely constrained).<sup>2</sup>
11. Further, the applicant claims that following the murder of [Relative 2] an FIR was lodged with the police accusing the Awami League of having done this and he claims that the FIR also referred to the extortion demands and the assault upon [Relative 1], and at the SHEV interview the applicant claimed that this FIR also referred to the clash which had occurred. The applicant has not provided a copy of the FIR (which he claims [Relative 3] lodged with the police about the murder of [Relative 2]) nor has he provided any other documentary evidence to support his claim that a legal case is pending in Bangladesh in this regard. It has been argued on the applicant's behalf that it has been difficult for the applicant to acquire documents from Bangladesh while he has been here in Australia owing to his own circumstances and those of his family members. However, given that the applicant has managed to have a number of identity and educational documents sent from to him from Bangladesh I am not persuaded that the applicant has been affected by problems of this kind.
12. At the SHEV interview it was put to the applicant that he had been asked about his reasons for departing Bangladesh at a Departmental entry interview of [January] 2013 but he had said nothing about the matters addressed in his current claims. In response, the applicant stated that when he first arrived in Australia he was scared and was still having nightmares about the sea crossing he had recently made to reach Australia. He also submitted that other persons had told him that if he told the truth about his real problems he would have been sent back to Bangladesh. I note, however, that the applicant was interviewed some three weeks after his [arrival] in Australia and, having listened to the audio recording of the applicant's entry interview, I found that he sounded relaxed and calm and he certainly said nothing to indicate that he was not fit to be interviewed. I accept that in some circumstances a newly arrived asylum seeker might fear that if he revealed his true circumstances this would lead to his being deported (such as in the case of a person who, in his country of origin, had been been accused

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<sup>1</sup> UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734; UK Home Office, "Operational Guidance Note Bangladesh", 16 September 2013, OGCOD145418; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167.

<sup>2</sup> UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734.

of a serious criminal offence such as murder) but the applicant has given no indication of why it was, or what had been said to him, that led him to believe that he would be returned to Bangladesh if he told the Australian authorities that he was a member and supporter of the BNP and/or that his family had been the victims of extortion demands and/or that he had had a family member murdered. I am not persuaded that the applicant did withhold information of this kind for fear that it would lead to his being deported to Bangladesh.

13. At the SHEV interview it was put to the applicant that what he had said at his entry interview was that he had departed Bangladesh because he and his family had been struggling for a long time, and that his brothers needed to pursue their studies but if he put them in school he could not pay for this. In response, the applicant replied that because of what other people had told him he had just made up a story. He said that after his entry interview he did not get a (bridging) visa that would allow him to get out of immigration detention and so he had had another interview, when he was mentally stable, and then he had said what had happened and he had provided a copy of this other interview with his amended SHEV application. This other interview was documented in a Departmental email of [April] 2013 (and the applicant supplied a copy of this email with his amended statement of January 2017). The April 2013 Departmental email reports that the applicant had told his Departmental case manager that the applicant and [Relative 1] had owned a shop and that over the last three months the Awami League had been harassing them every 15 days for a forced donation, and that as a consequence of this the applicant and his family members had a verbal and a physical fight with the Awami league about payments, and this resulted in the Awami League killing [Relative 2]. I accept that the applicant made statements of this kind to the Department [in] April 2013. However, it remains the case that the applicant did not volunteer this information until he found that he would not be provided with the migration outcome he wanted on the basis of his previous statements. I also note that the applicant gave no indication at his April 2013 interview that he was a member or a supporter of the BNP or that he and his family had been targeted for any reasons associated with his family being supporters of the BNP.
14. It has been argued on the applicant's behalf that while the applicant was in immigration he could not explain properly his party involvement in Bangladesh because of his limited education. I note, however, that the applicant has completed his secondary education in Bangladesh and, in any event, I am not persuaded that the applicant was unable to provide his current claims at the entry interview as a consequence of being unable to articulate such claims or because the questions he was asked were overly complicated. At the entry interview the applicant was asked why he had departed Bangladesh and he referred to having struggled financially and the need of his brothers to pursue their education. He then said that [Relative 1] had sold some land and borrowed some money to send him to Australia to see if the applicant could do something to help the family. Asked if there was any other reason he had departed Bangladesh or if there was any danger to him in Bangladesh he answered, 'no'. Asked if he or any members of his family had ever been associated with any political groups he answered, 'no'. Asked if there were any political groups in his area he said that the Awami League and the BNP were there and that when they are in power they 'show their power and muscle' and these kind of things. Asked if these problems ever impacted on his own daily life he said that, if there was ever a problem, they did not go out and do their shopping at the market or the bazaar and they just stayed at home. Asked what would happen if he returned to Bangladesh the applicant said that life would be tough and that he and his family would not be able to eat three meals a day and his brothers would not be able to get an education. The applicant thus plainly had both the opportunity and the ability to articulate statements at the entry interview that would have indicated his involvement in the BNP if, in fact, this was genuinely the case.

15. The applicant's family have had the financial wherewithal to send not only the applicant to Australia but one of his brothers to [Country 1] and another to [Country 2]. They are plainly not affected by the kind of financial difficulties which the applicant described at his entry interview. However, and while I am willing to accept that the applicant submitted a 'made up a story' at the entry interview in that he submitted that he and his family were suffering from serious financial difficulties which do not actually affect them, I am not persuaded that the applicant withheld any information at the entry interview about his being a member of the BNP or about him and his family being supporters of the BNP or about their having been targeted by the Awami League for extortion. The applicant has submitted that he thought that if he told the truth at the entry interview he would have been returned to Bangladesh but he has never satisfactorily explained why he thought that stating that he and his family had been supporters of the BNP and had been victims of extortion would cause the Australian authorities to Bangladesh, and I am not persuaded he was under an apprehension of this kind. I am not persuaded that the applicant was unfit to be interviewed or that he was somehow intellectually incapable of providing his current claims at the entry interview. Moreover, when the applicant's entry interview statements, and his April 2013 statements, are considered in association with the applicant's unconvincing evidence at the SHEV interview, and the absence of any documentary evidence to substantiate his claim to be a member of the BNP or that an FIR has been lodged about the murder of [Relative 2], I consider that these matters seriously undermine the credibility of the applicant's claim to have been a member and supporter of the BNP whose family were also BNP supporters and who were targeted for extortion by the Awami League, resulting in an assault on [Relative 1] and a clash, with the applicant and his family on one side and the Awami League activists on the other, after which [Relative 2] was murdered.
16. Given this, I do not accept that the applicant is a member of the BNP or that he or any of his family members are supporters of the BNP or any other political party, or that they were the focus of extortion demands (or that the applicant and his family have experienced financial difficulties for this or any other reason), or that the applicant and his family have ever been attacked or of any adverse interest whatsoever to Awami League activists. Given this, I am not satisfied that the applicant would, if he returned to Bangladesh, face a real chance of harm of any kind for reason of his being a member and/or a supporter of the BNP, or for reason of being part of a family whose members support the BNP, or for reason of having been targeted by the Awami League for donations in the past and/or for having refused to pay such donations and/or because [Relative 2] has been murder and [Relative 3] has filed an FIR with the police accusing the Awami League of having perpetrated this murder.
17. It has been submitted that people with no political background have fallen victim to the present Awami League regime. I have found that the applicant is a person with no political background and I consider that the applicant is, like a large portion of the Bangladesh population, among those persons with no interest in electoral politics (in May 2016 the Asia Foundation published the findings of a survey on the attitudes of Bangladeshis towards democracy and this found that interest in politics was low and decreasing).<sup>3</sup> However, and while the evidence before me indicates that the Awami League has sometimes sought to harm or extort business owners and other persons perceived as being political opponents (such as members and supporters of the BNP and its allied Jamaat e-Islami) the evidence does not indicate that persons such as the applicant who have no interest in politics, and who are also members of the ethnic Bengali and Sunni Muslim community which predominates in

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<sup>3</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206.

Bangladesh, face a real chance of suffering harm of any kind on this basis from the Awami League or any other actor in Bangladesh.<sup>4</sup>

18. At his entry interview the applicant indicated that, in Bangladesh, he and his family had sometimes avoided going to the bazaar when the Awami League or the BNP were showing 'their power and muscle'. Given the manner in which organised political activity in Bangladesh such as rallies and hartals (strikes) can sometimes see clashes between rival groups (and the police) and turn violent, and given the manner in which this can sometimes result in harm not just to political activists and security personnel but, in some instances, to bystanders and passing commuters,<sup>5</sup> I accept that the applicant may, while in Bangladesh, have sometimes chosen not to go the bazaar on such occasions when organised political activity was occurring and that, if he were to return to Bangladesh, he may similarly modify his behaviour in the future. However, instances of harm to bystanders and commuters in such circumstances in Bangladesh would appear to be rare<sup>6</sup> and, in any event, I am not satisfied that the applicant's modifying his behaviour by avoiding the bazaar at such times would conflict with a characteristic that is fundamental to his identity or conscience, or any other 5J(3) limitation. Further, and although political violence can erupt in public places in Bangladesh at times of heightened political unrest such as elections, the evidence does not indicate that such eruptions occur so frequently that the applicant's ability to subsist would be threatened if he avoided the bazaar on such occasions or that in this, or some other regard, it would be unreasonable for the applicant to modify his behaviour in this way. I am therefore satisfied that it would be reasonable for the applicant to modify his behaviour in this way. Further, the evidence indicates that harm to bystanders and commuters from political violence in Bangladesh has proven rare<sup>7</sup> and I consider that it will continue to be rare in the future, even allowing for future times of heightened political unrest such as future elections. Even if the applicant were to go to the bazaar on such occasions (that is, even allowing for the possibility that he would not modify his behaviour in the future as he has done in the past), I am not satisfied that the applicant would face a real chance of harm of any kind from such political violence.

19. Although the applicant has never claimed to fear harm on the basis of being a failed asylum seeker or on the basis of his claim to have departed Bangladesh illegally the delegate did, nevertheless, go on to assess these as implied claims. Although I am not persuaded that either of these claims was ever implied by the applicant I have, for the sake of completeness, considered these matters also. I accept that the applicant would be a failed asylum seeker if he were to return to Bangladesh having had his SHEV application refused. The applicant claims to have departed Bangladesh by boat without a passport and, although I have found the applicant's claims in other regards not to be credible, I am, given the extent to which Bangladeshi citizens engage in irregular migration,<sup>8</sup> willing to accept that the applicant did

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<sup>4</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; US Department of State, "Bangladesh 2015 Human Rights Report", 13 April 2016, OGD95BE926166; Freedom House, "Freedom in the World 2015 - Bangladesh", NG5A1E6BC132; Odhikar, "Six-months human rights monitoring report, January 1 – June 30, 2015", 1 July 2015, CISEC96CF12886.

<sup>5</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; US Department of State, "Bangladesh 2015 Human Rights Report", 13 April 2016, OGD95BE926166 ; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167; UK Home Office, "Operational Guidance Note Bangladesh", 16 September 2013, OGCOD145418.

<sup>6</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; US Department of State, "Bangladesh 2015 Human Rights Report", 13 April 2016, OGD95BE926166 ; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167; UK Home Office, "Operational Guidance Note Bangladesh", 16 September 2013, OGCOD145418.

<sup>7</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; US Department of State, "Bangladesh 2015 Human Rights Report", 13 April 2016, OGD95BE926166 ; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167; UK Home Office, "Operational Guidance Note Bangladesh", 16 September 2013, OGCOD145418.

<sup>8</sup> IOM, "Bangladesh", 1 August 2014, CIS29397.

depart Bangladesh in this manner. Bangladeshis require a valid passport and visas (depending on the destination country) to depart from Bangladesh, and Bangladesh's Emigration Ordinance Act (1982) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in that Act. However, DFAT is not aware of any cases in which authorities have enforced these provisions, and DFAT further advises that Bangladesh accepts both voluntary and involuntary returnees, and that recent returnees from the United Kingdom have not been subjected to any adverse attention by the authorities or others. DFAT assesses that most returnees, including asylum seekers, are not subjected to adverse attention regardless of whether they have returned voluntarily or involuntarily. Authorities may take an interest in high-profile individuals who have engaged in political activities outside Bangladesh, including people convicted of war crimes in absentia<sup>9</sup> but the applicant is not a person of this kind. Nor does any of the other evidence before me indicate that the applicant would face a real chance of harm of any kind if he were to return to Bangladesh for reason of having departed Bangladesh illegally and/or for being a failed asylum seeker (and/or for having sought asylum in Australia), and I am therefore not satisfied that the applicant would face a real chance of suffering harm of any kind on any such basis, or any combination of these bases, if he were to return to Bangladesh.

20. Considering the circumstances of the applicant in their totality, and on the evidence before me, I am not satisfied that the applicant would face a real chance of experiencing harm of any kind for any reason from any actor if he were to return to Bangladesh. I am therefore not satisfied that the applicant would face a real chance of serious harm if he were to return to Bangladesh.

#### **Refugee: conclusion**

21. 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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22. 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**

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

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<sup>9</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206.

24. For the reasons given above, I am not satisfied that the applicant would face a real chance of experiencing harm of any kind if he were to return to Bangladesh. I am therefore not satisfied that the applicant would face a real risk of experiencing harm of any kind if he were to return to Bangladesh. I am therefore not satisfied that the applicant would face a real risk of experiencing any significant harm kind if he were to return to Bangladesh.

**Complementary protection: conclusion**

25. 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**

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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.