



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH
IAA reference: IAA17/03444

Date and time of decision: 24 January 2018 17:03:00
Karen Dix, Reviewer

Decision

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Bangladeshi citizen from Jessore district. [In] March 2016 he lodged an application for a safe haven enterprise visa (SHEV) claiming to fear ongoing threats and being killed by members of Awami League (AL) due to his deceased father's involvement in the Bangladesh National Party (BNP).
2. [In] August 2017 a delegate of the Minister of Immigration and Border Protection (the delegate) refused the visa.

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).
4. On 18 September 2017 the IAA received a submission from the applicant's representative which refutes a number of the delegate's findings including those regarding the applicant's credibility. These matters may be regarded as argument rather than information.
5. The submission also reiterates the applicant's claim made during the SHEV interview that his father was killed due to a land dispute in the home village and following his father's death his mother took the applicant and his [brother] to another upazila where they lived with his mother's family. In addition, the applicant now seeks to rely on 2 documents dated 2015 and August 2014 regarding the prevalence of land disputes and corruption in their resolution and has also provided new claims which were not before the delegate, namely:
 - The disputed land has now been occupied for approximately 30 years by those with whom the applicant's father had the dispute.
 - The applicant attempted to amicably recover his father's property in order to work and live on the land but he was denied access to the land and he faced harassment and threats from his father's enemies who are rich and well connected with the Awami League.
 - The applicant will be at risk of being kidnapped and held for ransom on return as his enemies know the applicant has been living and working in Australia and will perceive him to be wealthy.
6. The representative also submitted a statutory declaration from the applicant which provides further details regarding the land dispute, those involved in the dispute, the applicant's attempts to resolve the land dispute and the reason for the attack on his brother. The representative submits that the applicant's previous representative did not provide some vital information to the delegate including a statutory declaration or statement of claims. Additionally the applicant was unable to eloquently and prudently present these claims to the delegate at the SHEV interview because he is poorly educated, had a poor understanding of the questions he was asked, a lack of intelligibility and although providing candid short answers to the delegate's questions was unable to provide further details regarding the complexity of land conflicts in Bangladesh.
7. The information provided in the applicant's new statutory declaration and the new claims raised in the representative's submission describe events which all occurred well before the

delegate's decision and would have been known to the applicant who raised the land dispute claim during the SHEV interview. The two cited country information documents also predate the delegate's decision. Those country information documents do not appear to contain any credible personal information. I am not satisfied with the representative's explanation for not raising the claims or providing the statutory declaration and country information documents previously. The applicant prepared his visa application with the assistance of a registered migration agent and only at the SHEV interview claimed his father was killed due to the land dispute. Despite being provided with further opportunities to give further information at the SHEV interview, he indicated that he had no further matters to discuss. He also responded to concerns and questions raised by the delegate who reworded questions when the applicant indicated he did not understand. I do not accept that the applicant was unable to adequately present his claims. There is no information before me that the applicant has made any complaint against his former agent. I am not satisfied that the statutory declaration and the claims in this document, or the new claims raised by the representative and the cited country information in the submission could not have been provided to the delegate prior to the decision. The delay in providing this information, in the circumstances, also raises significant doubts about its reliability. The applicant has not provided a satisfactory explanation as to why the material should now be considered and it's not apparent to me that there are any exceptional circumstances to justify considering the information. The applicant has not satisfied me that the information could not have been provided to the Minister prior to a decision or that it is credible personal information which may have affected the consideration of his claims. I am not satisfied that s.473DD(b) is met. I am also not satisfied that there are exceptional circumstances to justify considering the new information.

8. The representative also refers to a number of other documents which all appear to predate the delegate's decision, were not before the delegate and are new information - 2 documents regarding the variations in the issue of birth certificates and the low numbers of births that are registered in Bangladesh; and a 2012 Amnesty international report, two January 2014 Human Rights Watch reports and two Wikipedia reports which the representative claims indicate a deterioration in the human rights situation with some people going missing or being killed. The representative has only given a brief description and hyperlinks to these documents and has not provided copies of the extracts or the documents despite being aware that the IAA Practice Direction states that hyperlinks to publicly available documents are not acceptable. As the representative has not complied with the Practice Direction I have not considered them. Furthermore it does not appear on the face of the submission that the documents are recent (all predate the delegate's decision) or that they contain credible personal information which may have affected the consideration of the applicant's claims. I am also not satisfied that s.473DD(b) is met.
9. The applicant also provided a copy of a letter from his current employer in Australia dated [September] 2017 which confirms the applicant has been employed as [Occupation 1] since January 2016. The letter was not before the delegate. Having regard to its contents, I do not consider it relevant to the review.

Applicant's claims for protection

10. The applicant's claims can be summarised as follows:

- The applicant is a Sunni Muslim of Bengali ethnicity and a citizen of Bangladesh who was born in [Village 1], Jessore district in Bangladesh. The applicant's father is deceased, his mother lives with the applicant's [uncle] in Bangladesh and his brother is living in [Country 1].
- When the applicant was young his father was killed in their local area by a terrorist group. The group threatened his mother, brother and him continuously and destroyed their home because his father had been seriously involved in the BNP and the applicant was in opposition to those who killed their father. The police also used to harass his family. The applicant went to [Country 2] and [Country 3] due to the constant threats and the risk to his life but as he was in those countries illegally he was not able to survive and was harassed in [Country 2] by the police.
- After he returned to Bangladesh he lived with his grandfather. He was not harmed physically because he was hidden. He travelled to [Country 4] where he worked illegally. His brother who was in [Country 4] as well recently returned to his grandfather's house in Bangladesh but was seriously injured by AL and returned to [Country 1].
- The applicant fears being killed or seriously injured by AL/enemies of his father on return.

Factual findings

Identity and receiving country

11. The applicant has consistently claimed to be a Bangladeshi citizen who was born in [Village 1], Jhikargacha upazila in Jessore district. He provided copies of three English translations of a Bangladeshi birth certificate, and a character/nationality certificate as evidence of his identity and nationality. I note the discrepancies in the applicant's name and variations in the day of birth although the applicant has consistently stated that he was born in [year]. As noted by the delegate the day of birth was manually altered in one of the birth certificates submitted by the applicant who claims that the change was made as the local chairman made a mistake. I also note that until 2001 when an electronic central recording system was introduced, birth and death certificates were issued by local registrars and there was no national link up between any of these records; and that despite compulsory registration being introduced in 2004 people are still able to apply for birth certificates without supporting documentation and there continues to be a high prevalence of document fraud.¹ Despite the discrepancies and after consideration of the country information I accept that his identity is [applicant name] born [date] and that he is a Bangladeshi national.

12. The applicant claims that he lived illegally in [Country 2] for approximately two years and in [Country 3] for approximately six months although there are variations regarding the years when he actually lived there. He also has consistently claimed to have travelled illegally to [Country 4] in 2007/2008 where he worked until he travelled to Australia. He claims that an agent facilitated his travel to [Country 2] and [Country 4]. I accept the applicant's account of his entry and status in [Country 2], [Country 3], and [Country 4] and find that the applicant

¹ UK Home Office, "Bangladesh Country of Origin Information Report", 20 August 2010, 1734, p. 130; Department of Foreign Affairs and Trade (DFAT), "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 5.23-5.24

does not have an existing right of return to these countries and his receiving country is Bangladesh.

Father's death, BNP association and AL harm

13. The applicant in his SHEV application claimed that his father was killed by terrorists when the applicant was a young child of approximately [age]. They threatened the applicant, his mother and brother continuously and destroyed their home in [Village 1]. The applicant went to [Country 2] and [Country 3] and when he returned to Bangladesh he lived in his grandfather's house due to the high risk of harm. He claimed that he was threatened because of his father's serious involvement in the BNP and his family's opposition to the AL. He also stated that when his brother who also worked in [Country 4] returned to the grandfather's house in Bangladesh he was seriously injured by AL members and left Bangladesh.
14. The applicant provided three documents in support of his claims – a letter from a local doctor dated [March] 2013 which states the applicant's father was murdered by terrorists by gun shot and bomb blast when the applicant was small; and 2 statements from the local Bankra Union chairman dated [March] 2013. One of the chairman's statements indicates that his father was killed by terrorists when the applicant was [age] and the applicant went to live at his mother in law's house. After living there for some years the applicant went to [Country 2] where he lived for 2 years and to [Country 3] where he lived for 6 months following which he returned to Bangladesh. After six months he was attacked by the same terrorists and he and his brother went to [Country 4]. The terrorists destroyed the house, threatened to kill the brothers often and attacked his mother. The second statement indicates that Awami League terrorists broke the family house and territory because of the father's BNP support. The family left the house as the terrorists threatened to harm them if they returned home. The applicant and his brother went to a foreign country and their mother lived with the applicant's grandfather.
15. During the SHEV interview the applicant was asked about the circumstances of his father's death. He responded that his father was killed by relatives – uncles and others like his paternal uncles when the applicant was only [age]. When the delegate indicated that in his visa application he stated his father had been killed by terrorists, the applicant responded that he was very young when his father died but his mother told him that some enemies from [Village 1] killed his father and after the incident they left the family home in [Village 1] and went to live with their [uncle]. The applicant indicated those responsible for his father's death were distant relatives who they called uncle but were not their real uncles. When asked why they killed his father the applicant stated that his mother had told him that his father has a dispute regarding some land. He stated that when his father was alive he was involved in the BNP but did not know if he had any particular role in the party. The applicant also stated that he is not a supporter or member of any political parties in Bangladesh.
16. The applicant has consistently claimed since his arrival in Australia that he was [age] when his father was killed. He has also claimed (and the doctor's letter supports this) that his father was killed by gun shot and a bomb blast, although at the entry interview he indicated his father was killed by a bomb blast when he had gone shopping. Given the broad consistency of this claim I am willing to accept that the applicant's father was killed in 1987/88 although whether by a bomb blast or gunshot is unclear. However I have significant concerns regarding the claimed reasons for his father's death which differ significantly between the SHEV application and the interview. The applicant at entry interview stated that none of his family had been associated or involved with any political group. In the SHEV application the applicant stated that his father was killed by AL, and they targeted the applicant and his brother because their father was

seriously involved in the BNP. The statement from the local chairman appears to support the applicant's claim of his father's BNP involvement. However at the SHEV interview the applicant stated that although his father had some involvement in the BNP the reason for his father's death was due to a local land dispute, involving persons who at one stage he described as distant relatives, which is significantly at variance to the visa application claims and the information in the documents from the local doctor and local chairman.

17. I accept that his father died; however I consider that if the land issue was the reason for his father's death and for any subsequent threats or harassment against the family, that the applicant given the centrality of this claim to his case, would have mentioned this in the SHEV application and at the entry interview. I am not satisfied that the applicant's father was killed due to the land issue or that the family was subject to ongoing harassment for this reason.
18. I accept that the applicant's father may have been a BNP supporter but there is no credible evidence before me to indicate that his link to the BNP was anything more than as an ordinary supporter. I note that country information indicates that in July 1987, around the time the applicant's father was allegedly killed due to his BNP involvement, the AL, BNP and other parties which were in the parliamentary opposition, united in protest against a controversial legislative bill. They organised nationwide strikes and protest marches, and the government which was dominated by the Jatiya party declared a state of emergency and arrested many opposition activists. Parliament was also dissolved and elections were scheduled for March 1988. These elections were boycotted by all the major opposition parties.² I accept that his father may have been killed during this time; however other than the applicant's assertions and the information in one of the union chairman's letters indicating AL targeted the family after his death due to the father's BNP support, there is no credible evidence before me to support the applicant's claim that his father was killed by AL due to his BNP support. I also note that the doctor's letter and the other chairman's letter which were provided by the applicant, only state his father was killed by terrorists and do not give any further meaningful details to support this claim. Additionally neither of these documents indicates whether the doctor or chairman had firsthand knowledge of the situation and I have accorded them little weight. Given the country information and the absence of any evidence regarding his father's level of political involvement I am not satisfied that the applicant's father was killed by AL or any other political group due to his BNP support.
19. The applicant claimed at the SHEV interview that following his father's death his mother left the family home and took them to their [uncle's] house. In his visa application he indicated that he and his brother lived at their grandfather's house in Monirampur upazila, which is an adjacent area to the applicant's home area of Jhikargacha upazila. One of the union chairman's documents states that the family took shelter at their grandfather's house, and the other document indicates the applicant lived in his mother in law's home (the applicant has never claimed to be married). Nevertheless, despite the discrepancies between the documents and the applicant's account regarding who they lived with, I accept that the applicant moved to Monirampur upazila when he was approximately [age] and lived with his mother's family until he travelled to [Country 2] and [Country 3]. I also accept that he and his brother returned to Monirampur area upon their return to Bangladesh and the applicant's mother continues to reside in this area.
20. Given I am not satisfied that the applicant's father was killed by AL or any other group due to his BNP support or that he was more than an ordinary supporter, I am also not satisfied that the applicant and his family have continued to suffer harassment, threats or the destruction of

² UK Home Office, "Bangladesh Country of Origin Information Report", 20 August 2010, 1734, pp. 16-17

the family home due to his father's former BNP involvement and were forced to move away from [Village 1] for this reason. Nor am I satisfied that the applicant travelled to [Country 2], [Country 3] and [Country 4] due to a fear of harm or threats made against him by AL. Moreover I have concerns regarding the reliability of the union chairman's documents provided in support of these claims, which although prepared on the same day appear to contradict one another in some respects, do not indicate that they are based on the chairman's personal knowledge and are also inconsistent with other aspects of the applicant's claims. This includes the statement in one of the documents that the applicant went to his mother-in-law's house to live when the applicant has never claimed to be married, and which also contradicts the other document stating the applicant went to his grandfather's house to live. One of the chairman's letters also states the applicant's father was killed by terrorists who also attacked the applicant when he returned from [Country 3] some 16 years after the father's death and often attacked the applicant's mother. However this contradicts the applicant's claim in his visa application that he was never physically harmed. Nor has the applicant ever indicated that his mother was attacked at any time. It is also inconsistent with the other letter which states the family were threatened by AL. Given the significant discrepancies in the documents I am not prepared to place any weight on them.

21. I note that the applicant did not travel to [Country 2] until he was [age] [some] years after his father's death. He indicated that he does not support any political party and although the AL were in power between 1996 and 2001 during which time there was an increase in political violence, the applicant was not involved in any political activities which would bring him to the attention of AL.³ The applicant also claims to have returned to Bangladesh when he was [age] and left again when he was [age] for [Country 4]. He indicated that he was never physically harmed although he was fearful and upon his return from [Country 3] he lived in Monirampur upazila where he grew up and not in his birth village. During this period the BNP was in power and I note the applicant travelled to [Country 4] prior to the 2008 elections being held when the AL was elected to power.⁴ I also note that country information indicates that supporters or members of political parties were not at risk of being arrested or living in fear of violence on a day-to-day basis due to their political affiliations.⁵ Given I do not accept that the applicant's father was killed by AL or anyone else due to his BNP support, I am not satisfied that the applicant was of any interest to the local AL in his birth village which he had not lived in since 1987/88; that he has had any form of political involvement with either AL or BNP, or had any profile as a BNP supporter arising from his father's former BNP support prior to his departure from Bangladesh in 2007/2008. I am also not satisfied that the applicant was threatened, his brother was attacked by AL or the family home destroyed by AL supporters to intimidate him and his family due to his father's former BNP support.

Refugee assessment

22. 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.

³ UK Home Office, "Bangladesh Country of Origin Information Report", 20 August 2010, 1734

⁴ *ibid*

⁵ DFAT, "Country Report Bangladesh", 20 October 2014, CIS2F827D91369, 3.55

Well-founded fear of persecution

23. 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.

24. The applicant fears being killed or seriously injured by AL/enemies of his father on return. He fears being attacked like his brother was by the local AL leader who is from an influential family.

25. Country information indicates that there is a long standing rivalry between AL and BNP and both parties when in power have used parliament, the executive and the judiciary to undermine their political opponents. Most politically motivated violence occurs between political parties during times of political unrest particularly during national elections and hartals (strikes), with BNP leaders subjected to a high level of official discrimination during periods of heightened political tension, particularly national elections; and BNP supporters or members in rural areas are subjected to a low level of violence associated with AL extortion. High levels of political violence continued throughout 2016 and the early months of 2017, however the majority of the political violence involved intra-AL party clashes. AL-BNP inter-party violence is reported to have declined since the hartals of early 2014. DFAT assesses that AL, BNP and Jamaat-e-Islami (JI) members are subjected to a low level of inter-party violence but notes that AL activists or the Bangladeshi authorities are much more likely to pursue and harm prominent opposition leaders or opposition student and youth members rather than mere supporters or party function attendees.⁶

26. The applicant indicated at interview that he does not support the BNP or any other political party. Apart from his father’s support for BNP some 30 years ago, there is no evidence of any family involvement in the BNP or in politics. Given the applicant’s lack of any political involvement, the lack of interest in the applicant by the AL, as well as his lengthy absence from his village and from Bangladesh since approximately 2007/2008, I am not satisfied there is a real chance of him suffering any harm on return to Bangladesh from AL or the police. The country information also does not indicate that relatives or associates of former BNP

⁶ DFAT, “Country Information Report Bangladesh”, 5 July 2016, CIS38A80121206, 3.53, 3.57-3.58 , 3.62; International Crisis Group, “Political Conflict, Extremism and Criminal Justice in Bangladesh”, 11 April 2016, CIS38A8012646, pp. 1, 4; Odhikar, “Annual Human Rights Report 2016”, 1 January 2017, CISED50AD44; Ain O Salish Kendra, “Human Rights Situation in Bangladesh 2016”, 28 March 2017, CISED50AD3723; Odhikar, “Human Rights Monitoring Report: April 1 – 30, 2017”, 1 May 2017, CISED50AD4210; DFAT, “Bangladesh - Country Information Request CI161130110919945 - Political Violence”, 6 February 2017, CXC9040661299

supporters are targeted or harassed and I am also not satisfied that he would be targeted by AL due to his father's support of the BNP over 30 years ago.

27. I am not satisfied he has a well-founded fear of any harm as a result of any connection to the BNP or as a consequence of his father's death. I am not satisfied that the applicant faces a real chance of persecution by the AL or anyone else on return.

Returning Asylum seeker/illegal departure

28. The delegate considered whether the applicant would face a real chance of harm as a returning asylum seeker who departed illegally although the applicant did not claim to fear harm for this reason. The applicant claims, and I accept, that he departed Bangladesh illegally. Country information indicates that the Emigration Ordinance Act (1982) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the Act; however DFAT advises that it is not aware of these penalties being enforced⁷ and there is no information before me to indicate otherwise. I am not satisfied that there is a real chance of the applicant facing any penalties including detention and/or imprisonment as a result of his illegal departure.
29. International Organisation for Migration (IOM) indicated that over 5 million Bangladeshis currently work overseas, and contribute greatly to their families, communities and the country's economy through remittances. IOM works with different governments implementing return and resettlement programmes and offering support to both government and returnees in the form of Assisted Voluntary Return (AVR). It also assists rejected asylum seekers, trafficked victims, stranded migrants, labour migrants and qualified nationals to return home on a voluntary basis.⁸ According to DFAT Bangladesh accepts both voluntary and involuntary returnees, and the IOM Assisted Voluntary Returns and Repatriation (AVRR) program provides assistance to Bangladeshi returnees in cooperation with the returning country and the Government of Bangladesh. DFAT assesses that most returnees, including asylum seekers, are not subjected to adverse attention regardless of whether they have returned voluntarily or involuntarily. The 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.⁹
30. The applicant has not been involved in any political activities in Bangladesh or in Australia, and there is no evidence of any involvement in criminal activity or of any outstanding criminal charges in Bangladesh. I am not satisfied that the applicant faces a real chance of any harm for any reason.

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

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

⁷ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 5.20

⁸ IOM, "Bangladesh", 6 August 2014, CIS29397

⁹ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 5.21-5.22

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. I have found that the applicant does not face a real chance of harm on return to Bangladesh due to his deceased father's political affiliations with the BNP, his father's death, or as a returning asylum seeker who departed illegally. In *MIAC v SZQRB* (2013) 210 FCR 505, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear'. Therefore for the reasons stated above I am not satisfied the applicant faces a real risk of significant harm.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.