



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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BANGLADESH

IAA reference: IAA17/03689

Date and time of decision: 17 July 2018 13:39:00

M 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. On 6 May 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 on 29 September 2017, and the Department of Immigration and Border Protection (the Department) referred the matter to the IAA on 5 October 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). No further information was obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - If he is forced to return to Bangladesh he fears that he will be killed or harmed due to his political opinion and membership of a particular social group, being an eldest son of his family who is a supporter of Bangladesh Nationalist Party (BNP). The Awami League political group, the police, army, and supporters of Awami League will harm him if he returns. Everyone in Bangladesh who does not support the Awami League is under severe threat from the Awami League and they have to do what these people say otherwise the Awami League will call the armed forces to control the people. The civilians in Bangladesh are among the largest victims of torture, murder and disappearances. Anyone who does not support the ruling party can be kidnapped or disappeared.

### Refugee assessment

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4. 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

5. 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.
6. The applicant claims to be a national of Bangladesh and this is not in dispute. 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.
  7. The applicant lodged his SHEV application on 6 May 2016 and this included a 5 April 2016 statutory declaration which put forward his claims to protection (the written claims). The applicant submitted that he was a Sunni Muslim and an ethnic Bengali who originated from the [the] Khulna Division of Bangladesh. His father operated their family farm and had been supporting the BNP political group for about 15 years. In 2007 the applicant was helping his father on the farm when members of the Awami League approached him. They demanded that the applicant should begin to support them immediately and join their political group. The applicant advised his father of this situation and his father strongly opposed the applicant's joining them and it was not the applicant's desire to do so as he did not believe in their political position. The applicant followed his father and began to support the BNP group as he thought at that time they would be able to protect him from the Awami League members. After he started to support BNP the Awami League political group came to know that he and his father were supporting the BNP as a family. During the applicant's involvement with the BNP he did not commit and was not charged with any crimes. However, many other BNP who had not committed any crimes were killed and arrested by Awami League members. The reason many of them were in jail, hiding and faced criminal charges was purely because we were supporting the opposition political party, BNP group.
  8. The applicant's written claims continue by submitting that in July 2012 two members of the Awami League came to the applicant's family's home. These people were armed with guns and they threatened the applicant's father and asked him of the applicant's whereabouts. The applicant was not home at that time and they thought his father was helping to hide the applicant so they tortured and threatened his father. They hit him on the right hand side of his head severely with a hard pole and threatened that when they would kill the applicant when they found him as in their culture killing the eldest son of a family is a symbol of breaking the family and what they stand for. For that reason the applicant was being targeted more so. After the Awami League men left the applicant's mother called him to tell him what had happened. She said the whole family was very scared and shaken. Because of this incident the applicant was fearful for his family and for himself. His father began to seek help with BNP members but none of them could provide the applicant with any real protection against these people. It was widely known that persecution of BNP supporters extended to every city in Bangladesh. As no one was able to provide him with protection in Bangladesh he knew that he would be arrested, tortured, killed or wrongfully detained. [In] November 2012 he departed Bangladesh by boat for [one country], and then travelled by boat to [a second country], and then by boat to [a third country] and then by boat to Australia. He did not employ a passport for any of this travel. Due to the previous threats received against his life he is well known to members of the Awami League and the army and the police.
  9. On 3 July 2017 the delegate interviewed the applicant about his protection claims. At that interview the applicant indicated that he supported the BNP and when the delegate asked

him to clarify if he was a member of the BNP or just a supporter of the BNP he said that his father had long been a member of the BNP but he himself was a supporter. When the delegate asked the applicant when he had begun to support the BNP he said that this had occurred when he was around [a certain] age (which would have been around 2006 to 2007). The delegate asked the applicant if he attended any meetings. He said that his father went regularly and that he himself went just two or three times. When asked if had any specific role to play in the local BNP he said he did not do anything specific. When asked what occurred at the meetings he attended he said that there were just discussions about how to organise protest processions. When asked if he went to any such processions he said that it was a normal occurrence to go to processions. When asked again how many procession he went to he said that these happened every day or two and that he did not count them all. The delegate then asked if he was saying he went to demonstrations a lot and he said that this was what he was saying. The delegate then asked the applicant what the processions were about. The applicant made no response. The delegate waited some time for a response but when none was forthcoming she moved on to her next question.

10. Later in the SHEV interview, as in his written claims, the applicant spoke in broad terms about how he opposed the Awami League because they were kidnapping and killing and having arrested on false charges any person who supported or involved themselves in the protests and activities of the BNP or against the Awami League. It is true that following the December 2008 election of the Awami League government the BNP staged many protests (processions) and hartals (strikes) and that numerous BNP members and supporters were arrested and involved in clashes with police and Awami League supporters, and that criminal charges (said by the BNP to be false charges) were being brought against BNP members. But beyond this the applicant appeared to have no knowledge of any of the key specific issues which affected the BNP and its membership in these and other regards between 2006/2007 and 2012. In 2006/2007, at the time he claims to have become involved in the BNP, the BNP had just finished a term in government and was preparing to contest the elections which were scheduled to be held in early 2007. During 2007 the non-partisan caretaker government suspended elections (with the backing of the military) and set about arresting numerous BNP and Awami League figures on corruption charges and both the BNP and the Awami League found themselves under intense pressure. In 2008 the caretaker government allowed the BNP and the Awami League to effectively re-enter the democratic process and a national election was held in December of that year which the BNP contested but lost to the Awami League. Following this, the Awami League government establishing the International War Crimes Tribunal and this led to the arrest of a number of BNP leaders, as well as leaders belonging to the BNP's coalition partner the Jamaat e-Islami, on charges of having perpetrated war crimes during Bangladesh's 1971 war of independence. These arrests prompted fierce protests from the BNP and Jamaat e-Islami over the years which preceded the applicant's departure from Bangladesh in 2012.<sup>1</sup> But the applicant evinced no specific awareness of such matters as the war crimes charges under the current Awami league government or the corruption arrests under the caretaker government, or of any of the other significant events which affected the BNP and its members and supporters between 2006/2007 to 2012.
11. I accept that the applicant has just [number] years of education and I would not necessarily expect him to have a sophisticated understanding of the BNP's political agenda. I also note

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<sup>1</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; DFAT, "DFAT Country Report: Bangladesh", 20 October 2014, CIS2F827D91369; International Crisis Group (ICG), "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646; UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167.

that the applicant claims to have supported the BNP because of his father's wishes and because he thought the BNP could provide him with protection rather than because of any specific interest in the BNP's broader political program. But even making allowance for considerations of this kind, I find it implausible that the applicant would be so unaware of so many of the key matters which animated BNP organised political activity from 2006/2007 to 2012 if he had, as he claimed, attended a lot of BNP processions during these years. The fact that the applicant did not demonstrate any significant knowledge of the key matters discussed above raises serious doubts about his claim to have been an active supporter of the BNP in Bangladesh during these years.

12. I note, moreover, that the applicant's birth certificate (which he provided to the delegate to evidence his identity) shows that the applicant's birth was only registered in Bangladesh [in] 2013 so as to enable the issuances of his birth certificate on the same day for this purpose. This does not raise any doubts about the integrity of the document itself as it is not unusual for Bangladeshi births to go unregistered notwithstanding Bangladesh government initiatives to encourage birth registration. Although birth certificates are officially required to access such services as education many Bangladesh service providers nonetheless do not demand such birth certificates even when they are required to do so by law. The need for a birth certificate, however, is a more strictly observed prerequisite with regard to voter registration. In 2008 the Bangladesh Election Commission completed a nationwide independent audit of the country's new digital voter list to restore the integrity of the national electoral roll and also, simultaneously, issued the new Bangladesh national identification card to those who registered.<sup>2</sup> At the SHEV interview the applicant stated that he has never obtained the Bangladesh national identification card. This, and the fact that he did not even register his birth until after he arrived in Australia, is strong evidence that the applicant did not register to vote, and did not vote, in the December 2008 election and this raises serious doubts about whether the applicant has any interest in Bangladesh politics at all.
13. At the SHEV interview the delegate asked the applicant to speak about the incident he claimed to have experienced with the Awami League. The applicant said he did not know what the delegate was talking about and so the delegate put it to the applicant that in his SHEV application he had submitted that in July 2012 two members of the Awami League who were armed with guns came to his family home when the applicant was not at home and these Awami League men tortured and threatened his father. The applicant then confirmed that this had happened and he said that these men had come at night and had asked for him and when they could not find him they beat up his father and his father [was injured]. The applicant said that his father was a prominent BNP figure in the area and that his father was the president of the lowest level BNP unit which comprised three local villages, including their own village. When asked what was happening in Bangladesh now the applicant said that the Awami League could not beat his father anymore because his father could not even walk straight. However, later in the interview the applicant said that his father was still the local BNP president and that his father was still organising all the protest meetings and marches. The delegate asked the applicant why the Awami League would want to target him (the applicant) and the applicant responded (in a manner to similar to the explanation presented in his written claims) that it was because he was his father's eldest son and this was how things were done in Bangladesh and that if they could kill off the applicant it would psychologically cripple his father, and that having done this the Awami League might then even kill his father, and that this would bring an end to the BNP in their area. The delegate

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<sup>2</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; DFAT, "DFAT Country Report: Bangladesh", 20 October 2014, CIS2F827D91369; UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734.

asked the applicant what he meant in his written claims when he stated that he was known to members of the Awami League and the army and the police. The applicant said that when the Awami League had not been able to find him they had reported him to the police, and that their bosses had then reported it to the defence people. The applicant volunteered no information to explain how he had come to know this, and I have not found the applicant's evidence in this regard to be convincing.

14. While it is not unheard of for the family members of prominent political figures to be targeted in Bangladesh by political rivals the evidence before does not indicate that there is a tradition in Bangladesh wherein political actors seek to eliminate prominent rivals by making that prominent rival's eldest son, rather than the prominent rival himself, their primary target,<sup>3</sup> and I have not found the applicant's evidence in this regard to be convincing. At the end of the SHEV interview the delegate asked the applicant why he had made no mention in his SHEV application of his father's being the local BNP president if this was in fact the case. The applicant said that he may have missed putting this information in and that if the delegate wanted proof of this he could provide her with this and that he could also provide the delegate with his father's medical reports. The delegate said that it was up to him (the applicant) to decide upon what evidence he wished to provide and she said that she would give the delegate seven days to provide any further such evidence and that if he needed more time he should contact her. The delegate never received anything further from the applicant in this regard nor did the applicant request any further time in which to provide such evidence even though the delegate did not decide the matter until some three months later.
15. Given the applicant's unconvincing evidence about his own involvement in supporting the BNP, and his apparent lack of awareness of any of the more significant political issues that have affected his country over recent years, and given that he would not appear to have registered to vote for the December 2008 national elections, I do not accept that the applicant is a supporter of the BNP or that he has ever been involved in an organised BNP activity, or even that he has any interest in Bangladeshi politics. Given this, and given his unconvincing evidence about how he was searched for by the Awami League, and then reported to the police and the army, I do not accept that he has ever been of interest to these actors on the basis of being BNP supporter or for any other reason. Given the absence of any documentary evidence whatsoever to substantiate his claim's about his father's involvement in the BNP I do not accept that applicant's father was the local BNP president or that the applicant's father was ever a BNP member or supporter either. Given this, I am not satisfied that the applicant would face a real chance of harm of any kind from the Awami League or their supporters, or from the Bangladesh police, the Bangladesh army or any other actor in Bangladesh for reason of his, or his father's, support for the BNP or because he is the eldest son of a BNP supporting family.
16. The applicant claims to have departed Bangladesh by boat without a passport. If true this would mean that he departed Bangladesh unlawfully since citizens of Bangladesh require a

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<sup>3</sup> DFAT, "Bangladesh - Country Information Request CI161130110919945 - Political Violence", 6 February 2017, CXC9040661299; DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; DFAT, "DFAT Country Report: Bangladesh", 20 October 2014, CIS2F827D91369; Ain O Salisk Kendra, "Human Rights Situation in Bangladesh 2016", 28 March 2017, CISED50AD3723; Odhikar, "Bangladesh, Annual Human Rights Report 2016", 1 January 2017, CISED50AD44; Odhikar, "Human Rights Monitoring Report: April 1-30, 2017", 1 May 2017, CISED50AD4210; Odhikar, "Human Rights Monitoring Report: April 2015", 1 May 2015, CISEC96CF1722; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167; ICG, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646; Freedom House, "Freedom in the World 2015 - Bangladesh", NG5A1E6BC132; UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734.

valid passport to depart from Bangladesh. While I have not found the applicant's claims to be credible more broadly I am, given the extent to which Bangladeshi citizens engage in irregular migration,<sup>4</sup> willing to accept that the applicant did depart Bangladesh without a passport as he claims. The evidence, however, does not indicate that he would face a real chance of harm upon return to Bangladesh for having done this. Bangladesh's Emigration Ordinance Act (1982) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the Act, but DFAT is not aware of any cases in which the Bangladesh authorities have enforced these provisions. 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>5</sup> but the applicant is not a person of this kind. I am not satisfied that the applicant would face a real chance of harm of any kind for reason of having departed Bangladesh unlawfully and/or for having sought asylum in Australia, regardless of whether he were to return voluntarily or if he was forced to do so by way of being deported.

17. The applicant has also expressed his claims by submitting that everyone in Bangladesh who does not support the Awami League is under severe threat from the Awami League and that such people have to do what the Awami League people say otherwise the Awami League will call the armed forces to control the people. The civilians in Bangladesh are among the largest victims of torture, murder and disappearances. Anyone who does not support the ruling party can be kidnapped or disappeared.
18. While I do not accept that the applicant has ever been a supporter of the BNP, and while I do not accept that the applicant has any interest in politics or in supporting the BNP or in opposing the Awami League, I do accept that on the same basis the applicant is not a supporter of the Awami League (since he has no interest in politics). In this regard the applicant would be like many other people in Bangladesh (in May 2016, the Asia Foundation published the findings of a survey on the attitudes of Bangladeshis towards democracy and this poll found that interest in politics was low and decreasing).<sup>6</sup> However, the evidence before me<sup>7</sup> does not indicate that the government of Bangladesh or its authorities are seeking to abduct, torture and murder civilians in general or specifically civilians who, like the applicant, are members of Bangladesh's predominant ethnic Bengali and Sunni Muslim majority population who do not support the Awami League by way of having no interest in politics. Nor does the evidence before me indicate that the applicant would face a real chance of being told what to do by Awami League people in any manner other than the manner in which the Awami League's elected officials are democratically enabled to make laws which all citizens of Bangladesh are required to adhere to. I accept that applicant has departed Bangladesh unlawfully but, as noted above, I am not satisfied that he would face a real chance of harm on this basis and given that the applicant has indicated that he has otherwise been a law abiding citizen who has no interest in breaking the law, and given that

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<sup>4</sup> IOM, "Bangladesh", 1 August 2014, CIS29397.

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

<sup>6</sup> DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206.

<sup>7</sup> DFAT, "Bangladesh - Country Information Request C161130110919945 - Political Violence", 6 February 2017, CXC9040661299; DFAT, "DFAT Country Information Report: Bangladesh", 5 July 2016, CIS38A80121206; DFAT, "DFAT Country Report: Bangladesh", 20 October 2014, CIS2F827D91369; Ain O Salisk Kendra, "Human Rights Situation in Bangladesh 2016", 28 March 2017, CISED50AD3723; Odhikar, "Bangladesh, Annual Human Rights Report 2016", 1 January 2017, CISED50AD44; Odhikar, "Human Rights Monitoring Report: April 1-30, 2017", 1 May 2017, CISED50AD4210; Odhikar, "Human Rights Monitoring Report: April 2015", 1 May 2015, CISEC96CF1722; Odhikar, "Human Rights Report 2013", 15 April 2014, CIS28167; ICG, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646; Freedom House, "Freedom in the World 2015 - Bangladesh", NG5A1E6BC132; UK Home Office, "Country of Origin Information Report, Bangladesh", 20 August 2010, CIS1734.

he has provide no specific claims about how the laws made by the Awami League government would cause him to suffer harm of some kind, I am not satisfied that there is a real chance that the applicant would suffer harm of any kind for reason of being told what to do by Awami League people, and/or for reason of being a civilian, and/or for reason of being a person who does not support the Awami League.

19. Considering the circumstances of the applicant in 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**

20. 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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21. 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**

22. 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.
23. 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 if he were to return to Bangladesh.

#### **Complementary protection: conclusion**

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

## **Decision**

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

## Applicable law

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### ***Migration Act 1958***

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

In this Act, unless the contrary intention appears:

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
  - (c) that is not inconsistent with Article 7 of the Covenant; or
  - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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