



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

BANGLADESH

IAA reference: IAA18/05670

Date and time of decision: 15 October 2018 13:39:00

S McNeill, 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) is a national of Bangladesh. On 20 April 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV application). He claims to fear persecution from the Awami League (AL) because he supports the Bangladesh National Party (BNP).
2. On 10 September 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate did not accept the applicant was an active supporter of the BNP or that he was a person of interest to the AL.

Information before the IAA

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

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He was born in [year] in Narayanganj, Dhaka, Bangladesh.
 - He is of Bengali ethnicity and a Sunni Muslim.
 - He is an active supporter of the BNP. He used to attend their meetings.
 - During that time he worked in a garment factory and the AL cadres used to come to his factory and force the workers to attend their meetings. They threatened and harassed him when they knew he was a BNP supporter.
 - He was involved with the BNP when he came to [Australian City 1] but since he has moved away from [Australian City 1] he cannot be actively involved. When he visits [Australian City 1] he meets with his BNP friends and discusses political activities with them.
 - If he is returned to Bangladesh he would face serious harm on the basis of being a BNP supporter opposed to the AL and he would be forced to support the AL.
 - He also fears harm as a failed asylum seeker who departing Bangladesh illegally; he would be arrested for breaching immigration laws and he would be particularly targeted when they know his political affiliation.
 - He also fears harm because he has supported the BNP in Australia.
 - The police will not protect him because they have close links to the AL.
 - He fears even if he moved to another part of Bangladesh he will face harm because he will continue to support the BNP.

Refugee assessment

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. There is no issue as to the nationality of the applicant. I accept that the applicant is a national of Bangladesh and that Bangladesh is the receiving country for the purpose of this review.

Support for the BNP

8. The applicant claimed to support the BNP and that he used to attend their meetings whilst in Bangladesh. At his SHEV interview on 21 June 2018 the applicant was questioned about his support for the BNP. Whilst I accept the applicant has a limited primary education [his] evidence about his involvement with the BNP including attending meetings was vague and stilted. Asked when he first became interested in the BNP, the applicant stated since he could remember he had always been a supporter of the BNP; it was the party he liked and as a citizen he voted for them. He was unable to recall the dates of when he started attending BNP meetings and then stated he was about [age] or [age] years old when he started to attend the meetings. Sometimes he would go monthly or weekly according to when they were held.

9. The applicant when asked what was discussed at the meetings, stated when they went to meetings it might be people gathering for a procession; if it was a special occasion like the independence day celebration they would be talking about Bangladesh and Bangladeshi politics. He said he had attended many processions, so many that he had not counted. He did not have a specific role with the BNP and had never paid a membership fee as he was only a supporter. Asked about his siblings, the applicant said some of them supported the BNP and some supported Jamat-e-Islami (JI) but he wasn't sure who supported which party. He was attracted to the BNP because the MP in their area used to do a lot of good things for the community and that is why he supported the party. Asked whether he had anything else he wanted to tell about his involvement with the BNP, the applicant said ‘no’.

10. I do not accept he attended regular BNP party meetings given his inability to provide any evidence on what was discussed at these meetings. His lack of interest in politics is also demonstrated by not knowing which of his family members supported the BNP or the JI when politics dominates life in Bangladesh. I accept the applicant attended processions but these were more general in nature such as Bangladesh Independence Day. I do not accept the applicant is an active BNP supporter. I am more inclined to find the applicant, of the two political parties that have dominated politics in Bangladesh since independence, holds an opinion which favours the BNP over the AL.¹ I am willing to accept that on a very minor level the applicant passively supported the BNP whilst in Bangladesh.

Problems with the Awami League

11. The applicant claimed that whilst working at a garment factory AL cadres used to come to their factory and force him to attend their meetings. They threatened and harassed him when they knew he was a BNP supporter. I note in his SHEV application under his employment history it includes his role as a worker in a manufacturing factory however no dates are provided as to when he commenced his employment there or when he finished there. [Another occupation] is also recorded but no dates again have been provided. Likewise in his statutory declaration included with his SHEV application no specific timeframe has been provided for his employment in the garment factory despite this being central to his claims.
12. At his SHEV interview the applicant said he could not remember the year he started working at the garment factory but he worked there for about five to seven years sewing clothes. Before he came to Australia he was [doing another role]. Whilst at the garment factory, if the AL had their own meeting or processions, they would forcefully take people to their events. If people did not want to go willingly the AL would threaten them and even show they were carrying arms. The applicant said personally he did not have a problem with the AL but it was to do with his workplace and he was unable to work properly because of these things. Every two to four days they would try and take them to meetings and processions and told them they had to go. They had to go otherwise they would be threatened and they would scare people by firing into the air. Asked if he was threatened the applicant said of course.
13. The delegate pushed the applicant to provide more details and tell him what happened. The applicant repeated what he had already stated. At his workplace they would forcibly take people to their meetings and processions and firearms would be used. In his area everyone knew about [Mr A] the local AL MP and everyone was frightened off him. On one side the BNP group would come and then on the other side the AL would come and they would have a fight and that made him fearful and people died. [Mr A]'s people would come to the garment factory and this started in 2008 when the AL came to power.
14. The applicant stated that this was happening every two days, sometimes weekly and sometimes because of all the fighting he didn't want to go to work. There were [several] people at his garment factory and they would take the whole [group] to the event and for that day the garment factory would be shut down.
15. Asked why they wanted to take him, was it because they wanted him to be an AL supporter, the applicant said when the BNP called a strike the AL didn't want it to succeed. They would also gather garment workers from other factories. The applicant said he was not physically attacked but they were always threatening them by saying that if they did not go to an event

¹ Department of Foreign Affairs and Trade, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 3.51.

they would get into trouble and be shot. Asked whether they actually said anything to him, the applicant said 'no never'. They used to come in front of the factory gates, the managers or supervisors told them to gather all the people working on that day and if they didn't go they would shoot them.

16. The delegate put to the applicant that nothing specifically happened to him. The applicant then stated one day he actually told them he didn't want to go and that day they specifically threatened him. They told him if he didn't go to the meeting they would shoot him and they took out a gun. It was probably in 2012 but he couldn't recall accurately. Asked whether there was anything else he wished to tell about this, the applicant said 'no'. The applicant also said he had no trouble with the police. Asked what made him leave, whether there was an incident that made him come to Australia, the applicant stated it was his frustration that he could not work freely even though Bangladesh was a democratic country. He could not do his work, there was constant stress and this went on not only for days or months but years and years.
17. Towards the end of the interview, asked by the delegate whether there was anywhere besides his hometown of Narayanganj that he could live, the applicant stated he had brothers in Thakakurgav and Dinajpur and he could probably stay there for two or three days. His workplace however was in Narayanganj so that is where he would have to live. The applicant again repeated he could stay in Naranyaganj. After a natural justice break the applicant then said he wished to clarify that if he wanted to go back to Narayanganj then all the problems would start all over again. He had not understood the question in the first place and this was the reason he left Bangladesh. If he returned there the problems will start again. He could not move to Dhaka as that was close to Naranyaganj so it was almost the same place. There were no garment industries in other cities and that was the sort of work he did. Asked whether the garment industry was only in one place, the applicant stated yes. It was the only work he was skilled in; he had [done another job] for one year but it was not the sort of job that suited him.
18. The applicant's oral evidence with regards to his claimed threats from AL cadres I have found unconvincing. The applicant has been unable to provide with any precision the period of time he actually worked at the garment factory only stating it was for a five to seven year period. The applicant stated the problems at the factory started in 2008 when the AL came to power. Country information before the delegate indicates the relationship between the AL and BNP is characterised by longstanding enmity.² The BNP were in power from 2001 until 2006. Countrywide violence before a scheduled 2006 election gave the military justification to intervene on 11 January 2007 which resulted in a military backed caretaker government that continued until December 2008 with democracy being restored in January 2009 when the AL again came to power.³ The election for which the AL secured power took place in December 2008.⁴ Most inter-violence (AL versus BNP) occurs during period of heightened political unrest during national elections and hartals (strikes).⁵ I accept that on occasion his work may have been interrupted by political unrest or hartals but given Bangladesh's economic ongoing growth at an annual rate of five to six per cent since the mid-1990s accelerating to 7.1 per cent in 2016, I find the applicant has exaggerated the level of disruption from the AL.⁶ The

² Ibid 3.52.

³ International Crisis Group, "Political Conflict, Extremism and Criminal Justice in Bangladesh", 11 April 2016, CIS38A8012646, p. 3; DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 2.3.

⁴ UK Home Office, "Country Policy and Information Note - Bangladesh - Opposition to the government", 18 January 2018, OG9EF767910, p.16.

⁵ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 3.58.

⁶ DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 2.8.

applicant has also not explained why he left his job in the garment factory to [do other work]; however, I am not satisfied it was because the AL knew he was a BNP supporter or because of any fear of harm from the AL.

19. The applicant presented his evidence in a vague and unpersuasive manner, he seemed unable to provide any substantive detail beyond merely stating 'they' would come to the garment factory to force them to go to meetings and processions and threatened them by shooting a gun in to the air. I accept given the nature of politics in Bangladesh, this might have happened on occasion during the time he worked at the garment factory (which is not clearly indicated) but I do not accept that it happened as frequently as claimed. Nor do I accept the applicant was individually targeted on one occasion which he thought 'probably' occurred in 2012. It was only after the delegate pressed him for more details that the applicant said they specifically threatened him when he had only just stated that nothing ever actually happened to him.
20. I also like the delegate do not accept the applicant misunderstood the questions regarding whether he could live anywhere besides his hometown. The applicant twice stated he could live in Naranyganj. The applicant did not appear to misunderstand the question when posed to him and he responded without hesitation. At no time during the interview did he state he had a problem with the interpreter. The applicant's willingness to return to his hometown indicates that he does not fear the AL on his return to Bangladesh. I also do not accept that his hometown is the only place of employment for garment workers given 22 per cent of the labour force in Bangladesh is engaged in formal work, mostly in the textiles and ready-made garments sector,⁷ and garment exports accounted for more than 80 per cent of total exports in 2016.⁸
21. I am more persuaded that whilst the political interference at the garment factory from both the AL and BNP caused him some frustration, it was the lack of economic opportunities which ultimately caused him to leave Bangladesh. The applicant clearly articulated this to the delegate when asked what made him leave. DFAT assesses that continuing economic challenges, including low income levels and poor economic opportunities, act as 'push factors' for emigration from Bangladesh.⁹ A significant number of Bangladeshis continue to seek higher wages overseas: as of early 2016, there were an estimated 8.6 million Bangladeshi migrants worldwide. Bangladesh received over USD 13 billion in remittances in 2015, which accounted for approximately 12 per cent of gross domestic product (GDP).¹⁰ I find that the applicant was of no adverse interest to the AL when he departed Bangladesh in 2013. I find that the applicant departed Bangladesh in 2013 to seek employment opportunities overseas.

BNP activities in Australia

22. The applicant claimed to fear harm because of his involvement with and his support of the BNP in Australia. At his SHEV interview the applicant said there was a group organised by [Mr B], the [Mr B] group and when he was in [Australian City 1] he attended one meeting in [one suburb] and once in [another suburb]. Asked what was discussed at these meetings the applicant said they talked about Bangladesh. He had done no other activities apart from attend these two meetings. This group was aligned with the BNP. He couldn't remember the date he attended the meetings other than it was about three years earlier when he was living

⁷ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 2.10.

⁸ DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 2.9.

⁹ Ibid 2.13.

¹⁰ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 2.10.

in [Australian City 1]. He was now living in [another location] (where he [worked]) so he only communicated with them sometimes over the phone. This was either fortnightly or sometimes monthly. He had friends in [Australian City 1] who were 'members' and they told him that a few days ago [an official] had visited and they had organised to stand in front of where she was staying and gave slogans how her government was unlawful. He had not been able to come.

23. I accept the applicant attended two meetings whilst residing in [Australian City 1] and that his friends he met at these meetings were BNP supporters. Only one address is included in his SHEV application for the period he has resided in Australia so it is unclear how long he has been at this address and how long he stayed in [Australian City 1]. Regardless, that he has attended only two BNP meetings since arriving in Australia in June 2013 demonstrates his lack of overall interest in politics and that he is more focussed on work. I am not satisfied his attendance at two meetings the applicant claims were run by BNP supporters makes him an active BNP supporter. I accept he still however favours the BNP over the AL and as such could be described as a low level BNP supporter.
24. According to DFAT the security situation in Bangladesh is volatile and can deteriorate quickly without warning. Security threats include politically motivated violence, particularly ahead of the next elections in late 2018 or early 2018.¹¹ Politically motivated violence (PMV) manifests regularly in the form of violent clashes between supporters of different factions of the same party (intra-party violence), supporters of rival parties (inter-party violence), and between party supporters and law PMV tends to peak during periods of heightened political unrest, including during elections, strikes, and blockades. It tends to be most prevalent outside Dhaka, particularly in northwest and southeast Bangladesh.¹² I note the applicant hometown is near Dhaka.
25. Between 2012 and August 2017, political violence claimed the lives of 1, 329 people with over 71, 000 people injured. Many of the casualties are members of the student wings of the main parties.¹³ The number of people who are affected by political violence remains low in proportion to the size of the major parties. In general, evidence does not indicate there is a real risk of state or non-state persecution or serious harm for ordinary party members or supporters.¹⁴ Bangladesh has a current population of 161 million.¹⁵ DFAT assesses that under the current AL government, senior members of opposition political parties (particularly the BNP) face a high risk of politically motivated arrest, legal charges and travel bans. Active members of opposition political parties and auxiliary organisations who participate in demonstrations also face a high risk of arrest and physical violence, both from security forces and ruling party activists. This risk is elevated around times of heightened political tension, including elections. Ordinary members of opposition political parties and auxiliary organisations who do not engage in political activities and demonstrations face a low risk of arrest, although this may vary according to location and timing.¹⁶ In recent years, the frequency and level of intra-party violence has far outweighed that of inter-party violence,

¹¹ DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 2.29.

¹² Ibid 3.59.

¹³ UK Home Office, "Country Policy and Information Note - Bangladesh - Opposition to the government", 18 January 2018, OG9EF767910, [2.2.7], p. 6.

¹⁴ Ibid [2.2.10], p.6.

¹⁵ DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 2.6.

¹⁶ Ibid 3.55.

particularly between competing AL factions.¹⁷ DFAT assesses that violence is also highly likely to accompany the next national elections in late 2018 or early 2019.¹⁸

26. The applicant is not a member of the BNP. Whilst I accept the applicant is a low level supporter of the BNP, I am not satisfied that he is an active supporter of the BNP. Given the priority he places on work over politics both in Bangladesh and Australia, I am not satisfied he has a genuine commitment to be politically engaged or that he would seek to be actively involved in election campaigning for the BNP on his return to Bangladesh. The applicant has not indicated that he would engage in BNP activities on his return to Bangladesh and in light of his minimal prior involvement, I am not satisfied that the applicant would become politically active on his return to Bangladesh, or that his involvement would extend beyond merely supporting the BNP.
27. Whilst I accept PMV remains a problem in Bangladesh, taken into account the applicant's personal circumstances, his passive low level support for the BNP and the country information before me, I am not satisfied that the applicant faces a real chance of harm in Bangladesh from the AL, or that he would be forced to join the AL or anyone else on the basis of any past or future sympathy or low-level support for the BNP party or for any other reason.

Failed asylum seeker and unlawful departure from Bangladesh

28. The applicant claimed to fear harm on his return to Bangladesh as a failed asylum seeker and because he departed Bangladesh illegally and therefore, would be arrested for breaching immigration laws and would be particularly targeted when they knew his political affiliation. The applicant has consistently claimed that he departed Bangladesh unlawfully without a passport and I accept that he did so. The applicant has resided in Australia for over five years and has sought asylum.
29. DFAT reports that the Emigration Ordinance Act (1982) (EO Act) makes it an offence to depart from Bangladesh other than in accordance with the procedures laid down in the EO Act.¹⁹ The EO Act refers to penalties of up to one year imprisonment or a fine of 5000 taka in certain circumstances.²⁰ Information before the delegate indicates this is approximately AU\$76. DFAT reports from 2014 and 2016 indicate that DFAT is not aware of any incidence of enforcement of these provisions and there is no indication in the 2018 report that this has changed.²¹ There is no country information in the review material to support that the Bangladeshi authorities enforce the EO Act against returning Bangladeshi asylum seekers or that they specifically target BNP supporters. I am not satisfied that the applicant faces a real chance of any harm in Bangladesh on the basis of having departed illegally.
30. Bangladesh accepts both voluntary and involuntary returnees. The International Organisation for Migration's Assisted Voluntary Returns and Repatriation program assists Bangladeshi returnees in cooperation with the returning country and the Government of Bangladesh. DFAT has no evidence to suggest that recent returnees from likeminded countries have received adverse attention from authorities or others.²² DFAT assesses that most returnees,

¹⁷ Ibid 3.61.

¹⁸ Ibid 3.60.

¹⁹ Ibid 5.21.

²⁰ The Emigration Ordinance Act (1982) Bangladesh ", minlaw.gov.bd, 1982, CXBB8A1DA23900.

²¹ DFAT, "Country Information Report Bangladesh", 5 July 2016, CIS38A80121206, 5.28; DFAT, "DFAT Country Report Bangladesh 20 October 2014", 20 October 2014, CIS2F827D91369; 5.28.

²² DFAT, "DFAT Country Information Report Bangladesh", 2 February 2018, CIS7B83941169, 5.22.

including failed asylum seekers, are unlikely to face adverse attention regardless of whether they have returned voluntarily or involuntarily.²³ I have not accepted that the applicant had any profile of adverse interest to any AL cadres, supporters or party members when he left Bangladesh and I am not satisfied that he would be viewed as having any such profile upon return. I am not satisfied that the applicant faces a real chance of any harm in Bangladesh as a returning asylum seeker or a returning failed asylum seeker who departed unlawfully.

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 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. As previously indicated, I am not satisfied the applicant would face a real chance of experiencing harm of any kind if he were to return to Bangladesh as a low-level BNP supporter who was of no adverse interest to the AL when he departed Bangladesh or on the basis of his low level support of the BNP in Australia. The Federal Court has held that 'real risk' imposes the same standard as the 'real chance' test in the refugee criterion.²⁴ Relying on the findings set out above, I am similarly not satisfied there is a real risk of the applicant being harmed.
35. I have found that the applicant does not face a real chance of suffering harm of any kind or as a returning asylum seeker or returning failed asylum seeker who departed Bangladesh unlawfully without a passport or travel document now or in the foreseeable future. There is, similarly, no real risk that the applicant would suffer significant harm upon his return to Bangladesh.

²³ Ibid 5.33.

²⁴ MIAC v SZQRB (2013) 210 FCR 505.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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