

**1219867 [2013] RRTA 809 (28 October 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1219867  
**DIAC REFERENCE(S):** CLF2012/106708  
**COUNTRY OF REFERENCE:** Bangladesh  
**TRIBUNAL MEMBER:** Rowena Irish  
**DATE:** 28 October 2013  
**PLACE OF DECISION:** Sydney  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Bangladesh, applied to the Department of Immigration for the visa [in] 2012 and the delegate refused to grant the visa [in] 2012.

### CLAIMS AND EVIDENCE

3. The applicant claims to have become interested in converting from Islam to Christianity while in Bangladesh. He claims that he was in a business partnership with [other] partners, one of whom was Christian. The other partners were unhappy with his interest in Christianity and his involvement in hiring a Christian receptionist. As a result they assaulted him and spread rumours about him. The partnership broke down. The applicant's family ostracised and criticised him. He travelled to [Country 1] with his wife to attempt to convince her to reconcile with him and show that he was not interested in Christianity. However she overheard him talking to some Christians in a restaurant and returned back to Bangladesh. When the applicant returned to Bangladesh he was assaulted and his marriage broke down. Since arriving in Australia the applicant has been attending [Church 2].
4. The application form (completed with the assistance of a registered migration agent) states that the applicant was born on [a certain date] in Dhaka, Bangladesh. He lists his religion as Christian. He lists his occupation as "business" and states that he was store keeper at [Business 3] until [2005] and Chairman of [Business 3] from [2006] to [2012]. His wife, [children], mother, [siblings] all remain in Bangladesh.
5. He arrived in Australia [in] 2012 on a visitor visa. He had previously travelled to [Country 4], [Country 5] and [Country 1] in 2011.
6. In support of his claims the applicant provided:
  - Letter from [Ms A], Case Worker, Settlement Grant Program, Sydney Multicultural Community Services, undated.
  - Letter from [Pastor B], [Church 2] dated [in] 2012 stating applicant has been attending since [a certain month in] 2012.
  - Letter of support from [Mr C] dated [in] 2012.
  - Baptism certificate dated [in] 2012.
7. The applicant was interviewed by the delegate [in] 2012. The Tribunal has listened to a recording of that interview and refers to it, where relevant, below.
8. The applicant appeared before the Tribunal on 9 September 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages. The applicant was represented in

relation to the review by his registered migration agent. The representative attended the Tribunal hearing. The evidence given by the applicant at the hearing is referred to, where relevant, below.

9. At the hearing the applicant provided the following documents:
  - A letter from [Pastor B], [Church 2], dated 17 August 2013 stating that the applicant has been attending since [a certain month in] 2012.
  - A letter of support from [Mr D], [from a certain community organisation] dated 18 August 2013 referring to the applicant's good character and involvement with the Bangladeshi community.
  - Letter from [Ms E], Caseworker, [Community Services], undated, giving background information about the applicant including that he "recently converted to Christianity and he is regularly practicing his religious views".
  - Letter from [Dr F], [specialist], dated [2013] stating that the applicant was admitted to [a hospital] with [medical problems] which have subsequently been treated.
10. Following the hearing on 16 September 2013 the Tribunal sent to the applicant an invitation to comment on or respond to information pursuant to s.424A of the Act with a respond due by 30 September 2013. On 17 September 2013 the applicant requested an extension of time to respond. The Tribunal agreed not to make a decision before 18 October 2013. On 23 September 2013 a written response was received from the applicant. A tribunal officer phoned the applicant's representative who confirmed that they intended to provide further evidence before 18 October 2013. As at the date of this decision no further submissions have been received.

## **FINDINGS AND REASONS**

11. The law upon which the below findings and reasons is based is set out in Attachment 1.
12. On the basis of the applicant's Bangladesh passport, which was presented at the hearing, the Tribunal finds that the applicant is a citizen of Bangladesh. There is nothing in the evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Bangladesh. Therefore the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicant is a national of Bangladesh, the Tribunal also finds that Bangladesh is the applicant's "receiving country" for the purposes of s.36(2)(aa).

### **Refugee criteria**

13. Having spoken at length with the applicant and having considered the response provided to the s.424A letter, the Tribunal has a number of concerns about the applicant's evidence which leads it to find that the applicant is not a credible witness and has not been truthful about his experiences. These concerns are discussed below.
14. **First**, the applicant claims to have been in business with [Mr G], [Mr H] and [Mr I]. He claims that [Mr I] was a Christian and it was through him that the applicant became

interested in Christianity. However, in the Memorandum of Association for [Business 3] provided by the applicant with his visitor visa application it states that the Board of Directors are the applicant, [Mr G], [Mr H] and [Mr J]. It does not refer to [Mr I] as having any role in the company. At the Tribunal hearing the applicant initially stated that [Mr I] was not known by any other name and that [Mr J] is an alternate name for [Mr H]. When the Tribunal put to the applicant that the company documents refer to [Mr J] and [Mr H] as separate people the applicant then changed his evidence and stated that [Mr J] was [Mr I]'s name which he used to hide the fact that he was Christian from the other partners (which was the explanation provided in response to the s.424A letter also). The Tribunal found this unconvincing, not only because of the inconsistent and changing nature of the applicant's evidence about the name [Mr J] but also because it is inconsistent with the applicant's evidence at the Departmental interview that the other partners were aware that [Mr I] was a Christian at the time they entered into the partnership, as discussed below.

15. **Second**, at the Departmental interview the applicant stated that [Mr G] and [Mr H] were aware that [Mr I] was a Christian at the time they entered into the partnership agreement (which is dated [in] May 2006). However at the Tribunal hearing the applicant claimed that they were not aware that [Mr I] was a Christian and only became aware of this in the middle of 2008. When this was put to the applicant in the s.424A letter he stated that he could not recall whether he said the other partners knew about [Mr I]'s Christianity at the Departmental interview but if he did then it was a mistake. The Tribunal has listened again the recording of the Departmental interview and the applicant clearly states that the two Muslim partners were aware that [Mr I] was a Christian at the time they entered into the partnership agreement. He states that he was aware and told the other partners. The delegate then confirmed with the applicant that the other partners knew about [Mr I] being a Christian and there followed a discussion about why fundamentalist Muslims would go into business with a Christian and the applicant stated that they had agreed to do business and just let each other do their own thing. In light of the length and depth of the discussion at the Departmental interview the Tribunal does not accept that the applicant made a mistake when claiming that the Muslim partners knew about the Christian partner at the time of entering the partnership. Instead the Tribunal considers that the applicant has fabricated his evidence in an attempt to explain the inconsistency between his claim and the company documents provided with his visitor visa application. This causes the Tribunal to doubt that the applicant was involved with any Christian business partner in Bangladesh.
16. **Third**, the applicant's evidence in relation to the continued involvement of the Muslim partners in the business was so inconsistent as to not be credible. In his written statement the applicant claimed that the partnership agreement was terminated on 16 May 2010. At the Departmental interview the applicant stated that [Mr G] and [Mr H] had ceased to be partners in the business on 16 March 2010. However at the Tribunal hearing he initially stated that he had made an error at the Departmental interview and that they ceased to be partners in the business in [2012]. Later in the hearing he stated that they had not ceased to be partners but had in fact taken over the running of the business and ousted the applicant and [Mr I] from the business. When the Tribunal asked how the applicant could still have been Chairman at the time he left Bangladesh in [2012] (which was the evidence he gave at the hearing) if he was ousted [some months earlier] the applicant then changed his evidence and stated that he was only Chairman until [some months earlier]. This is not only inconsistent with the applicant's

earlier evidence to the Tribunal but is also inconsistent with his application form in which he states that he was Chairman until [he left Bangladesh in] 2012.

17. When the applicant's statement about his Muslim partners ceasing to be partners [in] March 2010 was put to the applicant in the s.424A letter the applicant changed his evidence again and claimed that they had ceased to be partners in the business in [2012] but then took over the running of it since the applicant left the business. The Tribunal found this unconvincing as it would have expected the applicant to have provided this explanation at the hearing had it been true. Furthermore, the applicant claims in his s.424A response that the Muslim partners took over the running of the business by taking advantage of [Mr I] as he is a Christian and could not challenge them. However, the applicant had stated at the Tribunal that [Mr I] had ceased to have a role in the business from [2012] and at the Departmental interview that he ceased to have a role in the business from 2010. The applicant (in his s.424A response) claimed that this was a mistake on his part but having looked at the context of the applicant's evidence to the Department the Tribunal is not satisfied that it was a mistake.
18. **Fourth**, in support of his application for a visitor visa the applicant provided a letter of support from [Mr G], Managing Director of [Business 3], dated [one month before he left Bangladesh]. The letter states that the applicant is Chairman of the company and that [Mr G] hopes that the applicant will join the company again after completion of his visit to Australia. As discussed with the applicant, this letter suggests that as at [the date of that letter] the applicant was still Chairman of [Business 3] and still had a good relationship with [Mr G] who was Managing Director. In response the applicant replied that he took this letter from [Mr G] in [2011] but then later changed the date after their relationship broke down. The Tribunal found this unconvincing as the applicant stated at the hearing that the Muslim partners were against him from [well before that time] when they assaulted him. It therefore appears unlikely to the Tribunal that [Mr G] would have given him such a letter in [2011]. Furthermore, the applicant later stated that he only decided to come to Australia after his partners had assaulted him. When the Tribunal asked why [Mr G] had given him a letter of leave from the company then the applicant changed his evidence and stated that not only had he amended the date on the letter but also the contents of the letter and that it was actually provided by [Mr G] to enable the applicant to travel to [Country 1]. The Tribunal found this unpersuasive as the applicant had not previously claimed to have amended the contents of the letter, only the date. When this was put to the applicant in the s.424A letter he provided an explanation consistent with the last explanation provided to the Tribunal. However, for the reasons discussed above the Tribunal does not accept that explanation.
19. Furthermore, the above explanation is inconsistent with the applicant's evidence at the Departmental interview that he had obtained the letter from [Mr G] because he planned to leave Bangladesh in 2009. When this was put to the applicant in the s.424A letter he claimed that his evidence about when he obtained the letter was mistaken at the Tribunal hearing because of his recent heart surgery and the length of the hearing. The Tribunal does not accept this explanation. Although it accepts that the applicant had [surgery] in [2013] the letter from [Dr F] states that he is "asymptomatic with an excellent result from the procedure". The letter does not refer to any effects on the applicant's memory or ability to concentrate. The Tribunal does not accept that this would have affected his evidence at a Tribunal hearing some [months] after the procedure. While the Tribunal accepts that the hearing was a long hearing three breaks

were taken during the hearing and the applicant was advised that he could ask for a break at any time if required but he did not at any time indicate that he required an adjournment.

20. **Fifth**, the applicant's evidence in relation to the share allocation for [Business 3] was inconsistent. At the Tribunal hearing he stated that the four partners invested an equal amount of money in the partnership. However, the applicant was given 5000 shares, [Mr G] got 3000 shares and [Mr H] and [Mr I] got 2000 shares each. When the Tribunal asked why the share allocation was uneven if the investments were all equal, the applicant claimed that this was because he was the organiser of the partnership and [Mr G] was the Director so he was honoured with more. It appeared to the Tribunal that the applicant was attempting to create an impression that he was the most important person in the partnership. However in the Memorandum of Association of [Business 3] provided with his visitor visa application it states that [Mr G] was allocated 5000 shares, the applicant and [Mr J] were allocated 2000 shares and [Mr H] was allocated 1000 shares. When this was put to the applicant in the s.424A letter he claimed that the initial allocation was as set out in the Memorandum of Association but then they increased the total shares by 2000 so that they were allocated as per his evidence at the Tribunal hearing. The Tribunal does not accept this explanation as it is not consistent with the applicant's reasoning as to why shares were allocated at the time of inception of the partnership (ie that he got more because he organised the partnership). Furthermore, he has failed to provide any explanation of why [Mr G] would agree to reduce his share allocation from 5000 shares to only 3000 shares in favour of the applicant and [Mr H]. This causes the Tribunal to doubt that the applicant had the organising role he claims to have had in the company.
21. **Sixth**, the Tribunal found the applicant's evidence about his involvement in Christianity in Bangladesh to be inconsistent and unpersuasive. In his written statement he claimed that he got to know about Christianity through [Mr I] who took him to a Christmas party on 25 December 2009. However at the Tribunal hearing when asked when he first attended a Christian church he referred to having attended a Christmas party in 2005 and stated that before this he went to church many times with [Mr I]. He could not recall exactly when he started going to church but that it was around the middle of 2004. The Tribunal finds it surprising that the applicant would refer in his written statement to attending a Christmas party in 2009, suggesting that this was his first contact with a Christian event, if he had been attending church since the middle of 2004. When the Tribunal discussed with the applicant the contents of his written statement the applicant then changed his evidence and stated that although he was attending church from 2004 he only attended the Christmas party in 2009. The Tribunal found the change in his evidence unpersuasive.
22. Furthermore, the applicant stated that [Mr I] was a priest at the church when he started attending in 2004. However he had earlier stated that he was not aware that [Mr I] was a priest at the time he entered the partnership agreement in 2006. The Tribunal does not find it credible that the applicant could have been attending a church for a period of around two years and not be aware that his friend was a priest at the church. When this was discussed with the applicant at the hearing he claimed that [Mr I] had not told him that he was a priest. Even if the applicant had not been told by [Mr I] the Tribunal would have expected that he would have become aware of his friend's role in the church via other means, for example what was written on church documents, from talking with other people and from observing his role.

23. **Seventh**, the Tribunal found the applicant's evidence in relation to his baptism in Bangladesh to be unpersuasive. The applicant claimed at the Departmental interview that he had organised to be baptised in Bangladesh [in] 2012. However at the Tribunal hearing he stated that he had discussed being baptised with the priest in Bangladesh but the priest was too scared to do it. He also inconsistently stated that he was not able to attend church in Bangladesh after returning from [Country 1] in [2011]. When this was put to the applicant in the s.424A letter he responded that he had set a date [in] 2012 but could not go ahead because of the situation with his family and friends and because he was fearful of the consequences. Any differences in his evidence were due to his recent [surgery] and high dosage of medication at the hearing. As referred to above the Tribunal does not accept that his [surgery] in [2013] affected his evidence at the hearing in [2013]. The Tribunal discussed the applicant's health with him at the beginning of the hearing. He stated that he was taking regular medication but that it does not affect his memory or concentration and that he was just feeling a bit nervous. The Tribunal does not accept that the medication explains discrepancies in his evidence. The inconsistencies in the applicant's evidence and his failure to provide an adequate explanation for them leads the Tribunal to doubt that he was involved with Christianity as claimed or had organised any baptism in Bangladesh.
24. **Eighth**, in his written statement the applicant states that:
- As soon as my other two partners found out that I recruited a Christian receptionist, they became angry and started spreading the rumor that I was having a love affair with that Christian lady though my friend [Mr I] even before her recruitment and also spread the rumor that I was converting myself to Christian religion etc. However, on the ground of my recruitment of that Christian receptionist, a serious argument broke out which turned to violence eventually. That means, those two partners assaulted me in front of my staffs and colleagues in the office..."
25. However at the Tribunal hearing the applicant claimed that he recruited the Christian receptionist in [2008] and that in 2010 his partners found out that he, [Mr I] and the receptionist were Christians. When the Tribunal asked what the fight was about in [2011] the applicant stated that it was because he was close to [Mr I] and going to church. When the Tribunal put to him that he had written in his statement that it was because of the receptionist he then changed his evidence and stated that it was because of both [Mr I] and the receptionist. The applicant's inability to provide a consistent explanation for what caused the assault in [2011] causes the Tribunal to doubt that any such assault occurred.
26. **Ninth**, the applicant claims that he went to [Country 1] in [2011] in order to reconcile with his wife and persuade her that he was not interested in Christianity but that this backfired when she heard him talking about Christianity in a restaurant and returned to Bangladesh and told his remaining family. However the applicant's evidence about what he discussed was inconsistent. In his written statement he says that he talked to the people in the restaurant about going to church and the procedure of being baptised without mentioning that he was going to be baptised himself. However at the Tribunal hearing he claimed that he was talking to someone in the restaurant about his own baptism.
27. Furthermore, given the aim of the trip to [Country 1] and the applicant's circumstances in Bangladesh at that time, the Tribunal does not find it credible that he would then voluntarily approach Christians in a restaurant while in the presence of his wife and talk

about baptism. When this was discussed with the applicant at the hearing he claimed that his wife did not speak English so he thought that she would not understand. The Tribunal does not find this to be an adequate explanation as it appears clear to the Tribunal that it would be very risky to have such a conversation in front of his wife, especially in light of his evidence that he had been assaulted and ostracised as a result of rumours about his conversion to Christianity before travelling to [Country 1].

28. **Tenth**, in the applicant's statement he claimed that he was assaulted by his family and by others on two occasions in the street in [2012] after returning from [Country 1]. However when asked at the hearing about what difficulties he had after he returned from [Country 1] he referred to having been beaten in the office and stated that he could not remember any other occasion. When the Tribunal put to him that he had previously claimed to have been assaulted by persons other than his partners he then stated that he was assaulted on one occasion [at a later date in] 2012. The Tribunal found the applicant's evidence so inconsistent that it was not credible. It does not accept that he was assaulted on any occasions after returning from [Country 1].
29. **Eleventh**, the Tribunal has concerns about the delayed departure of the applicant. The visa label in the applicant's passport states that the visa was granted on [a certain date in] 2012 but he did not arrive in Australia until [five weeks later]. This raises concerns for the Tribunal that the applicant was not in genuine fear for his life given that he chose to remain in Bangladesh for nearly a month after having the means to leave. When this was discussed with the applicant at the hearing he claimed that he had to delay his departure because he had trouble raising the money to come to Australia. The Tribunal does not accept this explanation as the documents provided in support of the applicant's visitor visa application suggest that the applicant was in a good financial position. He provided a bank statement showing that as at [a certain date before his departure in] 2012 he has a balance of 9,64,838 taka and access to a credit card. When this was raised with the applicant at the hearing he claimed that he had just changed the date on the statement from [2011] to [2012] and that he had already spent this money on his travels to [Country 1], [Country 5] and [Country 4]. When the Tribunal put to him that the document did not appear to have been altered as it was an original stamped with a water mark he then changed his evidence and stated that he paid someone else to forge the document.
30. When information in the bank statement was put to the applicant in the s.424A letter he responded that he had to "overwrite the bank statement" to make it stronger for his visa application and that the credit card did not have any credit available on it. In response to the information in the s.424A letter that he had not referred to the bank statement being a forgery or having been tampered with when discussing it at the Departmental interview, the applicant then claimed that he altered his bank statement in [2011] to go to [Country 1] and then against in [2012] to come to Australia and that he may have overlooked or missed this piece of information at the Departmental interview. The Tribunal does not accept this explanation as it is not consistent with his evidence at the Tribunal hearing that he had the money at the time he travelled to [Country 1], [Country 5] and [Country 4] but had spent it during those travels. The applicant's inconsistent and changing evidence suggests to the Tribunal that he did not delay his departure because of any financial concerns but rather because he did not have any fears for his safety in Bangladesh.



31. The above concerns are so numerous and significant that the Tribunal is not satisfied that the applicant is a credible witness. While it accepts, based on his visitor visa application, that he was Chairman of [Business 3], it does not accept that he was in business with a Christian partner, that he hired a Christian receptionist, that was interested or involved in Christianity in Bangladesh, that he was assaulted, harassed, threatened, ostracised or ousted from his business as a result of any interest or involvement in Christianity. It is not satisfied that he travelled to [Country 1] in an attempt to reconcile with his wife following difficulties relating to Christianity or that he approached Christians while in [Country 1] which lead to difficulties with his family and friends and Bangladesh. The Tribunal is not satisfied that the applicant left Bangladesh as a result of any fears for his safety.
32. The Tribunal has considered the applicant's activities in Australia. He claims to have been attending [Church 2] regularly since [2012] and to have been baptised [in] 2012 (and has provided a baptism certificate in support of this).
33. He has provided letters of support from [Mr C] and [Pastor B]. Neither [Mr C] nor [Pastor B] attended the hearing in support of the applicant. The letters from [Pastor B] state that the applicant has been attending [Church 2] since [a certain month in] 2012 but do not give any opinion as to the genuineness of the applicant's beliefs. The letter from [Mr C] appears to have been written as an employment reference and although he refers to the applicant as a "dedicated member of [Church 2]" it states that [Mr C] has only known the applicant for three months.
34. The applicant has also provided letters of support from [Ms A], [Mr D] and [Ms E]. The letters from [Ms A] and [Ms E] state that the applicant has converted to Christianity. However these appear to be based on the applicant's account to them rather than first hand knowledge. The letter from [Mr D] does not refer to the applicant's Christianity.
35. The applicant was able to demonstrate some knowledge of Christianity and in light of the letters of support and baptism certificate the Tribunal accepts that he has been attending at [Church 2] and been baptised. When the Tribunal discussed s.91R(3) with the applicant at the hearing he stated that everything was true and from his heart and inconsistencies were due to his heart operation. However, in light of the significant credibility concerns outlined above, the concerns of the Tribunal in relation to the letters of support and the Tribunal's finding that the applicant did not have any interest or involvement in Christianity in Bangladesh the Tribunal finds that the applicant's involvement with [Church 2] in Australia was solely for the purpose of strengthening his claim to be a refugee with the meaning of the Convention. Therefore, in accordance with s.91R(3) the Tribunal disregards the applicant's conduct since arriving in Australia. The Tribunal is not satisfied that the applicant has any genuine interest in Christianity or would participate in Christianity if he returned to Bangladesh.
36. In light of the above findings the Tribunal is not satisfied that there is a real chance that the applicant would be persecuted as a result of his religion or for any other reason if he was to return to Bangladesh now or in the reasonably foreseeable future.
37. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

### **Complementary protection criteria**

38. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa).
39. For the reasons discussed above, the Tribunal has found that the applicant is not a credible witness. It is not satisfied that he had an interest or was involved in Christianity in Bangladesh. It is not satisfied that he was in business with a Christian partner, that he hired a Christian receptionist or that he was attacked, harassed, threatened or ousted from his business. The Tribunal has considered the applicant's activities in Australia and his involvement with [Church 2] in Australia. For the reasons discussed above the Tribunal has found that the applicant engaged in those activities out of any genuine interest in Christianity. There is no evidence to suggest that his family or anyone else in Bangladesh are aware of his involvement in Australia as he stated that he has no contact with his family. The Tribunal is not satisfied that the applicant has any genuine interest in Christianity or that he would be involved in any Christian activities if he was to return to Bangladesh. Therefore the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he will suffer significant harm as required by s.36(2)(aa).
40. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
41. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

### **DECISION**

42. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Rowena Irish  
Member

## ATTACHMENT 1 - RELEVANT LAW

1. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

### Refugee criterion

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
3. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
4. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
5. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
6. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
7. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
8. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely*

attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

9. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
10. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
11. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

#### **Complementary protection criterion**

12. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
13. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
14. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Section 499 Ministerial Direction**

15. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.