

071716789 [2007] RRTA 339 (20 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071716789

DIAC REFERENCE(S): CLF2007/84205

COUNTRY OF REFERENCE: Bangladesh

TRIBUNAL MEMBER: Phillippa Wearne

DATE DECISION SIGNED: 20 December 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Bangladesh arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal (“the Tribunal/RRT”) for review of the delegate’s decision.

The Tribunal finds that the delegate’s decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the *Migration Act 1958* (the “Act”).

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

Australia is a party to the Refugees Convention and, generally speaking, has protection obligations to 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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: 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.

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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

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 persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.

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.

Whether an applicant is a person to 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.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department of Immigration and Citizenship file 2007/84205 which includes the applicant's original protection visa application and the delegate's decision record. The Tribunal has also before it the applicant's RRT case file 071716789.

The applicant claims fear of persecution in Bangladesh for the convention-related reason of political opinion and membership of a particular social group.

Protection visa application (PVA)

According to the PVA the applicant is man from District A, Bangladesh. He gives his name as Mr E (his "claimed name"), which is a different name to the one on the passport which he used to travel to Australia.

The PVA indicates the following information. The applicant has never married. His mother and father reside in Bangladesh. He has had many years of formal education. He speaks, reads and writes Bengali, and he reads and writes English. He does not indicate a religion. He gives his occupation before he came to Australia as "business" and states that he worked as "director" at the same company for several years.

The applicant claims: "I could not get out from Bangladesh with my own passport. I came with someone [else's] passport". The passport which the applicant used to travel to Australia was issued in Bangladesh.

The PVA attached copies of documents including the following:

- A copy of 10 pages of a passport issued in the name of *Mr F* The pages indicate that a temporary visa was granted to *this name*.
- A translated copy of a birth certificate in the applicant's claimed name.
- Two untranslated copies of identity cards with photograph identification of the applicant.
- A translated copy of an *Intermediate and Secondary School* certificate in the applicant's claimed name, indicating a successful completion of schooling from high school.
- A translated testimonial in regard to the applicant in his claimed name from high school.
- A translated certificate as to "residence" and good character under the claimed name of the applicant. It is signed by the "Chairman" of District A.

The applicant attached a statutory declaration to the PVA. It is set out below, with minor editorial changes made as indicated.

1. I am a citizen of Bangladesh.
2. I, [Mr E] was born in Bangladesh. I came to Australia in the name of [Mr F], who I have never [met]. The Passport number is [number]. Date and place of issue Dhaka, [date].
3. I am seeking protection in Australia so that I do not have to go back to Bangladesh.
4. My family, community and the country that I came from and where I lived till my departure from Bangladesh would prosecute me if I return to Bangladesh because of my political background and homosexuality. I am a gay and [a] [position] of Bangladesh Nationalist Party (BNP).
5. Moreover the Bangladesh authori[ties] would not protect me because they condemn the practice of gay and lesbian in the country since they regard such practice as against their religious [beliefs] and cultural morals.
6. I lived at same residence all of my life. I first became interested in politics in [year] [At] that time I was a first year student of [college]. I believed that through political involvement, I would be able to provide [a] voice for the community. I had always desired to be a significant presence in my community and believed that a political career could assist me in this way.
7. After becoming a member of the party I became involved in various activities to help it increase its popularity within the community. [Information about the activities].
8. I became a gay during final year at the college in [year]. Up until that time I have never had any man or sexual relationship in my life. I was introduced in to homosexual[ty] by one of my political leader[s], who was [position] of this College. [Mr G] ([position] of the college) admired me and convinced me to become his gay partner. It started as a casual affair and eventually develop[ed] into more serious relationship.
9. However, because homosexuality is condemned in the country, we kept it secret among ourselves. You can never allow yourself [to be] seen in public. You would be outcast from the family and community if you are caught practicing homosexual[ty]. And, would be beaten and stoned to death. I continued my gay affairs throughout the period that I was at the college and throughout period of living in Bangladesh.
10. Due to my hard work in [the] parliamentary election, I was elected to [the] position of [position] for the party in the area of [District A] in [year]. In that election the BNP was elected to government and [Mr H] elected as a [position] in my area, later became [position] in cabinet. The party chairperson Begum Khaleda Zia personally congratulated me for he hard work that I had given to the party during the election campaign, which had helped assure [Mr H] victory in [area]
11. This was an important position within the party which provided a great deal of responsibility for me. It was quite unusual for a member who had been involved for only [number] years to be appointed to this position, and I [k]new that it was due to

my hard work. This position would establish me as a[n] important member of the party which would help increase my significance and popularity in community.

12. My position as [position] required me to ensure that activities [activities]. I was also given the responsibility of [duties].

13. [Through] this work the party increased its popularity, and my profile improved within the party. I also became well known to members of the opposing party, the Bangladesh Awami League, as they knew that my activities were reducing their popularity in the community.

14. In [year] I was approached by the Awami League district secretary. [H]e asked me to join the Awami League, and told me that if I did this I would be given the same position I held in the BNP. They knew that I was very popular [not only] amongst local community but throughout the district.

15. However, I refused their offer to joint Awami League as I [k]new that the many of the members were violent people who were corrupt, and who misused their political power for their benefit.

16. As my party (BNP) [had] finished our five years ter[m] as a government and handed over the power to caretaker government, [on the] same night I and my family had suffered greatly. The Awami League supporters ransacked my house so badly. They were looking for me everywhere. Thousand[s] of my fellow BNP supporters were forced to leave their homes and businesses as a result of political violence.

17. On [date] we organised a public rally against Awami League violence in town. [We] were approached by [number] Awami league [cadres] with sword[s], kni[ves] and hockey stick[s]. I was beaten with [a] hockey stick on my neck, arm and legs. But the BNP president of [area] [names] were injured very badly with other political members.

18. It was on [date], after [number] days of the president Sahab [U]ddin resigned from care taker government and emergency implemented all over Bangladesh, the army came to my house and asked me about [Mr H] who was a parliamentarian and Minister of [department]. [T]hey took me [to an] unknown place and interrogated me [for] [number] days. [I] was tortured and detained in [a] dark place. I had no food and water during that period. After the interrogation the army handed me over to the [District A] police. And I was kept in [jail] for [duration] The police filed [a] case against me for carrying [out] the political activities while emergency period [was] going on. I had been asked to report to the police station regularly.

19. I was very depressed and traumatised over my helpless situation which forced me to leave my country. I [did] not even dare to go out of Bangladesh with my own passport. With the help of [Mr H]'s secretary, I was introduced to a travel agent who organised [everything] for me to escape from Bangladesh to save my life. As I have breached my bail condition, I fear that if I return to Bangladesh, I would be arrested and detained under emergency Act. [I also] fear [s]erious human rights abuses and persecution.

20. I strongly believe that if I have to go back to Bangladesh, the army will kill me in the name of fake encounter. It has happened too many of my fellow political activists and leader[s].

Before the hearing the applicant submitted the following documents to the Tribunal:

- A letter from his lawyer in Bangladesh, together with a translation of it. The letter states that as the applicant did not attend court on “the fixed date”, his bail has been cancelled and a warrant issued for his arrest. The letter also states that the “[p]resent political condition of the country is very hard. The caretaker government declare [sic] that terrorist or criminal in which the party he belongs will be arrested then will be criminal of those case and if found guilty will have to suffer punishment. In no way he will not be pardoned [sic]. It is regret to inform you that for came [sic] time your [sic] enemies have been searching to kill you and police are searching [sic] you.”
- A copy of a warrant of arrest in the applicant’s claimed name, together with a translation of it.

The Tribunal has before it the Department’s case file CLF2007/84205 relating to the applicant. The Tribunal has had regard to an audio tape of an interview conducted with the applicant, and the delegate’s decision which are held on the Department file. It also has the Tribunal case file 071716789 relating to the applicant.

Evidence at the hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali (Indian/Pakistani) language.

[Information about the applicant’s age deleted in accordance with s.431 as it may identify the applicant] He explained that the culture in Bangladesh was different to that in Australia regarding ages. He said that people in Bangladesh tended to “speculative” rather than specific about their ages.

The applicant said that he had never had a sexual relationship with a woman. He confirmed that he had never married. He said that during his last year of college, he had become attracted to a man, and that they had “slept together” in the hostel. The Tribunal asked the applicant if this was the same man he had referred to in his statement. The applicant agreed that this was the case. He said that at first their relationship had been conducted in secret, but gradually others came to know of it. He said that he continued a sexual and emotional relationship with Mr G until he left Bangladesh. He said that he had not had a relationship with any other man in Bangladesh.

The applicant said that “bad news” travels very fast in Bangladesh “by word of mouth” and it had not been long before his parents had found out about his relationship with Mr G. His parents had asked him whether he was a “homosexual man” and when he confirmed this, they had asked him to leave the home. They did not provide him with any financial support, and his contact with them and his siblings from that time on was “occasional” He said that he last saw his parents some years ago. The applicant said that he remained estranged from his family. He said that his homosexuality had brought “shame” on the family. He said that he felt ostracised by his family and the local community. He said that he felt degraded and not accepted. He said that these feelings had been very difficult for him.

The applicant told the Tribunal that he had rung his parents a couple times since arriving in Australia. On the third occasion they asked him not contact them again.

The applicant said that the passport that he had used to come to Australia was not his. He said that he had never met *the person* under whose name he had travelled to Australia. The

Tribunal referred to Departmental movement records which indicated that the holder of that passport had travelled to Australia previously. The applicant said that he had not travelled to Australia before. The applicant said that he had a photograph taken for the passport, but apart from that he did not know how the passport had been made for him. He said that his “leader” had arranged his “departure documents” The Tribunal asked whether this “leader” was the same person whom he had referred to as his “boss” in the interview with the Department. He agreed that this was the case. He said that this person was not his employer. He was a senior member of the Bangladesh Nationalist Party (BNP), Mr H. The Tribunal sought confirmation that this was the same person whom the applicant had also referred to in the statement attached to the PVA as “parliamentarian and minister of a government department”. The applicant agreed that this was the case. He described his relationship with Mr H as “very close” He confirmed that it was not a sexual relationship. The applicant said that Mr H had helped him after he had been arrested and then released by the caretaker government. The situation in Bangladesh was “out of control” and Mr H had helped him because he was not safe. The applicant said it was done in return for all the hard work he had done for the party.

The Tribunal asked the applicant about his employment before he left Bangladesh. It asked what he had meant when he described himself as a “contractor” during the interview with the Department delegate. The applicant said that he was one of the local leaders of the BNP party. While that party was in government, he had very good contacts for contracts. [Information about the applicant’s work details deleted].

The Tribunal asked him in what capacity was he a local leader. He said that he was the local member of the BNP. He said that he had first become interested in politics around when he was in the first year at college. His parents were not particularly political but politics was something that had always interested him. He said that he had wanted to do something for his country, and that he saw his work with BNP as doing that. He said that his activities for the BNP at this time included promoting the party. The applicant told the Tribunal that the political environment in Bangladesh was very different from that in Australia. He said that even if an election was not due for a long time, there would still be a great amount of local political activity. The various parties constantly tried to enliven and motivate political feelings. The situation was far more politicised than in a place like Australia. The frequently organised demonstrations and sometimes there were strikes and blockades as well. Every month different strategies were planned to keep the local population “happy and satisfied” with the local BNP. The applicant said that great use was made of the media. He said that he had worked very hard for the BNP. He was not paid for this work. It was because he put so much into his political work and that he came to the attention of the leader, Mr H. It had also led to his position for the party.

The applicant said that he was elected to a position for his home district. He said that it was difficult for him to deal with specific years. He thought it may have been in early 2000s. The Tribunal confirmed that his statement had indicated that it was in early 2000s when he was elected. He said that it was not a position that he was voted into; he was appointed to another position by Mr H.

The Tribunal asked the applicant why members of the rival political party, the Awami League, had asked him to join their party. He said that it was because he had become well-known by members of that party for being active and doing a good job for the BNP. He said that the political environment was very different in Bangladesh from Australia. He said that it was quite common for the lower level leaders to change political allegiance. He said that he

was committed to the policies of the BNP, and so he did not change allegiance to the rival party.

The Tribunal asked the applicant to explain the policy differences between the BNP and the Awami League. The applicant had some difficulty doing this. However when the Tribunal asked for the two parties' attitudes to nationalism, Islam, secularism, and conservatism, the applicant was able to provide correct responses.

The applicant said that Awami League members ransacked his family's home looking for him. They harassed his family. When they could not find him there they went to the BNP office and ransacked that. These events occurred because the BNP had handed over power to a caretaker government after finishing their five year term. The applicant said that there was great unrest. Shortly after his family's home was ransacked, he and other BNP members organised a public rally to protest against the Awami league violence. He said that he had been beaten. He said that senior members of the BNP were more badly injured.

The applicant said that a state of emergency was declared on 11 January 2007. In the next few days the military rulers arrested many people. The applicant said that they came to his house and arrested him. He said he was not sure where he was taken. He said that he was interrogated for a short period of time. He was asked about the whereabouts of Mr H. He could not give the information because he did not know it. He had lost contact with Mr H in the past few days. The Tribunal asked why the military had been interested in Mr H. The applicant said that they were interested in all leaders of both the BNP and the Awami League, and they had arrested many of them in the local district. He said that the military wanted to destroy all political groups. Many of the leaders had been charged with corruption. He said that many people had been killed by the military. Sometimes it was made to look like an "accidental" killing.

He said that it was common knowledge in the district that he was close with Mr H, and this is how he had come to be questioned about him. He said that he was detained in a cell by himself. He felt very isolated and did not like being by himself. He "suffered alone." There was no light in the cell. He could not hear any other noises. He said that he was given no food or water during this period.

The applicant said that when he was first questioned about Mr H, his interrogators did not believe him. He said that he was kicked several times. When he cried he was left alone for a while, and then his interrogators returned and asked him the same questions. He said that the kicking had left him with quite severe pain. He was not able to receive treatment for these injuries until he was released from jail.

After the days in detention, he was "handed over" to the police and kept in a jail for a few weeks. The conditions in the jail were "very bad" Hygiene was poor. There were no regular meals and no fresh water. He said that apart from these conditions he was not deliberately physically mistreated. However, the guards were very rough and made abusive comments to him.

After his release from jail, he was told to report to the police station regularly. He never did this. He said that he had never had a passport issued in his own name. The passport in someone else's name was arranged for his use.

The Tribunal asked the applicant why, given so many people had been arrested at this time he had been able to get help to leave the country. The applicant said: "I should say I am lucky. I had links and contacts. There were so many without channels. I had help and so I was able to leave." He said that he made arrangements to leave Bangladesh through Mr H's assistant. His only thought when he arrived in Australia was to save his own life. However, he said he was worried about the conditions in Bangladesh. Conditions there are very bad there under military rule. The applicant stated that if he was to return to Bangladesh he would be arrested again and detained under the emergency rule. He would be placed in jail again.

The applicant said that he had been looking for a partner in Australia. He said that he had not found one yet. He said that he was gradually "getting better" in communicating in English.

He said that he often went to the Mosque. Sometimes he stayed overnight at the Mosque. The applicant said he was not working and he was dependent on friends to assist him with accommodation and food. He said that he had lived in a particular suburb and he picked up mail from an address there, but he moved around from time to time staying with various friends and at the mosque.

The applicant told the Tribunal that he was very concerned about the recent cyclone which had hit Bangladesh. He said that even though his family and he were estranged, and they did not live in an area directly hit by the cyclone, he was still very worried about them. He said that he had spoken regularly to Mr G since arriving in Australia. However, he had not been able to contact him for the last few days. He was also concerned about Mr G.

Independent information

The Bangladesh Nationalist Party (BNP) was established by General Zia in 1978. An October 2006 report by the International Crisis Group, which was published not long before the military takeover, provides the following analysis of the two main political parties in Bangladesh.

1. The BNP

...[T]he BNP has moved away from its origins in the military but is still seen as the more overtly nationalistic party, mostly because it takes a harder line against India. General Zia moved the country away from its secular nationalistic origins, establishing a more conservative state whose identity merged Bengali cultural aspects and Islam. The BNP favours closer relations with Muslim majority states and tends to view the AL as willing to compromise this Bangladeshi identity through ties with India and secularism. Military governments under Zia and Ershad had close ties to the Pakistani military.

The BNP's conservatism has meant it has been mostly comfortable in alliances with religious parties such as the Jamaat-e-Islami, though the relationship is not always easy. BNP leaders maintain that JI is firmly under their control but critics believe the Jamaat is hollowing out the BNP and making it more religiously based. The BNP certainly suffers in some comparisons with the Jamaat, a Leninist-style party with generally disciplined and well-educated cadres who are not seen as corrupt. Religious minorities such as Hindus are suspicious of the BNP, which has targeted them in the past. Although Khaleda Zia's grip on the party remains strong, there are tensions as her son, Tareq Rahman, builds his own powerful base. Widely credited with crafting the 2001 election strategy, he and his advisers have become a second source of power within the party. When senior leaders criticised him in August 2006, they immediately faced calls from the national executive committee to resign.

2. The Awami League

The AL was founded by Shiekh Mujibur Rehman to struggle for Bengali rights in Pakistan before the 1971 split. Its manifesto has long been based on four principles: nationalism, secularism, socialism and democracy. Its brief time in power before it was overthrown by the military and Sheikh Mujib assassinated has left it with distrust for the military and the BNP. Like the BNP, it has opted for patron-client relationships rather than internal democracy.

Critical of the involvement of religious parties in government, the AL reminds voters of the role of groups like Jamaat in violence during the independence war. It has forged its own ties to religious parties in the past and is now linked to smaller, left-leaning parties. Despite attempts to groom her son Joy for office, Sheikh Hasina is unlikely to hand over the party in the near future. Her son has shown no great appetite to abandon his life in the U.S. and enter Bangladeshi politics, nor are there powerful anti-Hasina factions that might force an early retirement (International Crisis Group 2006, *Bangladesh Today*, Asia Report No.121, 23 October, pp.3-4)

The following information about the BNP is extracted from the Political Handbook of the World 2000-2002:

A breakaway BNP faction followed former Prime Minister Azizur Rahman into the National Front (below, under National Party) in July 1985. The main body of the party, led by the widow of General Zia, refused to participate in the parliamentary poll of May 1986, the Presidential balloting of October 1986, or the legislative election of March 1988. In 1989 the party was again divided into a majority group led by Begum Khaleda and a dissident bloc led by former BNP secretary general A.K.M. Obaidur RAHMAN. Begum Khaleda was installed as prime minister following the 1991 elections, after which parliamentary deputies were advised that factionalism would no longer be tolerated. The BNP won only 116 seats in the June 1996 election, Begum Khaleda becoming leader of an opposition "combine" that also included as principal participants the *Jama 'at-i-Islami* and the Islamic Unity Front (IOJ), supported by a number of smaller, nonparliamentary parties. Following its March 1998 departure from the government, the *Jatiya* Party joined the BNP, *Jama'at*, and the IOJ in a four-party alliance intended to bring the government down.

Although reportedly confronted in mid-July 1998 by the threatened resignations of 30 MPs unhappy with her policies, Begum Khaleda was reelected BNP chairwoman for a two-year term in October. A month earlier, two prominent BNP members, former government ministers Obaidur Rahman and Nurul Islam MANJUR, were arrested for their alleged involvement in the 1975 murder of four Awami League ministers. They were finally indicted, along with 20 other individuals, on October 12, 2000, but the status of the case, which had not yet gone to trial, was uncertain following the BNP's October 2001 election victory, which saw Khaleda Zia's return to the prime minister's office on the strength of a 191-seat parliamentary majority.

Leaders: Begum Khaleda ZIA (Prime Minister and Chairwoman of the Party), Shahjahan SIRAJ (Vice Chairman), Abdul Mannan BHUIYAN (Secretary General) ('Bangladesh,' Political Handbook of the World 2000 – 2002).

Caretaker Government: 29 October 2006

The BNP handed over power to a caretaker government, on 29 October 2006. The Asian Human Rights Commission released a media statement (2007) which stated:

Life in Bangladesh has been uncertain since the last quarter of the year 2006. The newly formed “Grand Alliance” of a number of rightist as well of leftist political parties led by the Bangladesh Awami League has once again called another nationwide “blockade” programme from January 7 to 9. The whole nation is facing yet another period of stagnation for seventy two hours... This is happening under a caretaker government, which took over on 29 October 2006, led by the President as the Chief Advisor.

The BNP led Four Party Alliance Government increased the service age of the Supreme Court Judges following the recommendation of a former judge of the Supreme Court, Mr. Mahmudul Amin Chowdhury after his retirement. Justice K M Hassan, who had pre-service involvement in the BNP politics was awarded the benefit of increasing the service age, became an objectionable person to the Awami League led political section of the country. The BNP and its alliance insistently mentioned the "supremacy" of article 59 of the Constitution of Bangladesh that authorizes “the last retired Chief Justice of the Supreme Court” to form a “Caretaker Government to hold a general election within 90 days” of its taking over the office. It was alleged by the critics that the BNP had a blue print to grab governmental power through a farcical election with the help of a well set bureaucratic back up. On the other hand, the Awami League led political alliance was allegedly cautious about the administrative set ups made by their political enemy. They tried their level best to prove their skill for political violence through a series of programmes like "Hartal" (general strike), "Aborodh" (blockade), demonstration, procession with "Logi" (a long bamboo stick used for plucking fruits from tall trees) and "Baitha" (boating stick)..... The whole nation has paid a huge price for this political power game. Around 50 people were killed by demonstrators in broad day light before a large number of television cameras in a clash between the two major political groups since late October 2006 ('BANGLADESH: Greedy politicians make nation's life stagnant, unsafe and uncertain to win power,' 2007, Asian Human Rights Commission – Statement, 8 January <http://www.ahrchk.net/statements/mainfile.php/2007statements/885/> - Accessed 5 November 2007).

Human Rights Watch World Report 2007 reported that political violence between supporters of different Parties during October 2006 led to 28 deaths ('Bangladesh', 2007, *Human Rights Watch World Report*, 1 January <http://hrw.org/englishwr2k7/docs/2007/01/11/bangla14864.htm> - Accessed 5 November 2007).

On the University of Illinois Urbana-Champaign website, Associate Director Matt Rosenstein discussed aspects of politics in Bangladesh as follows:

There has been street violence since the caretaker government took over in October. Why?

As the 2007 elections approached, one of the two major parties, the Awami League (AL), alleged that its rival, the incumbent Bangladesh Nationalist Party (BNP), was attempting to rig the polls by populating the caretaker government and election commission with BNP cronies. The AL called for various members of these bodies to be replaced, pressing its demands through street demonstrations. These led to violent confrontations with police and supporters of the BNP. News reports placed the tolls at 45 dead and hundreds injured during months of violence.

In general terms, savvy politicians in Bangladesh have learned that street demonstrations—in the form of transportation blockades and hartals (general

strikes)—are an effective means of advancing political aims. The strategy brings the country to a standstill until political grievances are addressed. Unfortunately, this tactic has a huge negative impact on both law and order and on the country's economy. Estimates vary, but each hartal deters further foreign investment and can cost Bangladesh, already one of the poorest countries of the world, millions of dollars ('Bangladeshi Electoral Politics,' 2007, University of Illinois website, 22 January http://www.ips.uiuc.edu/ilint/mt/interview/2007/01/bangladeshi_electoral_politics.html - Accessed 3 October 2007).

A state of emergency declared 11 January 2007

According to the BBC, a state of emergency was declared on 11 January 2007. Under the declaration of the state of emergency, people are forbidden to criticise the government and its activities. Protests and marches are banned, as are printing and broadcasting critical political news, photographs and cartoons (Ahmed, A 2007, 'Update 7 – Bangladesh caretaker chief quits, poll delayed' Reuters, 11 January).

The Department of Foreign Affairs and Trade (DFAT) advised the following in response to the RRT's questions about the state of emergency:

In the absence of official government figures on the number of persons detained, questioned, arrested or killed in 2007 during the State of Emergency, post can refer to information collated by local non-government human rights organisations and local newspapers...

A. According to the Daily Star, a leading local English language daily, the joint forces detained over 41,000 people across the country following the declaration of Emergency on 11 January ...until 5 February, an average of 1640 arrests per day. Members from all the major political parties, including BNP and Awami League, were among those who were detained.

According to a report prepared on Bangladesh by the South Asians for Human Rights (SAHR) Organisation (a South Asian regional network organisation addressing democratic and human rights issues at national and regional levels), almost 1000 people were arrested per day in the first few weeks of the State of Emergency. The detainees were alleged to be political cadres belonging to different parties, members of local government and individuals with criminal records, many of whom were subsequently released.

B. Following the 11 January declaration of State of Emergency, many local level political leaders, including BNP members went into hiding to avoid detention and arrests. The provision of the State of Emergency curtailed political activity of all parties.

C. Media reports during the first 30 days of the State of Emergency indicated that, local leaders/ activists were the main focus for arrest and detention by security forces. The detention of senior leaders began during the later part of February. Since February, the names of 177 suspects have been published by the Anti-Corruption Commission, as part of the broad anti-corruption drive of the present government. Senior members and MPs from major political parties, particularly BNP and Awami League, appeared on the list and many of them have already been arrested, including the two former Prime Ministers Sheikh Hasina and Khaleda Zia (leaders of Awami League and BNP respectively). Three former MPs from BNP are currently in jail on different charges, most notably corruption charges. In a report compiled by the National Democratic Institute (NDI) in Dhaka, of the eight persons who were

convicted and sentenced on different charges during the period March to September - five were from BNP, two from Awami League and one was from the Jatiya Party.

D. Post contacted Special Superintendent of Police (Immigration), Special Branch and gathered following information:

Immigration checkpoints at the international airports in Bangladesh have been computerized and have been using digital data since 2004. For all kinds of movements, the 'passport number' is the key identification code. A person would only be detained or stopped if the immigration officers have prior information of specific charges or complaints against any passport number.

The passport scanning/detecting machines currently in use are not sophisticated enough and are not equipped to effectively identify duplicate passports or passports with forged photographs. The department still largely relies on the experience and expertise of immigration officers in detecting counterfeits. Passport verification can only be carried out at the major air and sea ports in Bangladesh. Land ports are not connected to any national passport database, and all passport checks are done manually.

In October 2006, Zia International Airport (the largest international airport) Immigration introduced E-Immigration, an online embarkation/disembarkation (ED) facility for passengers. E-Immigration is capable of storing travel document information issued by different embassies or offices in order to check travellers with forged visa or travel documents. Such information is automatically displayed during immigration checking. Although the system has been introduced, it has not yet been made entirely functional and most of the document checks are still done manually.

Passport exit control, like many other sectors in Bangladesh, is subject to compromise through corruption.

E. A person charged with a criminal offence would only be detained at the airport if the immigration department has prior notification or instruction to detain or hold the person charged. The immigration department can also be requested to restrain the movement of a person who might be required for an ongoing investigation. A list of black-listed or wanted persons is forwarded to the immigration checkpoints on a regular basis.

Post would note that in Bangladesh, it is possible to obtain a genuine Bangladeshi passport using fraudulent documentation as proof of identity. This means that a person could travel on a genuine passport using a false identity, thereby evading possible detection at passport control. (Department of Foreign Affairs and Trade 2007, *DFAT Report No. 729 Bangladesh Request for Information*, 7 November).

Legal and community view of homosexuality in Bangladesh.

Homosexuality remains illegal in Bangladesh, punishable by life in prison. However, apparently this law is rarely enforced. There are cultural differences between Western countries and South Asian countries when defining homosexuality. In Bangladesh, various sources indicate that there are many men who have sex with men, but do not identify as homosexual.

The following extracts from the UK Home Office's 2007 report on Bangladesh elaborate further:

Lesbian, Gay, Bisexual And Transgender Persons

23.01 In a BBC News report of 21 June 2005, Roland Buerk wrote: “Non-traditional sexuality of any kind is deeply frowned upon in Bangladesh which, although a relatively tolerant Muslim country, remains conservative in sexual matters. Laws dating from the British Raj era making sodomy a crime punishable by life in prison are still on the statute books. In reality they are rarely enforced. The condemnation from society of anyone found to be gay is deterrent enough for most to remain very firmly shut in the closet.” Afsan Chowdhury of Himal Magazine commented as follows in an article in 2004:

“Being gay in Bangladesh isn’t easy because society responds differently to sexuality in public and in private ... People involved with gay issues say that between 5 to 10 percent of the population is homosexual. That would mean at least 6 to 12 million Bangladeshis, more than the total population of many countries, prefer the same sex. Even if that estimate is considered to be on the higher side and is reduced by half, the number left would still be significant ... One of the reasons that homosexuality is treated so gingerly is that the country’s Criminal Code decrees sodomy (homosexuality or advocacy of the same) a crime which is punishable with a jail sentence ... Demonstration of homosexual tendencies for short periods is quite common in Bangladeshi society. Those practising it are not ostracised, although if caught, are ridiculed ... Male homosexuality is tolerated despite religious sanction. Yet divorce citing gay behaviour by any partner is not known.”

23.02 According to the International Lesbian and Gay Association (ILGA) website, accessed on 4 October 2006, same-sex male and same-sex female relationships are both deemed to be illegal. Section 377 of the Penal (Criminal) Code provides: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may be extended to ten years, and shall also be liable to fine”. ILGA has quoted the following from a statement made by a Bangladeshi lawyer to the Swedish Embassy in Dhaka: “You will notice that the words ‘homosexual’ or ‘homosexuality’ have not been used in the statute. The instances of prosecution under this section [are] extremely rare. In my twenty years of law practise, I have not known or heard of a case where a person has been prosecuted for or convicted of homosexuality under the aforesaid section. Such a prosecution in fact would be extremely difficult, if not impossible, for lack of witness or evidence.”(UK Home Office 2007, *Bangladesh Assessment*, 26 February, Section 23).

The US Department of State’s 2007 report on Bangladesh states the following with regard to homosexuality and the lack of information available due to victims’ desire for anonymity:

Homosexual acts are illegal; however, in practice the law is rarely invoked. The law states that “whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.”

There were a few informal support networks for homosexual men, but organizations to assist lesbians were almost non-existent.

Incidents of attacks on homosexuals were difficult to track because victims’ desired confidentiality and local human rights groups did not monitor this area, but they were known to occur. Government safeguards in this area were nonexistent. There were few studies on homosexuality in the county, and information was difficult to collect. According to one report by Human Rights Watch (HRW) in 2002, homosexual men were subject to harassment and

rape by police and local criminals without proper methods of recourse, due to societal discrimination. HRW also found that homosexual men often faced threats of extortion. According to HRW considerable official and societal discrimination existed against those who provided HIV prevention services and against high-risk groups likely to spread HIV/AIDS (US Department of State 2007, *Country Report on Human Rights Practices for 2006 – Bangladesh*, 6 March).

Age and birthdays in Bangladesh

A 1998 study of nutrition in Bangladesh, by Bairagi and Ahsan, found that analysis of age to weight was difficult to produce because of the lack of accurate data on age. According to the report:

Several factors may explain why age reporting is a problem in Bangladesh and in many developing countries. In Bangladesh, birth records are rarely maintained and the annual observation or celebration of the birthday of a child is also rare. When the date of birth is needed for admission of a child to school (until a few years ago, >50% of children did not attend school), a teacher usually records the date of birth on the basis of his or her own guess rather than the child's actual date of birth (Bairagi, R. & Ahsan, R.I. 1998, 'Inconsistencies in the findings of child nutrition surveys in Bangladesh', *American Journal of Clinical Nutrition*, vol.68, pp.1267-1271).

A 1982 study discusses this problem at length; noting that accurate data is disturbed not only by the lack of importance ascribed to birthdays but also to cultural differences in regard to the measuring of the calendar year:

The Bengali year is divided into six seasons, each of two months, for a total of twelve months. Bengali months range from 29 to 32 days. The year begins with the month of Baisak (April 14 or 15 of the Western calendar depending on whether or not it is a leap year) and continues through the month of Chaitra (April 13 or 14 of the Western calendar), a cycle in which each Bengali year overlaps with two years in the Western calendar. For example, the Bengali year of 1398 began on April 14, 1981 and continues through to April, 1982. It is easy to check the exact relationship between Bengali and Western calendars, since annual Bengali calendars typically display the Western dates and, in predominantly Moslem Bangladesh, the Arabic dates.

Thus, knowing the Bengali month and year allows a close conversion to the Western system. However, each Bengali month occurs during two Western months, and the month of Poush covers portions of December and January of two consecutive Western years. Imputing the Western month and year for a Bengali month and year would not vary by more than 32 days and would be a correct imputation within one month.

Besides the difference in calendar systems, the reporting of young children's age is affected by the lack of importance placed on age. Birthdays are not generally celebrated in Bengali populations, and no particular importance is placed on achieving another calendar year of age. Children are accorded no ceremonial events that would mark the annual date of birth or announce the increment of age. Moreover, Bengali calendar years are not recalled accurately. It should be mentioned that Bangladeshis operate with three calendars: a Western one for business and political matters; an Arabic one for Islamic religious activities (Bangladeshis are predominantly Moslem); and a Bengali one for domestic purposes. Bengali Hindus would ordinarily use two calendars: the Bengali one for religious purposes and the Western calendar for other reasons. Thus in Bangladesh one encounters the difficulties of reporting dates compounded by three actively used calendar systems

(Bairagi, R. Aziz, K.M.A., Chowdhury, M.K. & Edmonston, B. 1982, 'Age Misstatement for Young Children in Rural Bangladesh', *Demography*, vol.19, no.4, November, pp.447-458).

According to one webpage on Bengali culture, "[b]irthdays are not of particular significance, except amongst the more westernized section of the population. We do celebrate the occasional birthday of a famous person".

<http://library.thinkquest.org/05aug/01453/Ages/Bangladesh%20interview.htm> – Accessed 20 November 2007)

The situation may be changing. According to a webpage on culture in Bangladesh: "is becoming fashionable, especially in urban communities, to celebrate children's birthdays"

(<http://www.everyculture.com/wc/Afghanistan-to-Bosnia-Herzegovina/Bangladeshis.html> Accessed 20 November 2007)

Cyclone hits Bangladesh 16 November 2007

The ABC posted the following bulletin on 16 November 2007:

Cyclone smashes into Bangladesh coast

A fierce cyclone packing extreme winds and torrential rain has devastated Bangladesh's south-western coast, wiping out homes and trees in what officials described as the worst storm in years.

The eye of cyclone Sidr, visible in satellite images as a colossal swirling white mass racing north from the Bay of Bengal, hit land in an impoverished coastal area near Bangladesh's border with India...

"The cyclone has battered Bangladeshi coastal areas. The velocity of the wind in that area is 220 to 240 kilometres an hour. (This) is a violent storm," said Samarendra Karmakar, the head of the Bangladeshi meteorological department.

The storm matched one in 1991 that sparked a tidal wave that killed an estimated 138,000 people, Mr Karmakar told AFP.

But he said he was optimistic a major effort this time to evacuate villages and place people in special shelters could mean low-lying Bangladesh would escape significant loss of life. (ABC News <http://www.abc.net.au/news/stories/2007/11/16/2092428.htm> - Accessed 18 November 2007.)

FINDINGS AND REASONS

On the basis of the available information the Tribunal is satisfied that the applicant is a national of Bangladesh and that he is outside that country.

On the basis of a *Forensic Document Examination Report* conducted by Department the Tribunal accepts the applicant's claim that he travelled to Australia on another person's passport to which his photograph had been attached.

The Tribunal found the applicant to be a credible witness. He gave consistent, plausible and detailed evidence in his written statement and at the hearing.

The applicant gave a believable account of his political activities in Bangladesh. The Tribunal accepts that the applicant has been involved in politics since the 1990s when he joined the BNP at college. It accepts that he became increasingly involved in BNP activities from that time and this was particularly so after he moved out of his family home. He was able to demonstrate a working knowledge of the BNP policies, and its activities at a local level. The Tribunal accepts the evidence that because of his involvement and work for the BNP the applicant came to the attention of a senior leader of the BNP, and that he was later appointed to a position for the BNP. The Tribunal accepts the evidence that he later worked as a contractor for the BNP. The Tribunal also accepts the applicant's evidence that because of his political beliefs and involvement in BNP activities he was targeted and assaulted by members of the rival political party at the end of the BNP's term in office. It also accepts the applicant's claim that he was detained, interrogated, kicked and then jailed by the members of the caretaker government under the state of emergency that was declared in January 2007.

On the basis on the independent information referred to above the Tribunal accepts that the applicant gave the wrong age to the Tribunal because he does not readily use his age as an identifying attribute.

The applicant's claims with regard to what happened to him in Bangladesh as a result of his political involvement and activities are consistent with the independent evidence available to the Tribunal, which is referred to above.

The Tribunal accepts that if the applicant returns to Bangladesh now or in the reasonably foreseeable future he will wish to continue his involvement in the BNP and its activities. As referred to above, the Bangladeshi caretaker government's monitoring and detaining of political leaders continues and it extends to rank and file members of the BNP and the Awami League.

The Tribunal considers that if the applicant was to return to Bangladesh now or in the reasonably foreseeable future there is a real chance that he would be detained and questioned again because of his long and known involvement with the BNP and his close association, or perceived close association with one of its leaders. The Tribunal considers that the persecution which the applicant fears clearly involves "serious harm" as required by s. 91R(1)(b) of the *Migration Act* in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant's political belief are the essential and significant reason for the persecution which he fears, as required by s. 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by s.91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely his political beliefs.

The Tribunal finds that the applicant is outside his country of nationality, Bangladesh. For reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his political beliefs if he returns to that country now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Government of Bangladesh.

The applicant's fear of harm is from the authorities. The independent information referred to above indicates the monitoring and detaining of BNP members by the authorities is widespread. As there is nothing to indicate that the applicant can safely avoid harm anywhere

in Bangladesh, the Tribunal is satisfied internal relocation within Bangladesh is not a reasonable option for the applicant.

The applicant has also claimed that he would be persecuted if he were to return to Bangladesh because of his homosexuality. As the Tribunal has already decided that the applicant is a refugee on another ground it considers it unnecessary to assess his claim as a member of a particular social group.

There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, Bangladesh. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958. Sealing Officer's I.D. PRRRNP</p>
