



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA

IAA reference: IAA19/06876

Date and time of decision: 18 September 2019 11:42:00

D Corrigan, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Sri Lankan national. He arrived in Australia by boat [in] February 2013. On 1 December 2016, he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 23 July 2019, a delegate of the Minister refused the application. The delegate did not accept that the applicant faced a real chance of serious harm or significant harm on account of his Tamil ethnicity, his actual or imputed political opinion, any perceived links to the (Liberation Tigers of Tamil Eelam) LTTE and his being a failed Tamil asylum seeker returning after a long period of residence in Australia.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 15 August 2019, the IAA received a submission from the applicant's representative. To the extent that it discusses the findings of and other matters before the delegate this is not new information for the purpose of s.473DC(1) of the Act. The submission includes new country information concerning political developments in Sri Lanka and the treatment of Tamils. All of it predates the delegate's decision. I note the applicant was represented during the SHEV interview and in a post-interview submission and I am not satisfied that this information could not have been provided to the delegate before she made her decision. I am not satisfied that this new information is credible, personal information about the applicant, which was not previously known, and had it been known, may have affected the consideration of the applicant's claims. Noting also that I have been able to make a decision favourable to the applicant on the basis of the referred materials, I am also satisfied there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a Tamil from [Town 1], Jaffna.
 - His father used to give the LTTE money, food and provided places to hide.
 - When the applicant was approximately [age] years old, he was sexually assaulted by someone from the army.
 - For approximately 12-18 months from early 2005 to 2006, he worked for the Tamil Rehabilitation Organisation (TRO) in [Town 2] in the Mullaitivu district. He worked [in certain roles] in a boys' home for children of LTTE fighters or cadres. During this time, he lived in [Town 2] but returned sometimes to Jaffna on weekends.
 - In 2005, he was questioned on several occasions by the army and the Central Investigations Division (CID). They accused him of working at the boys' home run by the TRO and he admitted this. They asked him to get information about LTTE members who worked there and had children there. He was also asked to regularly transport a CID

officer through the LTTE-controlled area around [Town 2]. He agreed to do this but informed the LTTE of it and was effectively acting as a double agent for the LTTE.

- In approximately February 2006, the LTTE pretended to arrest him (along with the CID officer he was transporting). He does not know what happened to the CID officer but he thinks that he was killed because the LTTE often killed those they took into custody for working against them. The LTTE took him to a house in Kilinochchi. His father had spoken to the LTTE and a Tamil MP and had arranged for him to go to Colombo after this fake arrest. He stayed for a week in this house in Kilinochchi and then travelled to Colombo with the MP in or around February 2006. In Colombo, he lived at the house of someone who worked for the MP and did not register with the police.
- He paid a Sinhalese agent to get a Sri Lankan passport for him when he was living in Colombo in 2006. This agent took him to the passport office and helped him to apply for it.
- In Colombo, he was arrested on suspicion of being involved in some bombings because he was a Tamil. He was arrested along with three others and detained at the police station for three days. He was physically abused. He was released without charge after his friend paid three Lakhs.
- In December 2008, he travelled to [Country 1] to work as an [Occupation 1]. He paid an agent to help exit Sri Lanka in 2008 when he flew to [Country 1] to make sure that he was not arrested at the airport or questioned by them because of his LTTE connections. He used the agent during the three times that he travelled through the Colombo airport.
- He remained in [Country 1] until August 2012. He returned briefly from [Country 1] to Colombo in February 2012 for [surgery]. His father had organised for someone to help him to pass through the airport without issues. He subsequently returned to [Country 1] in March 2012.
- In May 2012, his father was badly wounded in a motorbike accident. [A named boy]'s (one of the children from the boy's home) father was connected to the Eelam People's Democratic Party (EPDP) and he believes that it was [the boy]'s father who possibly provided information to the authorities about his work in in the children's home. He fears that the EPDP was responsible for the accident because of his involvement in the 2006 arrest of the man who he believes, was attached to the EPDP.
- In August 2012, he returned to Sri Lanka from [Country 1]. In November 2012, the CID called him to report to the [Town 1] office in regard to the children he met at the boys' home, who were by then university students and had been arrested for their participation in Martyrs' Day. The CID thought that he was giving these boys money to go towards a resurgence of the LTTE. He had given these boys money for their tuition when they needed it and to buy bicycles. They did not have parents so he sent them money when he was in [Country 1] but not when he was living in Colombo.
- He reported to the [Town 1] CID office and was blindfolded, taken to another location and interrogated for three hours about the 2006 arrest of the man by the LTTE. The CID told him that he should be available for further interrogation and that he should not leave Sri Lanka. He reported at the office six times. On one occasion, his passport was seized. However, he received his passport back with the help of a policeman friend.
- [In] December 2012, he flew from the Colombo airport to [Country 2], travelling on his passport. When he left Sri Lanka, he paid an agent who arranged a man who came with him through the boarding point and boarded the plane to [Country 2].

- The CID and police are definitely interested in him because he fled the country when he was still meant to report to the CID and the police wrote to his mother in August 2018 asking him to report. They had asked about him verbally for some time but did not previously put anything in writing. He fears that now that he has been overseas for many years, they will suspect him of again transferring or gathering funds for a re-emergence of the LTTE.
- He fears harm as a member of a particular social group of failed asylum seekers.

Refugee assessment

6. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

7. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

Country of reference

8. The applicant has provided translated copies of his Sri Lankan birth certificate and national identity card and he has consistently maintained that he is a Sri Lankan national. I accept that he is a Sri Lankan national and I find that Sri Lanka is his receiving country.

TRO and LTTE claims

9. I have considered carefully the applicant’s claims and overall I consider his evidence to be credible, largely consistent and generally in accord with country information. Though I note that the TRO was not banned by the Sri Lankan government until 2007, I note that country information indicates that the TRO was seen to be a front for the LTTE and involved in the channelling of money to it during the period which the applicant worked for it and thereafter. I note in particular that the UK Charity Commission had in 2004 delisted the organisation after an investigation had found that it acted as a front to facilitate fundraising and procurement for the LTTE and that in 2005 Human Rights Watch reported that the TRO was

publicly identified as a front for the LTTE.¹ The claims are also broadly consistent with country information regarding the long violent civil conflict between the Sri Lankan government and the LTTE which ended in 2009 and that many Tamils particularly in the north and east reported being harassed, arrested or detained during the conflict. The claims are also consistent with country information that there were human rights abuses (including detention and torture) by the Sri Lankan authorities during the conflict and in its aftermath against Tamils suspected of involvement with the LTTE.²

10. My major concern about the applicant's evidence relates to his capacity to obtain a Sri Lankan passport and enter and exit the country on a number of occasions via Colombo airport without difficulty. In 2009, the Sri Lankan Department of Immigration and Emigration (DIE) told the United Kingdom Home Office (UKHO) that they: [...] had access to an alert list. This list contained information relating to court orders, warrants of arrest, jumping bail, escaping from detention as well as information from Interpol and the SIS computer system. The DIE computer system had its own alert system related to the alert list but this did not indicate the exact reason for the alert. Following an alert, DIE would refer these people to CID or SIS to establish the position. In 2001, the Director of the Criminal Investigation Department told the Danish Immigration Service and Canadian IRB that: [...] the CID is involved in departure control only if cases are referred to it by immigration officials or airline staff. The Director added that the CID provides lists of wanted people to immigration officers only. In the same report, the UNHCR stated that: [...] it may be difficult for a person to leave the country if the person is wanted by the authorities. UNHCR stated that a wanted person risks detection not only at security controls within the airport itself, but also at checkpoints in Colombo and on the road to the airport. According to UNHCR, it would appear that the checks performed in Colombo do have an impact, and the authorities seem to be able to communicate information on wanted persons all over the country, or at least to the parts under its control. The CID is responsible for investigating cases and laying potential charges under the Sri Lankan Criminal Code and Immigration Act at the airport. The CID may investigate cases of document malfeasance, human smuggling and trafficking, and conduct criminal background checks of returned Sri Lankan nationals in order to check for any outstanding domestic criminal warrants.³ A UKHO Operational Guidance Note stated that immigration officers at BIA use a computer system that flags those who are "on the wanted or stop list," but that there is no concrete evidence to affirm that the database contains information on every individual who has been detained by the police or army.⁴
11. I note that the applicant has not claimed that he was ever charged with any criminal offence or the subject of a court order or that he had escaped detention or jumped bail and that there is country information that indicates that there are high levels of corruption in the Sri Lankan public sector.⁵ I note also that in the United Kingdom Upper Tribunal decision of *GJ and Others*, there was evidence given from witnesses that it was possible for a person of interest to leave the country using bribery with the help of an agent and that there was a practice whereby an emigration officer would close down his computer to avoid connecting an individual's passport to the system or alternatively not swiping the passport but stamping

¹ Refugee Review Tribunal Country Advice, "Sri Lanka – LKA37386...", 16 September 2010; International Crisis Group "The Tamil Diaspora after the LTTE", 23 February 2010; Human Rights Watch, "Human Rights Watch World Report 2005 - Sri Lanka", 1 January 2005.

² Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Sri Lanka", 23 May 2018.

³ United Kingdom Home Office (UKHO), "Report of information gathering visit to Colombo, Sri Lanka 23-29 August 2009", 1 August 2009.

⁴ UKHO, "Operational Guidance Note: Sri Lanka (April 2012)", 1 April 2012.

⁵ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

it to avoid alerting the database.⁶ I consider my concern on this issue to be outweighed by the country information as a whole and taking into account the applicant's particular circumstances and his general consistency and credibility of his account.

12. I accept for approximately 12-18 months from early 2005 to 2006, the applicant worked for the TRO in [Town 2] [in certain roles] in a boys' home for children of LTTE fighters or cadres. I accept that he was questioned on several occasions by the army and the CID. I accept that they accused him of working at the boys' home run by the TRO and he admitted this. I accept that they asked him to get information about LTTE members who worked there and had children there. I accept that he was also asked to regularly transport a CID officer through the LTTE-controlled area around [Town 2]. I accept that he agreed to do this but informed the LTTE of it.
13. I accept that in approximately February 2006, the LTTE pretended to arrest him (along with the CID officer he was transporting). I accept that the LTTE took him to somebody's house in Kilinochchi. I accept that his father had spoken to the LTTE and a Tamil MP and had arranged for him to go to Colombo after this fake arrest. I accept that he stayed for a week in this house in Kilinochchi and then travelled to Colombo with the MP in or around February 2006. I accept that in Colombo, he lived at the house of someone who worked for the Tamil MP and did not register with the police.
14. I accept that he paid a Sinhalese agent to get a Sri Lankan passport for him when he was living in Colombo in 2006. I accept that this agent took him to the passport office and helped him to apply for it.
15. I accept that whilst in Colombo, he was arrested on suspicion of being involved in some bombings because he was a Tamil. I accept that he was arrested along with three others and detained at the police station for three days. I accept that he was physically abused and that he was released without charge after his friend paid three Lakhs.
16. I accept that in December 2008 he travelled to [Country 1] to work as an [Occupation 1] and that he paid an agent to help him exit Sri Lanka in 2008 when he flew to [Country 1] I accept that he used the agent during the three times that he travelled through the Colombo airport. I accept that when he returned briefly from [Country 1] to Colombo in February 2012 for [surgery], his father had organised for someone to help him to pass through the airport without issues.
17. I accept that in August 2012 he returned to Sri Lanka from [Country 1]. I accept that in November 2012, the CID called him to report to the [Town 1] office in regard to the children he met at the boys home, who were by then university students and had been arrested for their participation in Martyrs' Day. I accept that the CID thought that he was giving these boys money to go towards a resurgence of the LTTE. I accept that he had given these boys money from [Country 1] for their tuition when they needed it and to buy bicycles.
18. I accept that he reported to the [Town 1] CID office and that he was blindfolded, taken to another location and interrogated for three hours about the 2006 arrest of the man by the LTTE. I accept that the CID told him that he should be available for further interrogation and that he should not leave Sri Lanka. I accept that he reported at the office six times. I accept that on one occasion, his passport was seized but, he received his passport back with the help of a policeman friend. I accept that in December 2012, he flew from the Colombo airport to

⁶ *GJ and Others (post-civil war: returnees) Sri Lanka*, CG [2013] UKUT 00319.

[Country 2], travelling on his passport but when he left Sri Lanka, he paid an agent who arranged a man who came with him through the boarding point and boarded the plane to [Country 2].

19. I accept that the police have asked his mother about his whereabouts and asked him to report (in writing) following his father's death in 2017. I accept it to be plausible that they continued to be interested in him again following the return of several of his family members for the funeral and on suspicion that he had returned. I note the applicant has provided a translated copy of a police form dated [August] 2018 in relation to this.
20. I accept that when the applicant departed Sri Lanka for Australia and in more recent times has been of adverse interest to the Sri Lankan authorities related to his work for the TRO and concerns that he has provided financial support to former members of the boy's home. I note the applicant has not claimed that he has ever been involved in the LTTE itself or that since coming to Australia that he has engaged in any Tamil separatist activities. However, in my assessment I have particularly taken into account the 2017 report of the UK Home Office which states that in general a person who evidences past membership or connection to the LTTE, unless they have or are perceived to have a significant role in it or in relation to post-conflict Tamil separatism or appear on a "stop" list at the airport, would not warrant international protection. They note there is evidence that the security forces continue to detain individuals who they suspect of having LTTE connections and each case should be considered on the evidence provide and that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.⁷ Given the applicant's role in the TRO and his later financial support of the men who were boys at the home and the more recent adverse interest in him by the Sri Lankan authorities, I consider despite the passage of time that there is a real chance that he may still be perceived as having a significant role in post-conflict Tamil separatism and previously in the LTTE.
21. DFAT have reported that 'Low profile' former LTTE members include former combatants, those employed in administrative or other roles and those who may have provided a high level of non-military support to the LTTE during the conflict. DFAT assesses that, although the great majority of low profile former members have already been released following their rehabilitation, any other low profile LTTE members who came to the attention of Sri Lankan authorities would be detained and may be sent to the remaining rehabilitation centre. Following their release from rehabilitation, low profile former LTTE members may be monitored but generally are not prosecuted. Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE throughout the country.⁸
22. DFAT have stated that some Tamils with imputed LTTE links reported police monitoring and harassment in 2016. They assessed that, while monitoring of Tamils in day-to-day life has decreased significantly under the current government, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues.⁹
23. DFAT report that some recent publications suggest that torture in Sri Lanka continues, including against members of the Tamil community and primarily perpetrated by the police. In October 2016, the HRCSL submitted a report to the UN Committee against Torture that claimed "torture to be of routine nature... practiced all over the country, mainly in relation to police detentions" and that police use torture during interrogation and arrest regardless of the nature of the suspected offence. The UN Special Rapporteur on Human Rights and

⁷ UKHO, "Country Information and Guidance, Sri Lanka: Tamil Separatism", 15 June 2017.

⁸ DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018.

⁹ Ibid.

Counter-terrorism concluded in July 2017 that “all of the evidence points to the conclusion that the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds. Since the authorities use this legislation [the PTA] disproportionately against members of the Tamil community, it is this community that has borne the brunt of the State’s well-oiled torture apparatus.” The UK Home Office in 2017 reported a notable reduction in torture complaints, though highlighted new cases of Tamil victims where police had resorted to violence and excessive force to extract confessions.¹⁰

24. Considering his particular circumstances and the country information considered as a whole, I find that there is a real chance that the applicant will be persecuted by the Sri Lankan authorities for reasons of his imputed pro-LTTE and Tamil separatist political opinion. I find the persecution would involve serious harm (including a threat to his liberty, significant physical harassment and significant physical ill-treatment) and systematic and discriminatory conduct. DFAT have stated that Sri Lankan security forces maintain effective control throughout Sri Lanka and individuals are unlikely to be able to relocate internally with anonymity.¹¹ As the harm feared is from the state, I find that the real chance of persecution relates to all areas of Sri Lanka and that effective protection measures are not available to him. His fear of persecution is well-founded.
25. Given these findings, I have not considered the applicant’s other claims including a sexual assault when a youth, his returning as a failed asylum seeker and the targeting of his father by the EPDP.

Refugee: conclusion

26. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

¹⁰ Ibid.

¹¹ Ibid.

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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