



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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INDIA  
IAA reference: IAA19/07249

INDIA  
IAA reference: IAA19/07251

INDIA  
IAA reference: IAA19/07250

Date and time of decision: 6 November 2019 11:22:00  
K Allen, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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

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### Visa application

1. The three referred applicants (the applicants) are minor siblings born to Indian Tamil parents from New Delhi, India. The oldest two siblings were born in India, the youngest was born in Australia. On 12 September 2017 their parents lodged a combined application with their children for Safe Haven Enterprise Visas (SHEVs).
2. The applicants' parents both made claims that they had been born in Sri Lanka and could not return to Sri Lanka because it was not safe for them to do so as a result of their Tamil ethnicity and imputed political opinion. In their visa application the children were identified as not raising protection claims.
3. On 1 October 2019 the Department found that the parents were actually Indian nationals, rather than Sri Lankan, and they had provided bogus Sri Lankan birth certificates in support of their claims. The applicants' parents then admitted that they were born in India and their father provided a copy of his Indian passport, which notes his nationality as Indian, and their mother provided a copy of her adoptive mother's Indian identity card. The parents were then excluded from the fast track process under s.91(W) of the *Migration Act 1958* (the Act) because they provided bogus documents, as defined in s.5(1) of the Act. The parents therefore have a separate Protection Visa Decision Record to their children due to them being excluded fast track review applicants as that term is defined in s.5(1).
4. On 1 October 2019 a delegate of the Minister for Immigration assessed the children's application and refused the grant of visas on the basis that they are not owed protection.

### Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the Act.
6. No further information has been obtained or received.

### Applicants' claims for protection

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7. The applicants have not made any of their own claims for protection instead relying on the claims of their parents. The parents' SHEV application of 12 September 2017 raised claims based on the family being Sri Lankans who lived illegally in India. Once the delegate determined that they were in fact Indian nationals they were invited to make claims for protection relating to India. In response the applicants' father made the claim that he dreads the idea of being sent back to India as he knows only harm to him and his family awaits them. He did not specify what that harm was, or why harm awaited them.
8. The delegate noted in her decision of 1 October 2019 that the applicants had not raised any specific claims in relation to their fear of harm in India but did form the view that the following claims may be inferred from their parents' statements:
  - The applicants are of Tamil ethnicity. The delegate noted that the applicants have not raised that they fear persecution on return to India as Tamils. However based on the parents' general claim to fear harm in India they may fear harm on that basis.

- On arrival to Australia they converted to Christianity. The delegate noted that the applicants have not claimed to fear persecution on return to India as Christians. However based on the parents' general claim to fear harm in India they may fear harm on that basis.
  - The older two children were in immigration detention in 2014 when their personal information was inadvertently published on the Department's website for a short period of time ('the data breach') and the delegate considered whether the applicants would face harm on that basis.
9. I am not at all satisfied that any claims were made with respect to the applicants on their return to India or that any claims arise on the material, but given they were dealt with by the delegate, I have also considered whether the applicants face a real chance of harm in India on the basis of their ethnicity, religion or as a consequence of the data breach.

### **Refugee assessment**

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10. 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**

11. 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.
12. In their combined SHEV application of 12 September 2017 the applicants' parents A and V made claims that they fear returning to Sri Lanka because they will suffer persecution due to their ethnicity as a Tamils and their imputed political opinions because they would be associated with the Liberation Tigers of Tamil Eelam. They both claimed that in India they were refused entry into school because their families were illegally in India and undocumented. They expressed the fear that this inability to access education in India has carried over to their own children and that their children would have no right to attend school in India. They also said that they would like their children to have the opportunity to grow up and live in a country where they will not face discrimination based on their ethnic

origin as Tamil people and where they will be able to live in freedom and follow the religion of their choice. In support of their application they provided Sri Lankan birth certificates for V and A. On 20 September 2017 the delegate sought evidence of the nationality of the applicants, V and A's children, under 91W of the Act. In response A stated that their illegal status in India made it impossible to obtain official documentation.

13. V and A attended a SHEV interview on 24 July 2018. It was put to them during the SHEV interview that there were concerns that their certified Sri Lankan birth certificates may not be genuine documents as the manner in which they were obtained was inconsistent with country information. They both responded that they were from Sri Lanka. It was put to both of them that there were concerns that they could be Indian citizens. They were asked if they had any reasons to fear returning to India. A said that if his children can attend school and if they can obtain identity documents then he does not mind going back to India. V said that she did not have any legal status in India and that her children could not attend school but if they can get "all these things", then she can go back to India. By "...these things", she explained that she was referring to legal documents and registration for her children. She stated that if she had these things, then there is no other reason why she could not return to India.
14. On 16 August 2018 V and A were invited to comment on the delegate's findings that their birth certificates were suspected to be bogus documents as defined by s.5(1)(b) of the Act. They responded that they were not born in Sri Lanka as they had claimed. They confirmed that they were born in India. They claimed that the only way to get out of India was to obtain false birth certificates. They also provided the additional information that within the first two weeks of arriving in [Australia], being religious Hindus who believed in God, and wanting to be around people and in the community, they sought the closest church near them, which was [a certain] Church. Whilst attending the services and hearing the message, and meeting the lovely people who accepted them, they eventually decided to follow Jesus as the only God. They were water baptised and became members of the church and attend the weekly services on a regular basis.
15. On 18 September 2018 V and A's documents were seized by the Department and they were invited to comment under s.91WA but they did not respond. On 1 November 2018 V and A were formally invited to make claims relating to India under s.56 of the Act as they had advised the Department that they were both born in India. They were also invited to provide documentary evidence of their identities in India. On 28 November 2018 V provided the identity card of her adoptive mother. She was unable to obtain any documents from her Indian birth family due to her circumstances. She claimed she was badly abused by her father and she was removed from her childhood home in India and adopted. A provided his Indian passport in support of his Indian nationality. It includes the details of V being his wife. It was at this point that he stated that he dreads the idea of being sent back to India as he knows that only harm to himself and his family awaits them. A decision was made in respect of V and A on 1 October 2019 refusing the grant of their visas on the basis that they were not owed protection. They were excluded from the fast track process.
16. The delegate also made a decision for the applicants on 1 October 2019 refusing the grant of their visas on the same basis. The delegate found that there was no evidence before her that the applicants are citizens of Sri Lanka. The first and second applicants were born in New Delhi, India and the third applicant was born in Australia. The parents of the applicants (V and A) both advised the Department that they were born in India and have both been assessed by the Department as being Indian citizens. The parents of the first and second applicants confirmed that they were born in India and A's Indian passport confirms that he is an Indian

national. V advised that she was born to an Indian family and later adopted by another family. I consider that V and A were never citizens of Sri Lanka and always citizens of India. Given they were born in India to Indian families there would be a record of their Indian nationality. Further A was able to obtain an Indian passport which confirms his Indian nationality. I note that V does not have any documentation but I consider that she would be able to obtain documentation particularly given that she is listed as A's legal wife on his passport. V and A have not made submissions disputing the delegate's findings about their Indian nationality. With regard to the children, country information<sup>1</sup> indicates that birth certificates are issued inconsistently across India. People born in India between July 1987 and December 2004 were granted citizenship if one of their parents was also an Indian citizen at the time of their birth. V and A advised that their eldest child was born in New Delhi in October 2004. Those born after December 2004 were granted citizenship if both their parents were citizens or if one parent was a citizen and the other was not an illegal migrant at the time of birth. The second and third children were born [on date] and [date] to Indian citizens and are therefore citizens by descent. Additionally with respect to the third child who was born in Australia, it may be open to the parents to obtain approval for the issue of citizenship documentation from the Ministry of Home Affairs through the Indian mission in Australia. V and A have not indicated that they have been prevented from registering the birth with the Indian mission or that they have concerns about their ability to register the birth and obtain the relevant citizenship documentation. I am satisfied that all the applicants are nationals of India and that India is their receiving country. As the applicants are nationals of India I consider that it is open to their parents to secure documentation in support of their identity and that they may be able to do this from Australia before returning to India.

17. The applicants have only lived in New Delhi in India. They have not indicated where they would return to in India but I have considered that the place they would most likely return to would be New Delhi where they previously lived. Their parents have not indicated otherwise. As noted above, the applicants have not raised any separate claims to that of their parents and their parents have only made general claims in relation to their fear of harm in India, noting only that harm awaits them. The delegate did however consider the whether the applicants would be harmed on the basis of their Tamil ethnicity, Christian religion or as a result of the data breach.
18. I am willing to accept that the applicants are ethnically Tamil as there are significant Tamil populations in India. Country information<sup>2</sup> indicates that India is a diverse, multi-ethnic and multi-lingual society and, as they would be returning to New Delhi I consider that they would be returning to a large, ethnically diverse city. DFAT reports that the Tamil language is spoken by 5.9 per cent of the population in India and, although only a relatively small number speak English as their first language, an estimated 125 million people speak English as either a first, second or third language. Although the applicants are part of a minority ethnic group, DFAT assesses<sup>3</sup> that India has effective constitutional protections against official discrimination on the basis of ethnicity and language. Additionally I do not consider that the applicants would be prevented from accessing services, including education on the basis of their ethnicity. DFAT reports that all Indian children aged six to 14 are entitled to free and compulsory education under the Constitution. According to an ASER 2017 report, the student enrolment rate at primary level is 96.9 per cent<sup>4</sup>. I am not satisfied that the applicants would face any harm including discrimination on the basis of their Tamil ethnicity or language, nor would

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – India", 17 October 2018, CIS7B839419830, 5.22

<sup>2</sup> Ibid, 2.5

<sup>3</sup> Ibid, 3.3

<sup>4</sup> Ibid, 2.21

they be prevented from obtaining identification documents, attending school and continuing their education.

19. I am willing to accept that the applicants' family have converted to Christianity in Australia. The 2011 Indian census stated that 2.3 per cent of the population are Christian and, although the population is majority Hindu, Christians are a majority in the three north-east states of Nagaland, Mizoram and Meghalaya<sup>5</sup>. Country information states that Section 15 of the Indian Constitution prohibits discrimination against any citizen on the grounds of religion while Section 25 guarantees the right to freely profess practise and propagates religion<sup>6</sup>. While Christians enjoy freedom in much of India, there are some recent reports of a growth in religious intolerance with the rise of Hindutva (Hindu nationalism). Regardless, DFAT assesses<sup>7</sup> that most Christians live day-to-day in India without societal discrimination or violence. DFAT does note that Christians engaged in proselytising, or perceived to be proselytising, particularly to Hindus, face a moderate risk of official and societal discrimination, and a moderate risk of societal violence. The UK Home Office and the US State Department similarly report<sup>8</sup> that Christians enjoy religious freedom in much of India and are able to express their faith freely and openly. However, they may face some abuses by Hindu nationalists, including interruption of church services or worship; vandalism; physical violence; and threats and harassment, most typically accusing Christians of forcibly converting Hindus. Anti-conversion laws exist in nine Indian states; Arunachal Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Odisha, Rajasthan and Uttarakhand, however only six of these states enforce those laws. DFAT assesses that the laws prohibit conversion based on force, allurement, inducement or fraud. DFAT also noted that there have been reported instances of the laws being applied to Muslims and Christians engaged in proselytization<sup>9</sup>. I consider that if the applicants are returned to India, that they would continue to practise Christianity and attend church with their parents. I note that Delhi has no anti-conversion laws in place. Despite sporadic cases of violence against Christians reported in India, DFAT states that most Christians in India live day-to-day without societal discrimination or violence. I consider the chance of the applicants, particularly as minors, being targeted for reasons of their religion in a large and diverse city like Delhi to be no more than remote.
20. I accept the view of the delegate that on 31 January 2014 some of the first and second applicant's personal information may have been inadvertently published on the Department's website for a short period of time. There is no information before me which indicates that the fact that the applicants travelled to Australia or that their parents made claims for protection would be of interest to the Indian government. The applicants have not raised any concerns regarding the impact of this disclosure in their case. Overall, I accept it is possible the Indian Government is aware the applicants are in Australia and may infer that their parents have applied for protection. I am not satisfied the applicants face a real chance of harm because of the disclosure of some of their family's personal information on the Department's website in 2014. I am not satisfied there is a real chance the applicants would be subjected to detention or other harm upon their arrival in India.
21. I have considered all of the applicants' circumstances, both individually and cumulatively and overall I am not satisfied that if the applicants were to return to India, they would face a real

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<sup>5</sup> DFAT, "DFAT Country Information Report – India", 17 October 2018, CIS7B839419830, 3.11-3.14

<sup>6</sup> Ibid, 3.4-3.6

<sup>7</sup> Ibid, 3.15

<sup>8</sup> UK Home Office, " 'Country Policy and Information Note – India: Religious minorities", 1 May 2018, OG9EF767926; US Department of State, "International Religious Freedom Report for 2017 – India", 29 May 2018, OGD95BE927557

<sup>9</sup> DFAT, "DFAT Country Information Report – India", 17 October 2018, CIS7B839419830, 3.6

chance of any harm on the basis of their background and experiences, including those addressed above, now or in the reasonably foreseeable future.

22. I am not satisfied that the applicants face a real chance of persecution.

#### **Refugee: conclusion**

23. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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24. Under s.36(2)(aa) of the Act, a criterion for a protection visa is that the applicant is a non-citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

#### **Real risk of significant harm**

25. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
  - the death penalty will be carried out on the person
  - the person will be subjected to torture
  - the person will be subjected to cruel or inhuman treatment or punishment, or
  - the person will be subjected to degrading treatment or punishment.
26. As set out above, I have assessed the applicants' claims for protection and found that there is not a real chance that the applicants will face any harm should they be returned to India. Real chance and real risk involve the same standard<sup>10</sup>. On the same factual findings, I am similarly not satisfied that the applicants face a real risk of suffering any harm on the same grounds, including significant harm, should they be returned to India.

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

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

#### **Member of same family unit**

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28. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the

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<sup>10</sup> *MIAC v SZQRB* (2013) 210 FCR 505

applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include siblings and dependent children.

29. As none of the applicants, nor either of their parents, meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

## **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.



## Applicable law

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

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

In this Act, unless the contrary intention appears:

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

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

...

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

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

...

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

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

...

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

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

...

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

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

...

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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