



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

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA19/07284

Date and time of decision: 29 October 2019 08:25:00  
L Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in April 2013 and applied for a Safe Haven Enterprise Visa (protection visa) on 16 May 2017. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 2 October 2019.

### Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). It includes a written record of an 'enhanced screening interview' conducted on 4 May 2013, approximately nine days after the applicant's arrival in Australia, and a written record and recording of an 'entry interview' conducted approximately 6 weeks later, on 20 August 2013, as well as his protection visa application and statement, and a record of his interview with the delegate conducted on 25 September 2019.
3. Included in the material is information indicating that the applicant is the "subject of an adverse report in AUSTRAC". This report has not been included and it appears from the Department's email trail that it was unable to be located. Nor is there any information explaining the nature of the report, including why it is considered adverse. Furthermore, this information was not discussed at the interview, nor has the delegate made mention of it the decision record and it is not apparent what bearing it has on the assessment of the applicants' claims under s.36(2) of the Act. I conclude that this information is not relevant to this review and I have not considered it.
4. No further information has been obtained or received.

### Applicant's claims for protection

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5. He is a Tamil male born in [Town], Jaffna District in Northern Province of Sri Lanka, and a citizen of Sri Lanka.
6. In 1992, he and his family left Sri Lanka and travelled to Tamil Nadu in India where he resided until his travel to Australia. He has never returned to Sri Lanka.
7. In summary, the following are the reasons he has provided for leaving Sri Lanka and why he cannot return.
8. In the enhanced screening interview conducted on 4 May 2013, the applicant claimed that:
  - Because of the problems between Sinhalese and Tamils he had to go to India.
  - He didn't know the details but from watching TV he heard about this. Two to three relatives of his had died earlier because of this problem. Therefore they went to India. He did not know anything about these relatives' death as he was a child.
  - Some friends he knew went to Sri Lanka and then returned back to India because of their problems. He didn't know the details, but they returned to India after approximately eight months. They "said 4<sup>th</sup> floor something". A lot of people have gone; what has happened to them he didn't know.

- He is unable to return to Sri Lanka because he had spent 21 years in India. He had no relatives in Sri Lanka. He didn't know if there were any threats to his life. He was unsure. There were war problems. There is no guarantee for his life. He believes he will be harmed and/or mistreated on return.
9. In the entry interview conducted on 20 August 2013, the applicant similarly stated that:
- He had left Sri Lanka because of the problems there. They had lost some relatives.
  - He is unable to return because there is no value or safety in Sri Lanka. People have been taken to the "4<sup>th</sup> floor" (of the Criminal Investigations Department and/or police department).
10. In his protection visa statement of 16 May 2017 attached to his protection visa application, he claimed that:
- His family left Sri Lanka in 1992. They left because of fighting and tensions between Tamils and Sinhalese. His family did not speak about their problems.
  - He is unable to return to Sri Lanka because of his ethnicity as a Tamil and he has lived in India for over 20 years. As a Tamil he cannot live safely in the country. He will be under particular suspicion because he has lived abroad for so long. He will also be a target because he has claimed asylum in Australia and/or protection from the Sri Lankan authorities.
  - He fears he will be detained, interrogated or tortured by the police or the military because they will perceive him to be a supporter of the LTTE because he was born in Jaffna and/or his residence in Tamil Nadu for many years.
  - He will have no place to live and will be unable to find a job as he has no connections in Sri Lanka.
  - He knows of many people who have returned to Sri Lanka who have been interrogated by officials when they arrive. They tell stories of being detained and questioned and held by authorities for long periods of time.
11. At his interview conducted on 25 September 2019, the applicant reiterated the claims he had made previously about why he had left Sri Lanka and feared returning. In summary, he further claimed that:
- In 2013, he came to Australia as there were problems in Sri Lanka. He had no one there.
  - He knew of people who had returned to Sri Lanka from India however they later returned back to India because of the problems there. He fears the war will restart.
  - The problems are still happening in Sri Lanka. People here talk about these problems. People who have returned have been stopped at the airport.
  - He doesn't know anyone or anything about Sri Lanka.

## Refugee assessment

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12. 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**

13. 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.
14. I accept the applicant's identity as claimed. He is a Tamil male born in [Town], Jaffna District in Northern Province of Sri Lanka, and a citizen of Sri Lanka. Sri Lanka is the receiving country for the purpose of the assessment of the first applicant's claim for protection.
15. The applicant claimed and I accept that he departed Sri Lanka with his family in 1992, when he was approximately eight years old. He and his family left because of the tensions between the Tamils and Sinhalese. His family did not speak about their problems and he knows very little about that time. He had some family members who were affected by the conflict including being killed but he does not know anything about the circumstances of their death. These aspects have been generally consistent throughout his interactions with the Department. It also accords with the country information before me that arising from the civil conflict many Tamils fled Sri Lanka and went abroad including to the southern Indian state of Tamil Nadu, where it has been estimated that 102,000 Sri Lankan Tamils reside.<sup>1</sup>
16. The applicant claimed and I accept that he and his family departed Sri Lanka by plane and entered India legally on tourist visas. When their tourist visas expired they did not return to Sri Lanka and registered with the Indian police. The applicant's evidence regarding his status in India has been consistent throughout his interactions with the Department.
17. I accept the applicant encountered difficulties as described when living in India; however I also accept the applicant's residence in India was an ad hoc arrangement and it does not give the applicant a right to enter and reside in India.
18. The applicant has not claimed that he was of any interest to the Indian authorities for any reason. I am satisfied that at the time of the applicant's departure in 2013 he was not of any interest to the Indian authorities or that he was of any interest to the Sri Lankan authorities or any groups or individuals because of his presence or activities in India.

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<sup>1</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

19. The applicant has claimed that on return to Sri Lanka he fears he will be harmed including being detained, interrogated or tortured because of his ethnicity as a Tamil, actual and/or perceived political opinion because of ethnicity, his birth and/or former residence in Jaffna in the Northern Province of Sri Lanka, his prolonged residence in Tamil Nadu in India and/or abroad and his return as a failed asylum seeker. He also fears the war will restart and he will be harmed.
20. I accept the applicant is a Tamil male who was born in Jaffna District in the Northern Province of Sri Lanka and that he and his family experienced some difficulties as Tamils and had to flee to escape the effects of the civil conflict in 1992, however DFAT reports that the security situation in Sri Lanka, particularly in the north and east, has significantly improved since the conflict ended just over 10 years ago in May 2009. The Sri Lankan government exercises effective control over the entire country. The government no longer restricts travel to the north and east. It removed military checkpoints on major roads in 2015.<sup>2</sup> I have considered the applicant's claims that the war will restart; however in light of the information before me, I consider this to be speculative and any chance of harm on this basis to be remote.
21. In 2018, DFAT noted Tamils have a substantial level of political influence and their inclusion in political dialogue has increased since the change of government in 2015. Under the Sirisena government, the monitoring and harassment of Tamils in day-to-day life has significantly decreased, surveillance of Tamils in the north and east continues, particularly those associated with politically sensitive issues. As a consequence of the improving situation, DFAT assessed that Sri Lankans of all backgrounds face a low risk of official or societal discrimination based on ethnicity, including in relation to access to education, employment or housing.<sup>3</sup>
22. DFAT reports the Sri Lankan government is sensitive to the potential re-emergence of the LTTE throughout the country and that the authorities maintain a 'stop' and 'watch' electronic database that contain information about persons of interest. It reports that low-profile LTTE members who come to the attention of the Sri Lankan authorities would be detained for questioning and may be sent for rehabilitation, although DFAT was not aware of rehabilitation being imposed on any former LTTE members who have returned from Australia.<sup>4</sup>
23. On the information before me, the applicant and/or his family members have not had any links or involvement with the LTTE, Tamil separatist activities, politics or political organisations or groups. I have found that at the time of the applicant's departure in 2013 he was not of any interest to the Indian authorities or that he was of any interest to the Sri Lankan authorities or any groups or individuals because of his presence or activities in India. There is no information to suggest that the applicant is on either the stop or watch lists. He did not have, and nor do I accept he would be perceived to have had any connection with and/or to the LTTE on return. Nor is there any independent information before me, absent any other concerns to suggest that Tamils who were born and/or former residents of Jaffna and/or the Northern Province of Sri Lanka and/or who have had a prolonged period of residence in Tamil Nadu and/or India and/or abroad are imputed to have been involved with and/or supporter the LTTE or with an actual and/or pro-LTTE and/or anti-government political opinion on this basis.

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<sup>2</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>3</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>4</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

24. Having regard to the evidence, I am not satisfied that the applicant will be imputed with any type of profile on return to Sri Lanka because of his background or his or his family's past circumstances. I am not satisfied that the applicant faces a real chance of harm as a Tamil male who was born in Jaffna in Northern Province and who had a prolonged residence in Tamil Nadu in India and/or abroad or that he will be perceived to have an actual and/or imputed pro-LTTE or anti-Sri Lankan government political opinion on his return to Sri Lanka now or in the reasonably foreseeable future.
25. Sri Lanka's Constitution entitles any Sri Lankan citizen the freedom to return to Sri Lanka. The *Immigrants and Emigrants Act (1949)* (the I&E Act) governs exit and entry from Sri Lanka. Sections 34 and 45(1)(b) of the I&E Act make it an offence to depart other than via an approved port of departure, such as a seaport or airport.<sup>5</sup>
26. I have accepted that the applicant departed Sri Lanka by plane and entered India legally on a tourist visa in 1992. He has not claimed to have departed Sri Lanka unlawfully and/or illegally. I am satisfied that the applicant departed Sri Lanka lawfully from an approved port of departure, an airport, in 1992.
27. The applicant has provided a copy of his Sri Lankan passport. It was issued by the Sri Lankan Deputy High Commissioner, Chennai in 2006. I accept the applicant's Sri Lankan passport has expired and he would be returning to Sri Lanka on a temporary travel document. I accept he has applied for asylum and would be returning to Sri Lanka after his asylum application has failed.
28. In February 2017, Prime Minister Ranil Wickremesinghe encouraged asylum seekers who migrated illegally to Australia to return home, and said even those who had broken the law in doing so could return safely.<sup>6</sup> Nonetheless, in 2018, DFAT reported that most Sri Lankan returnees, including those from Australia are questioned at the airport upon their return.<sup>7</sup> I accept that by the manner of the applicant's return, the Sri Lankan authorities may know or infer that he has made claims for protection in Australia.
29. DFAT has reported that for returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity, which would identify someone trying to conceal a criminal or terrorist background, or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed hometown police, contacting the person's claimed neighbours and family, and checking criminal and court records.<sup>8</sup>
30. I accept that, as a person returning on a temporary travel document, the applicant may be detained at the airport with other returnees for processing by the Sri Lankan authorities. I accept that during this process the authorities will become aware of the applicant's past circumstances. However, as discussed above, I have found that the applicant will not be imputed with any type of profile because of his background or his or his family's past circumstances on return to Sri Lanka. There is no evidence before me that he has outstanding court orders, arrest warrants or a criminal or terrorist background. I am satisfied that it would be quickly determined that the applicant has no adverse profile or other profile of interest.

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<sup>5</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>6</sup> Colombo Page, "Sri Lankan PM asks asylum seekers to return, says 'all is forgiven'", 15 February 2017, CXC9040661836; Australian Associated Press, "'All is forgiven' – Sri Lankan PM says returning asylum seekers won't be charged", 15 February 2017, CXC9040661932.

<sup>7</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>8</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

31. DFAT advice is that returnees are treated according to the standard airport procedures, regardless of their ethnicity and religion and that they are not subject to mistreatment during processing at the airport. The process can take several hours, due to the administrative processes, interview lengths and staffing constraints at the airport. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed.<sup>9</sup> The information before me indicates that the processing of returnees at the airport is not applied in a discriminatory manner or selectively enforced and nor will the applicant be mistreated.
32. Overall, I am satisfied that any period of detention that would occur while these investigations are ongoing will be brief and would not exceed the several hours that group processing generally takes. I am not satisfied he will be held for a long period of time and/or taken to “the 4<sup>th</sup> floor” (of the Criminal Investigations Department and/or police department). Nor am I satisfied the applicant being subjected to standard processing at the airport amounts to serious harm.
33. The applicant has claimed that he “has no connections to any community or family or friends in Sri Lanka that he is in touch with” in Sri Lanka. He doesn’t know anyone or anything about Sri Lanka. On return he would not have a place to live and would not be able to find a job.
34. DFAT has reported that between 2008 and 2017, over 2,400 Sri Lankan nationals departed Australia for Sri Lanka. This includes nationals who were returned from the Australian community, and those removed from Australian onshore immigration detention centres. Many others returned from the US, Canada, the UK and other European countries, and most returnees are Tamil. In 2017, the Sri Lankan Prime Minister publicly stated that failed asylum seekers from Australia would be welcome back to Sri Lanka. However, DFAT has also reported that apart from this positive government sentiment, failed asylum seekers may face practical difficulties on return. Failed asylum seekers receive limited reintegration assistance and many returnees have difficulty finding suitable employment and reliable housing on return. However, DFAT assesses that reintegration issues are not due to failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face. Furthermore, while the Sri Lankan government has reportedly decreased systematic surveillance of returnees, DFAT is aware of anecdotal evidence of regular visits and phone calls by the CID to failed asylum seekers in the North as recently as 2017. DFAT assesses that this surveillance of returnees contributes to a sense of mistrust of returnees within the community. A UNHCR survey in 2015 reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police. DFAT also notes that some failed asylum seekers reported social stigma from their communities upon return.<sup>10</sup>
35. I accept that the applicant would return to the North of Sri Lanka as a failed asylum seeker and that as such he may be the subject of some monitoring by the Sri Lankan authorities for a period, and reintegration issues and social stigma from his community; however I am not satisfied that such matters including the employment and accommodation difficulties he may face amounts to serious harm. In the present case, the applicant has completed a Year 10 level of education, is of working age and has in the past established and ran a photography business in India, and even taking into account the difficulties he may face on return discussed above, I am not satisfied that he would be unable to subsist.

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<sup>9</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

<sup>10</sup> DFAT, "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064.

36. I am not satisfied the applicant has a well-founded fear of persecution.

### **Refugee: conclusion**

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

### **Complementary protection assessment**

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38. 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**

39. 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.

40. I accepted that the applicant would very likely be travelling to Sri Lanka (whether involuntarily or otherwise) on a temporary travel document, I accept he may be detained at the airport for processing on return and questioned. I am not satisfied these measures constitute significant harm as defined. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, it does not constitute pain or suffering that may reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering or extreme humiliation. I am not satisfied there is a real risk of significant harm on this basis.

41. I accepted that as a Tamil failed asylum seeker returning to the North the applicant may be monitored by the authorities for a period and may face some reintegration issues including in finding employment and accommodation and some social stigma. I am not satisfied these measures and difficulties constitute significant harm as defined. I am not satisfied there is a real risk of significant harm on this basis.

42. Furthermore, I am also not satisfied that the processing that I accept he will face on return and any difficulties he may face reintegrating and/or social stigma collectively amounts to significant harm.

43. I have otherwise found the applicant does not face a real chance of harm on any or the bases claimed now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.



**Complementary protection: conclusion**

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

**Decision**

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

## 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.