



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

INDIA
IAA reference: IAA20/08283

INDIA
IAA reference: IAA20/08281

INDIA
IAA reference: IAA20/08282

INDIA
IAA reference: IAA20/08284

INDIA
IAA reference: IAA20/08280

Date and time of decision: 2 June 2020 17:19:00
K Allen, Reviewer

Decision

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

Visa application

1. The referred applicants (the applicants) are a husband (first applicant) and wife (second applicant) and their minor [children]. The first, second and third applicants were born in New Delhi in India, the fourth and fifth applicants were born in Australia. On 24 August 2017 they lodged a combined application for Safe Haven Enterprise Visas (SHEVs).
2. On 21 April 2020 a delegate of the Minister for Immigration (the delegate) refused the grant of the visas on the basis that the applicants were not owed protection and the matter was referred to the IAA.

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. No further information has been obtained or received.

Applicants' claims for protection

5. The first applicant has made claims for protection on behalf of all his family members. The second, third, fourth and fifth applicants rely on his claims and the family unit criteria.
6. The applicants' claims can be summarised as follows:
 - The applicants met a people smuggler in Kerala, India who was offering families the opportunity to leave India. The first, second and third applicants took up that offer and travelled to Australia from Kerala, by boat. The people smuggler provided them with false Sri Lankan documents and false claims so that the applicants could claim to be from Sri Lanka upon arrival in Australia.
 - In 2014 the applicants decided to tell the Immigration officials the truth, and said they were from India and wanted to return to India. Arrangements were made for the family to return to India and they were released into the community.
 - Everything changed when the first applicant's mother called and informed him that men had approached her in [a location in] Delhi, where she works, and told her that the applicants had brought shame on India by leaving the country illegally and claiming to be from Sri Lanka. They told her that when the applicants returned to India they would seek revenge against them. The first applicant then contacted the Department to say that he could no longer return to India as his life was in danger there. The first applicant claims he asked the Immigration official how people in India came to know that he had claimed protection in Australia and he was told that there was a data breach.
 - The fourth applicant, who was born in Australia, became very sick with a [medical condition] which revealed [the biological basis]. He is very sick and cannot receive the proper medical care in India, which could result in his death. There is no universal health care in India like there is in Australia and without money to pay for treatment, he will die in India.

7. The applicants attended a SHEV interview on 16 September 2019. In the course of discussing their claims they advised the following:
- The first applicant's mother has not been approached for about two years since lodging a harassment complaint with the police. She has been able to continue to live her life in safety.
 - The second applicant's family, who also remain in Delhi, India, live about two kilometres away from the first applicant's family and they have not been approached by any individuals as a result of the data breach.
 - The fifth applicant was born with [a different medical condition] and has had surgery to correct [this issue] three times. He will likely require further [surgery] at the age of [age]. They fear that they will not be able to access or afford medical care in India for the children.

Factual findings

Identity

8. I accept that the applicants are Indian and not Sri Lankan as they claimed on their arrival into Australia. In support of the first applicant's identity they provided a copy of a Union Territory of India Birth Certificate and copy of an Election Commission of India Identity Card in his name with his claimed date of birth. In support of the second applicant's identity they provided a translated copy of a Municipal Corporation of Delhi Birth Certificate and a copy of an Election Commission of India Identity Card in her name with her claimed date of birth. In support of the third applicant's identity they provided a copy of a translated Municipal Corporation of Delhi Birth [Certificate] with her parents listed. In support of the fourth and fifth applicants' identities they provided copies of their [Australian] Birth Certificates, listing their parents' names. Based on the information that they have provided, I accept that first and second applicants are married and that the dependant applicants are their minor children. Although their [youngest children] were born in Australia, I am satisfied that 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 Australia¹. The applicants have not indicated that they have been prevented from registering the births with the Indian mission or that they have concerns about their ability to register the births and obtain the relevant citizenship documentation. I am satisfied that all the applicants are nationals of India and that India is their receiving country.

Data breach

9. In February 2014, the Department unintentionally enabled access to a report on its website (the data breach). The report contained certain personal information about people who were in immigration detention on 31 January 2014. That information was removed from the website eight days later. People in immigration detention on 31 January 2014 may have had personal information accessed from the Department's website during the period of the data breach, however, details of claims for protection were not made available. I accept that the applicants were affected by the data breach, the details of which were described in a letter sent to them by the Department after the breach was discovered.

¹ UK Home Office, "Country Background Note – India", Version 1.0, January 2019, 20190125180755, 5.11

10. The applicants claim to fear for their lives as a result of the data breach on the basis that unknown people claim that they have brought shame to India by departing illegally and claiming to be Sri Lankan and those people have made threats to the first applicant's mother. The first applicant's accounts of how they were affected by the data breach have not been credible or consistent. In his SHEV application he stated that he and his family had applied to return to India voluntarily but everything changed when his mother called to tell him that men had approached her in the [location in] Delhi and told her that the applicants had brought shame on India by leaving the country illegally and claiming to be from Sri Lanka. They told her that when the applicants returned to India they would seek revenge against them. The first applicant claims he then contacted the Department to say that he can no longer return to India as his life is in danger there. He asked the officer how people in India came to know that he had claimed protection in Australia, and he was told that there had been a data breach. He told the Department that he could no longer return to India as he is accused of bringing shame to the country.
11. The first applicant was questioned about this claim in his SHEV interview. He said that all the people that were in detention at the same time as him had their cases leaked. He claimed he received a letter about this from the Department but that he did not bother to read it. He claimed he then got a call from his mother who said that unknown people had visited her at home and told her that her son has told a lie by saying that he has no citizenship and he is dishonouring the country and they asked her why is he doing that. He said they used to scare his mother and say they will kill her son when he returns. They then approached his mother at the [location]. He claimed that this all started about four and half years before the interview (2015) and it occurred many times. He claimed that with the assistance of her neighbours she registered a complaint with the police. There were CCTVs installed outside her home which stopped them coming to her street but when she is out of that area they come and scream and shout at her. When asked by the delegate, he stated that this last occurred nearly one and half to two years ago (2017). He said he thought it stopped because of the police complaint. He could not remember when she made the complaint but he thinks it was two and half to three years ago. He confirmed that his mother can live safely in her home with his father.
12. The first applicant confirmed that the unknown men had not approached his father, his siblings or his wife's family and he noted that his wife's family live only two kilometres away from his parents. He confirmed that the threat was not from anyone in the Indian government. He also said that no one knew the circumstances of their departure from India, he only advised his parents that they were in Australia after he called them when they arrived. At interview the delegate explained the data breach to the applicant. She explained that the information was only on the Department's website for eight days. It contained some personal information about people in detention on 31 January 2014 but it did not contain information about their claims for protection or visa status. She confirmed that the information about the applicants using Sri Lankan identities would not have been released. The applicant did not disagree.
13. I do not accept the first applicant's claims about these threats made in India. I consider it likely that he became aware of the data breach when he was notified by the Department and then manufactured a claim for protection on that basis. I find it implausible that unknown people not associated with the government in India would have been checking the Department website in the eight days that the information was there and decided that the information was about the applicants, particularly as they had not advised people in India of their plan to travel to Australia. Further, even on the remarkable chance that they did discover this information online the information which was released did not indicate that the applicants had made claims for protection or that they did so on the basis of claiming to be Sri Lankan. Therefore I do not

find it plausible and do not accept that they threatened the first applicant's mother on the basis that they had brought shame to India by claiming to be Sri Lankan and stateless.

14. Additionally, even if I accept that the first applicant's mother was threatened by unknown men for some other reason, on the basis of information provided by the first applicant, I am satisfied that she was afforded protection by the Indian authorities and that the first applicant confirmed that she has not been threatened or harmed since making a complaint to police a number of years ago. Finally, I consider that the applicants have never claimed to have been threatened by the authorities in India for seeking asylum in Australia. I consider that if the applicants were to return to India they could be identified as returning asylum seekers by the Indian authorities due to the circumstances of their return, including on temporary travel documents, and separate to the data breach.

Sons' medical conditions

15. The first applicant claims that two of his children, the fourth and fifth applicants, are very sick and cannot receive adequate medical care in India and that this could jeopardise their chance to live. He claims that there is no universal health care in India like there is in Australia and without money to pay for treatment, the two children will suffer, and could possibly die in India.
16. The applicants claim that their [son], the fourth applicant, has a [medical] condition. The first applicant was questioned in his SHEV interview about this. He explained that his son continues to experience [physical difficulties] and as such continues to be seen by his doctors approximately every three months. He added that when he enquired with the doctors whether the medical procedure could be hastened for his son, the doctors responded that there was a process involved and as such the procedure could not be hastened. An initial letter was sent by the treating doctor to the Department, approximately three or four years ago. The applicants were asked to submit an updated letter from their son's doctor pertaining to his medical condition which set out his current treatment, medications and prognosis and any treatment he might need to access in India.
17. On 26 September 2019, the Department received a letter from [a named medical specialist], in support of the fourth applicant. A summary contained within this letter stated that the doctor was happy with the patient's progress to date. There were no regular medications indicated, however, there were still tests outstanding, which were being undertaken. The doctor referred the recipient of the letter to a few official websites for further information on a range of [the relevant medical] conditions. The letter did not indicate that the fourth applicant would require treatment in India.
18. The applicants claim that their youngest son, the fifth applicant, was born with [another medical condition] and has had surgery to correct [this issue] three times and will require further [surgery] at the age of [age]. They fear that they will not be able to access or afford medical care in India for him. At the SHEV interview the first applicant was asked to submit a letter from his son's doctor with information about his condition, treatment and prognosis on his return to India. No information was forthcoming. I have no documentation at all before me about the fifth applicant's medical condition.
19. Based on the first applicants' accounts, I accept that the fourth and fifth applicants suffer from [two specified] medical condition respectively, for which they have been receiving the necessary medical treatment in Australia. I understand that they have both undergone surgeries in Australia to remedy their conditions and that they undertake regular review of

their conditions. I am not satisfied that the applicants will necessarily require ongoing treatment or medication in India as I have not been provided any information to that effect, however, I cannot rule this possibility out altogether.

Refugee assessment

20. 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

21. 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.
22. I accept that the applicants are Indians from New Delhi in India and not Sri Lanka as they previously claimed. I do not accept that they have adverse profiles with the Indian authorities or anyone else 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 and where their families live. They have not indicated otherwise. I accept that the applicants’ sons, the fourth and fifth applicants, have had medical conditions for which they have been treated in Australia. I have not accepted that the applicants were adversely impacted by the Departmental data breach or that they have a genuine fear of harm on their return to India on that basis. I am not satisfied that any other claims arise on the material provided by the applicants noting that, until the boys developed medical conditions, the family had asked the Department to return them to India.
23. The applicants have not demonstrated that their sons will require any medical treatment or medication on their return to India. However, I accept it is possible that they may require treatment at some stage. The applicants’ claim that there is no universal health care in India and without money to pay for treatment their children could die. Independent information sourced from The Commonwealth Fund², indicates that in principle, government health

² Indrani Gupta and Mrigesh Bhatia, “The Indian Health Care System”, The Commonwealth Fund, 13 October 2016

services are available to all Indian citizens under the tax-financed public system. However, in practice, bottlenecks in accessing such services compel households to seek private care, resulting in high out-of-pocket payments. This is consistent with the applicant's claims about the cost of healthcare in India.

24. DFAT also reports³ that India's health system faces a number of challenges including a diverse health profile, an acute shortage of infrastructure and lack of skilled health sector workers. While public health care funding comes mainly from the central government, each of the state governments is responsible for the delivery of medical services. Thus, according to DFAT, a large disparity exists between the services and health outcomes of each state and between urban and rural areas. With the majority of health care expenditure in the private sector, a large proportion of the population is vulnerable to poverty in the event of catastrophic illness. DFAT also reported that since 2017, the Indian government increased health spending and focused on improving the availability and efficiency of services. They are committed to moving India towards universal health care and relaunched a programme which incorporates state-run and national schemes with the aim of providing coverage of up to US\$10,000 for over 100 million lower income families.
25. The applicants would be returning to New Delhi, a very central urban area in India. The All India Institute of Medical Sciences, New Delhi provides medical services in New Delhi. Its website states⁴ that it makes world class clinical care available to millions of underprivileged citizens of India. It states that its corridors are thronged by patients, most of them too poor to afford quality treatment elsewhere. AIIMS is at present, not a single hospital but a conglomerate of facilities. It has over 1500 (beds) spread over the main hospital, Dr Rajendra Prasad Centre for Ophthalmic sciences, Cardiothoracic Centre, Neurosciences Centre, Institute Rotary Centre Hospital and De-addiction Centre. This complex of facilities caters to about 1.5 million outpatients and 80,000 inpatients every year. The number of surgical operations performed at AIIMS in the previous year was over 100,000. This information supports that there are sophisticated medical services available in New Delhi and that there are places where those services are targeted towards people who generally cannot afford private health care. Further, I am satisfied that once the applicants are established in India they may be able to pay for healthcare if required. They worked in India in the past running a [business] and they were able to procure enough money to pay for their passage to Australia. The applicants have not indicated that they would not be able to earn a living on their return.
26. I appreciate the applicant's concerns about access to medical care in India and the potential costs involved. However, there is nothing before me to suggest that medical care is absent in India, particularly in the applicants' home of New Delhi and the information before me does not support that they would be denied access to such medical services. I am satisfied that the fourth and fifth applicants do not face a real chance of harm as a result of medical treatment being withheld from them or that they face a real chance of persecution in term of access to healthcare for reasons set out in s. 5J(1)(a) of the Act, now or in the reasonably foreseeable future.
27. I accept that on 31 January 2014 some of the applicants' personal information was 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 made claims for protection would be of interest to the Indian government. I consider that

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report – India", 17 October 2018, CIS7B839419830, 2.16-2.17

⁴ All India Institute Of Medical Sciences, New Delhi website, <https://www.aiims.edu/en/about-us/patient-care.html> (accessed 2 June 2020)

the authorities may be aware of the applicants having sought asylum in Australia due to the manner of their return on temporary travel documents and separate to any data breach. I am not satisfied the applicants face a real chance of harm because of the disclosure of some of their personal information on the Department's website in 2014.

28. I am not satisfied there is a real chance the applicants would be subjected to detention or other harm upon their return to India. DFAT describes the return process for people being returned to India and reports that it is not aware of any credible reports of mistreatment of returnees by Indian authorities, including failed asylum seekers⁵. DFAT reports that returnees to India use an existing passport, a newly issued passport, or an emergency certificate, issued through an Indian diplomatic mission. Documents are signed on the basis of a confirmed identity. In most cases, this is a straightforward process, but significant delays have been reported where the identity of the client could not be confirmed to the satisfaction of the passport officer in the Indian mission. The Indian Ministry of External Affairs has confirmed that identities are referred to the police authorities in the location of claimed origin of the returnee. This process is not always reliable, and significant delays have occurred in isolated cases. Based on this information, and the fact that the applicants are from New Delhi and have their Indian and Australian identity documents, there is no reason to believe the applicants would be subjected to detention or other harm including extended interrogation and delays upon their arrival in India. The country information indicates that any delays in the process would be in confirming the applicants' identities and that those delays would occur in Australia while travel documents are issued rather than on arrival in India.
29. DFAT notes that Indian returnees would only have difficulties on arrival if they were wanted for a political crime or other crime in India, then they would face punishment. The applicants have not claimed that they were wanted to for any crimes at the time they departed India and so they would be unlikely to face arrest on arrival. Even if the applicants were to be questioned upon arrival in India to establish whether they are persons of interest, I am not satisfied that the applicants being questioned by Indian authorities would amount to harm.
30. I have considered all of the applicants' circumstances, both individually and cumulatively and overall, I am not satisfied that the applicants face a real chance of harm for any 5J reason in terms of access to medical care in India and am not satisfied that if the applicants were to return to India, they would face a real chance of any harm on the basis of any of their other claims, including as a result of the data breach or their return, now or in the reasonably foreseeable future.
31. I am not satisfied that the applicants face a real chance of persecution.

Refugee: conclusion

32. 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

33. 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

⁵ DFAT, "DFAT Country Information Report – India", 17 October 2018, CIS7B839419830, 5.20-5.21

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

34. 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.
35. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
36. I accept that the fourth and fifth applicants have been treated for medical conditions in Australia. I accept as possible that they may require treatment or follow up at some point in the future in India, although I have no information before me to that effect. The country information considered above indicates that the level and accessibility of health care that the applicants have had in Australia may not be available in India to same extent and that they may have to pay to access some services if they do not want to wait. I appreciate the strong and valid concerns that the applicants have as a result of these circumstances and the fears that they hold for their children. I am not satisfied however that the conditions in India and the limitations relating to medical services would, in these circumstances, constitute arbitrary deprivation of life, the death penalty or torture. Australian case law indicates that arbitrary deprivation of life does not concern the consequences of scarce medical resources in developing countries⁶. Further I do not consider that there is any requisite intention on the part of the Indian authorities to inflict pain or suffering that could reasonably be regarded as cruel or inhuman treatment or punishment, severe pain or suffering, whether physical or mental, or cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment in the Act.
37. As set out above, I have found that the applicants do not face a real chance of any harm in relation to the remainder of their claims. Real chance and real risk involve the same standard⁷. On the same factual findings, I am similarly not satisfied that the applicants face a real risk of suffering any harm, including significant harm, should they be returned to India.

⁶ *MZAAJ v MIBP* [2015] FCCA 151. In this case, the applicant claimed the Tribunal failed to consider that he might face arbitrary deprivation of life because of the prospect that he might die as a result of his inability to access dialysis in Sri Lanka.

⁷ *MIAC v SZQRB* (2013) 210 FCR 505

Complementary protection: conclusion

38. 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

39. 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 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 a spouse and dependent children.
40. As none of the applicants 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

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

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.