



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08894

Date and time of decision: 12 March 2021 12:51:00
L Hill, Reviewer

Decision

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

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

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Sri Lanka. He arrived in Australia in July 2013 and applied for a Safe Haven Enterprise Visa (protection visa) on 6 September 2017.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 18 February 2021 because the applicant did not satisfy s.36(2) of the *Migration Act 1958* (the Act).

Information before the IAA

3. I have had regard to the review material given by the Secretary under s.473CB of the Act.
4. I have obtained new information, "UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445". The new information is publicly available, from a credible and authoritative source and has been prepared specifically for the purpose of protection status determination. It relates specifically to the treatment of LGBTI Sri Lankans, a relevant issue for determination and is an update to the 2018 UK Home Office report, which was before the delegate. I am satisfied there are exceptional circumstances to justify consideration this new information.

Applicant's claims for protection

5. At the arrival interview and in his 2017 protection visa statement (2017 statement) and protection visa interview, the applicant's substantive claims for protection arose because of his past experiences as a businessman. In summary, he claimed that:
 - In Sri Lanka, he owned two businesses with his cousin; [Business 1] and [Business 2]. He frequently travelled to [Country 1] and [Country 2] to obtain stock for his businesses.
 - From 2011, he had a problem with a local group/gang known as [Gang]. This group belonged to his religion (Islam) and lived near his home and would come regularly to his businesses and demand money. They would threaten to kill him if he did not pay. They targeted him and other businesses because they were perceived as earning good money.
 - On one occasion, he made a complaint about the ongoing extortion requests to the police however they were unable to assist. After he made the complaint the [gang] started to target him more. He is unable to provide a copy of the police report as his mother has disposed of it; and he needs to be physically present at the police station to request a further copy.
 - In 2013, the leader of the [gang], "MN" asked him for money. MN wanted him to pay 20 Lakhs. He told him he could only pay him 10 Lakhs and arranged to pay the rest later. While paying the 10 Lakhs, he verbally scolded/cursed MN.
 - Three to four days later, MN was shot and killed. The [gang] went to his family's home and asked for him. The [gang] were looking for him because he had verbally scolded/cursed MN prior to his death and they believed that he provided information about MN to another gang. They harassed his wife, parents and friends. He went into hiding.

- In July 2013, he departed Sri Lanka and travelled to Australia by boat.
 - In September 2013, the [gang] kidnapped his brother. They wanted to know where his was. His brother wouldn't tell them and was beaten. A ransom was requested for his brother's release. His mother sold her jewellery and paid the ransom and his brother was released.
 - He fears on return he will be targeted and seriously harmed by the [gang] because he is a businessman and/or owns businesses and they believe he has informed another gang about them.
6. In the 2017 statement and protection visa interview, the applicant provided a new substantive claim for protection, his sexual orientation. In summary, he claimed that:
- He is more attracted to men. He has had relationships with men in Sri Lanka and Australia.
 - He fears on return he will be targeted and seriously harmed because of his sexual orientation.

Refugee assessment

7. 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

8. 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.
9. The applicant claims to be a national of Sri Lanka and I accept that he is, and that Sri Lanka is the receiving country for the purpose of this review.
10. The applicant has consistently claimed, and I accept that he and his family are practising Muslims. He prays five times a day and attends mosque once a week.

11. In the 2017 statement and interview, the applicant claimed that he is more attracted to men. He has had relationships with men in Sri Lanka and Australia. He started to realise he was attracted to males when he approximately [age] years old, and [at] school. He had to hide these feelings. He was later forced to marry his wife. He stated that he is not attracted to married life and that during his nine years of marriage (2004–2013) he had sexual intercourse with his wife maybe five to six times. Their [child] was born in August 2005.
12. The applicant claimed that in Sri Lanka, he only had one relationship with a male. His wife did not know this male. It was a discreet relationship. He was too fearful to tell others about it. This type of relationship is not allowed in public. It is illegal in Sri Lanka. His brother later found out about this relationship. His brother confronted him and told him that it was a shameful act.
13. The applicant claimed that since his arrival in Australia, he has been living freely. No one knows him here and he has been able to explore his sexual orientation without any restrictions. He indicated that in Sri Lanka he was always worried that people would find out that he was a homosexual but now he doesn't have to worry about that. Each Saturday he attends a gay club called [Name]. He has also attended similar clubs in the same area. Every three months he also attends the [Medical services provider] where he receives free check-ups and treatment. His longest relationship has been two to three months. He has had conversations with his brother, where his brother has asked him to return to his family in Sri Lanka and told him to leave this "habit", but he really can't change.
14. At the protection visa interview, the applicant was asked how he had reconciled his sexual orientation with his Islamic religion. He responded that this type of sexual relationship in his religion is compared with having sex with one's mother (unnatural). He had read religious books which had stated this, but he was unable to control it.
15. I have listened to the protection visa interview and I found the applicant's evidence regarding his sexual orientation to be spontaneous, detailed and persuasive. His evidence that when living in Sri Lanka he could not be open about his sexual orientation and had to continually hide his attraction, feelings and had to be discreet about his past relationship with a man because he feared what would happen if people found out is plausible when considered against the country information in the review material that the vast majority of Sri Lankans have conservative views about sexual orientation and gender identity, and that most LGBTI persons do not live openly due to the social stigma attached.¹ Furthermore, like the delegate, I am of the view that the applicant's evidence regarding the circumstances of his marriage is corroborated by the country information in the review material which reports that often gay men have been forced into heterosexual marriages, usually by family members, in Sri Lanka.² I also found the applicant's evidence regarding his experiences and engagement in the LGBTI community since his arrival in Australia to be cogent and convincing. On the evidence before me, and like the delegate, I accept that the applicant is a gay male. I am satisfied that s. 5J(6) of the Act does not apply to his conduct in Australia.
16. In the 2017 statement, the applicant indicated that he feared on return to Sri Lanka he would be seriously harmed because of his sexual orientation. He referred to an example in which a Sinhalese boy was arrested by the police and punished on account of his sexual orientation. He stated if his family came to know, this would bring shame to his whole family who may commit suicide including his wife's family who are Imams. He also feared he would be risk of violence

¹ UK Home Office, 'Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression', 1 October 2018, OG9EF767954.

² UK Home Office, 'Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression', 1 October 2018, OG9EF76795 and DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244.

from strangers on the street and stated that he believes that the police will refuse to protect him from this harm.

17. I have listened to the protection visa interview, and in contrast to the delegate's finding, I am not convinced that the applicant's verbal testimony contradicted his 2017 statement and he did not raise any claims that he would be persecuted on the basis of his sexual orientation on return. The applicant was asked what he thought would happen if his sexual orientation became known in his community in Sri Lanka. He responded that he comes from a large family, his parents have many relatives, and that this kind of thing, that being his homosexuality would bring shame to his family. This shame may cause his mother to hurt herself and have a great impact on his wife and [child]. While he indicated that he did not believe his family would harm him, he also stated that this type of relationship is illegal in Sri Lanka, and must be hidden, and that he would always worry what would happen if someone came to know about it. He also claimed that he would not be able to live freely or openly and without problem on return. In contrast to the delegate, I am satisfied that the applicant does genuinely fear that he will be persecuted on account of his sexual orientation on return.
18. Having regard to the applicant's evidence and his past conduct in Sri Lanka, I am also satisfied that on return he would be discreet and avoid disclosing to anyone his sexual orientation and that the reason he would do this is out of a fear of serious harm. The question, then, is whether, if he were open about his sexual orientation, there is a real chance that he would be persecuted for that reason.³
19. Same-sex sexual acts are illegal in Sri Lanka. Sections 365 and 365 (a) of the Penal Code make it a criminal offence to engage, respectively, in 'carnal intercourse against the order of nature' and 'acts of gross indecency'. These are commonly understood to apply to sexual acts between same-sex individuals and can attract sentences of up to 10 years' prison and a fine. Police have arrested individuals under these sections, however the UK Home Office and DFAT reports suggest that cases are rarely prosecuted.⁴
20. Whilst prosecutions are rare, on 15 July 2015 the Supreme Court of Sri Lanka heard and on 30 November 2016 handed-down their judgment in *Galabada Payagalaga Sanath Wimalasari and others vs Officer-in-Charge* (SC Appeal No. 32/11). This addressed the constitutional challenge to section 365 (a) of the Penal Code (gross indecency convictions) following a magistrate's 2003 imposing a term of imprisonment of one year (and fine of Rs.1,500) of two gay men following consensual intercourse. The Supreme Court heard all the evidence again and concluded that there was no reason to interfere with the finding of guilt in this case. However, the Supreme Court went on to look into whether the sentence imposed on the appellant was excessive in light of the circumstances of this case. Although the Supreme Court stated that whilst in some countries criminalisation of same sex acts had been repealed, they noted that in Sri Lanka it remained part of the law. However, given that the incident had taken place over 13 years previously, the appellants' lack of previous convictions or criminal history and considering the fact that the act was consensual the Supreme Court ruled that a custodial term of imprisonment did not appear to be commensurate with the offence. The one-year sentence

³ *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 and *ESD17 v Minister for Immigration & Anor* [2018] FCCA 870.

⁴ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244 and UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445.

was set aside and substituted with a sentence of 2 years rigorous imprisonment, suspended for a period of 5 years in order to offer the offenders the ‘opportunity to reform’.⁵

21. UK Home Office and DFAT have also reported that according to local LGBTI sources, police also use sections 365 and 365 (a) of the Penal Code or the Vagrants Ordinance (which empowers authorities to detain people considered to be loitering in public) to threaten, harass, extort money and sexual favours, and arbitrarily arrest and detain LGBTI individuals.⁶ UK Home Office report suggests that the exact reasons for, or how frequent or widespread such arrests are was unknown,⁷ however Equal Ground, in its 2017 mapping study, found that 46.7 per cent of LGBTI people experienced police harassment. LGBTI victims of abuse and harassment, including by the police, are generally unwilling to file complaints due to safety concerns and a reluctance to bring attention to their sexual orientation, meaning their incidence goes largely unreported.⁸
22. Anti-LGBTI sentiment is deeply ingrained in Sri Lankan culture and society and that the majority of Sri Lankans hold conservative views about sexual orientation and gender identity, and many prioritise collective values over individual rights. In 2019, DFAT reported that according to local sources, the LGBTI community faces threats, harassment and forced heterosexual marriage from family and members of the community. DFAT considers reports of violence in the home and public spaces to be credible, and many LGBTI individuals – especially Muslims – hide their identity to avoid harassment.⁹ In 2020, the UK Home Office reported that anti-LGB sentiment is deeply ingrained in Sri Lankan culture with most Sri Lankans holding conservative views about sexual orientation and gender identity. LGB persons face stigma, discrimination, harassment, emotional and verbal abuse and forced heterosexual marriage. Most LGB persons do not live openly as LGB persons due to social stigma.¹⁰
23. Beyond actual incidents of physical violence or discrimination on the part of the police or members of society, sources state that Sri Lankan law also discriminates against LGBTI people. DFAT and UK Home Office have reported that there are no legal safeguard or legislation which exists to protect LGBTI individuals from discrimination or hate crimes. Hate speech against the LGBTI community is common on social media.¹¹ In 2019, DFAT reported that according to local sources, LGBTI individuals are widely seen as “sexual deviants” and routinely experience discrimination and bullying in the workplace and the education and health care systems. Local LGBTI sources told DFAT that openly-gay couples face obstacles to securing housing and accommodation. As a result, many homosexual persons seek to conceal their sexual orientation.¹²
24. The lack of anti-discrimination legislation to protect the rights of LGBTI persons has meant that they have no recourse to a remedy when particular laws are used against them in a

⁵ UK Home Office, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression’, September 2020, 20201019173445.

⁶ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244 and UK Home Office, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression’, September 2020, 20201019173445.

⁷ UK Home Office, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression’, September 2020, 20201019173445.

⁸ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244.

⁹ DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244.

¹⁰ UK Home Office, ‘Country Policy and Information Note - Sri Lanka: Sexual orientation and gender identity and expression’, 1 October 2018, OG9EF76795 and UK Home Office, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression’, September 2020, 20201019173445.

¹¹ UK Home Office, ‘Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression’, September 2020, 20201019173445 and DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244.

¹² DFAT, ‘DFAT Country Information Report Sri Lanka’, 4 November 2019, 20191104135244.

discriminatory manner. Such discrimination is further enabled and promoted by the continued criminalisation of same sex activity and, therefore, stigmatisation of LGBTI persons. LGBTI persons who are the victims of violence or hate crimes will often not report these crimes to the police without fear that their sexual orientation or gender identity or expression will be exposed or highlighted. This can lead to further discrimination and marginalization and to potential prosecution under articles 365 and 365A of the Penal Code.¹³

25. I have considered the contemporary assessment by UK Home Office that while incidents of harassment, assault, extortion through money or sexual favours by the authorities do take place, the available country evidence does not establish that a person who is open about sexual orientation is likely to face treatment that is generally sufficiently serious by its nature and repetition to amount to persecution or serious harm.¹⁴ Nonetheless, the UK Home Office qualified this assessment, when it stated that the particular factors relevant to the person, including their ethnic or religious background, might make the treatment serious by its nature or repetition,¹⁵ and I consider this qualification to be relevant to this case, given the applicant's religious profile, as a practising Muslim.
26. The treatment of gay Muslim men in Sri Lanka has not been addressed in the various sources before me, however the DFAT report has specifically noted that many LGBTI Muslims tend to hide their identity to avoid harassment and when this is considered against the information above regarding the lack of any legal safeguards and the hesitation of LGBTI victims to report abuse and harassment, I consider the lack of any specific reporting does not mean that the treatment this group faces is not serious by its nature or repetition or that it does not sufficiently amount to serious harm. Rather, I am of the view that the credible reports before me regarding the incidents of discrimination, harassment, physical violence and extortion endured by LGBTI victims when considered cumulatively with the information above indicating the conservative nature of the applicant's own community, Sri Lankan Muslims¹⁶ and the population in Sri Lanka more generally leads me to be satisfied that should the applicant be open about his sexual orientation, even in a large city such as Colombo, which is reported as having a higher LGBTI community,¹⁷ there is a real chance he will face treatment which amounts to serious harm.
27. In light of the country information, I am satisfied that if the applicant was open about his sexual orientation, there is a real chance that, returned to Sri Lanka, he will face serious harm in the form of harassment, physical assault or violence, extortion threats, arbitrary arrest or detention. I am satisfied that the essential and significant reason for the harm is his membership of a particular social group, gay Muslim men. I am satisfied that the persecution is systematic and discriminatory and that, as one of the agents of harm is the State, the real chance of serious harm relates to all areas of Sri Lanka.
28. I am further satisfied that s.5J(2) and s.5J(3) of the Act do not apply. In light of the country information, I consider that effective protection measures are not available to the applicant given the information above regarding the lack of any legal safeguards and because the harm

¹³ UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445.

¹⁴ UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445.

¹⁵ UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445.

¹⁶ DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244

¹⁷ UK Home Office, 'Country Policy and Information Note Sri Lanka: Sexual orientation and gender identity and expression', September 2020, 20201019173445 and DFAT, 'DFAT Country Information Report Sri Lanka', 4 November 2019, 20191104135244.

would be inflicted on the applicant by the Sri Lankan authorities. I am also satisfied that requiring the applicant to conceal his true sexual orientation would constitute an impermissible modification of behaviour under s.5J(3)(c) of the Act.

29. I am satisfied that the applicant has a well-founded fear of persecution.

Refugee: conclusion

30. The applicant meets the requirements of the definition of refugee in s.5H(1) of the Act.

Decision

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

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

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.