



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/03184

Date and time of decision: 7 March 2018 09:13:00
Fiona Kerr, Reviewer

Decision

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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be of mixed ethnicity (Sinhalese and Tamil) and of the Christian faith from Sri Lanka. [In] January 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV). [In] July 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa.

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). No further information has been obtained or received.

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He has worked as a fisherman most of his life.
 - In March 2009 while living in [District 1], he was approached by three LTTE members who demanded one of his boats for three days. They were armed and he had no choice. They did not return the boat.
 - About seven or eight days after the boat went missing, he was arrested by the Sri Lankan Navy (SLN) as they had intercepted his boat which was being used to transport weapons for the LTTE.
 - He was interrogated about his LTTE links, verbally abused, beaten, cut with a knife, had his teeth knocked out, was beaten with a metal rod, and fell into unconsciousness.
 - Thinking he was dead, the SLN dumped him in nearby jungle, but he recovered and went to his uncle's. His uncle took him to [an] LTTE controlled area, for medical treatment in an LTTE hospital. He could not go to a government hospital because he would be handed over to the SLN. He stayed in an LTTE camp for five days recovering. During this time his uncle visited him and told him his small house in [District 1] had been burned down. He believed the SLN did it.
 - After five days, he asked the LTTE to take him in a boat to his father's village. They felt guilty and gave him 200,000 rupees and arranged for his transport by sea to [Town 1].
 - When he got to his sister's house in [Town 1] she said the local police had been looking for him. They also questioned his ex-wife.
 - He went to a friend's in [in another town] who got him a job on a big boat as a cook. He moved about for the next three years while working on the boat. He would spend lengthy periods at sea, and then be in hiding while on shore.
 - After three years he travelled illegally to Australia after the boat's captain told him it wasn't safe for him to live in Sri Lanka as the SLN was growing more prominent.

Refugee assessment

4. 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

5. 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.
6. The applicant has provided documents in support of his identity. I accept that the applicant is of Sinhalese/Tamil ethnicity and the Christian faith from [District 1] of Sri Lanka in the Northern Province and that for the purposes of this assessment Sri Lanka is his receiving country.
7. As will become apparent in this decision, like the delegate, I have significant concerns about the credibility of the applicant’s claims which centre on the alleged confiscation by the LTTE of one of his boats for their own use. I am mindful of the difficulties applicants have in effectively putting forward all of their claims for protection not least of which are the language barrier and the difficulties of recall over time, as well as possible past traumatic experiences. I also note the applicant was unrepresented at his SHEV interview (although he appears to have had some assistance with his SHEV application) and has had very little formal education. Nonetheless, in my view, the delegate gave him a fair opportunity to put forward his claims during the SHEV interview. With the assistance of the Sinhalese interpreter, he was able to understand the questions put to him by the delegate and it is not apparent that the applicant was disadvantaged to such an extent by his lack of English, unfamiliarity with the requirements for lodging his application and personal circumstances, that he was unable to effectively put forward his claims and provide evidence in support. Overall, I have formed the view that the applicant has not been truthful in regard to his claims for protection and I do not consider him a credible witness.

Confiscation of boat by LTTE/interest by the authorities

8. In summary, the applicant’s claims of past harm relate to the claim that his boat was taken by members of the LTTE in March 2009, the SLN found out, and he was detained, questioned, subject to severe physical abuse, and dumped for dead in the jungle. He managed to find his

way out of [District 1] and spent the next few years in hiding from the police and other authorities in various areas of Sri Lanka.

9. In his SHEV interview, the delegate put to the applicant that the LTTE was driven out of [District 1] in late 2007 and were pushed into the far north-east area of Sri Lanka. The applicant denied this was the case and said they continued to live in hiding in the jungle in [District 1]. This contradicts evidence given earlier in his interview when he said that the LTTE controlled the area he lived in in [District 1] at the time. He stated that the Sri Lankan army (SLA) and SLN also had camps in [District 1] at the time and appeared to suggest that the three co-existed side-by-side. Given that the Sri Lankan government was at war with the LTTE up until May 2009 I do not consider this credible.
10. The LTTE was at its peak in 2004; the majority-Tamil civilian populations of LTTE-controlled areas were required to interact with the LTTE as a matter of course.¹ The LTTE engaged in forced conscription² and were known to requisition the property of civilians living in their areas for their own use. However, the LTTE suffered a series of defeats in the months preceding the end of the war and their areas of operation and control were reduced to a small part of the east. From 2009 the north was under the control of the military.³ As the delegate noted, the Sri Lankan government announced its military victory over the LTTE in May 2009 and assumed complete territorial control of Sri Lanka.⁴
11. In that context I have serious doubts whether, with the LTTE on the point of comprehensive defeat, three people would present themselves to the applicant in March 2009, announce that they were LTTE, provide identification cards to that effect, and order him to hand over a boat for their use. I have also taken into consideration that in his entry interview the applicant gave a different time-line for these events stating it was in 2008. In my view it is also implausible that in the course of fighting a war with the government (for which they required the applicant's boat) the LTTE would subsequently feel guilty about not returning his boat and his treatment at the hands of the SLN and would compensate him by way of a significant sum of money, as well as pay for his journey by sea to [Town 1].
12. Further, the evidence he provided in his SHEV interview was unpersuasive and inconsistent with his written statement. When the delegate brought a map, the applicant was unable to point to the place he was at when the LTTE came. He said he could not read English but when the delegate put to him that he must have been able to recognise a map of [District 1] as he sailed around it, he stated he didn't go in the boat only those who worked for him did. This is not consistent with the evidence in his SHEV application that he was a self-employed fisherman on his own boat for about 14 years. In his SHEV interview he said the SLN came for him 7 or 8 days later after the story somehow got back to the SLN. This is a change from the evidence in the written statement provided with his SHEV application. He said his boat was used to transport weapons from [District 1] to [another town] and the SLN found out he was the boat's owner but didn't approach him immediately because he had a good relationship with a naval officer in [District 1] but four or five days later, an employee went to the navy and asked why he hadn't been arrested. It was because more navy people were now aware that they took a hardline

¹ Department of Foreign Affairs and Trade (DFAT) "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED850AD105

²Office of the United Nations High Commissioner for Human Rights (OHCHR) "Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka" 16 September 2015, CISEC96CF13357

³ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)" 31 March 2017, OGD7C848D112 at 5.1.2

⁴ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010 CIS19345

approach and arrested him. Apart from the fact that these details were not referred to in his SHEV interview, I do not consider it plausible that if the applicant had been suspected of something as serious as involvement in the transporting of weapons by the LTTE, that he would have avoided immediate arrest and detention simply because he had a good relationship with a naval officer.

13. His evidence about the physical abuse he claimed to have suffered was emotionally given but undetailed and in some respects inconsistent with his written statement, for example, the claim that his toenails had been taken off by burning during his detention was not made before. Additionally, he was unable to explain to the delegate why, if the SLN believed him to be dead, they would go into the jungle looking for his body having previously dumped it believing him dead. I also do not consider it plausible that, if he had undergone such a traumatic and violent incident in which he nearly died, it would be entirely omitted from his entry interview. I also place weight on the answer he gave to the interviewer on that occasion - in response to the question whether he was ever arrested or detained by the police or security organisations, he answered no.
14. In support of his claims, the applicant provided a letter in English from the Grama Niladhari (GN)'s office dated [February] 2014. Despite being from a local Sri Lankan government office holder, the letter is in English and no copy in the original Sri Lankan language has been provided. The letter does not indicate that the applicant is personally known to the GN, even to the extent of leaving the space for the applicant's national identity card (NIC) number to be inserted, vacant. It reiterates, in the most general of terms, the applicant's claims and also states the SLA is currently searching for the applicant which is not consistent with his claims. For these reasons, I attach no weight to this letter.
15. I have considered that there is some consistency in his claims between his entry interview and his SHEV application and SHEV interview, albeit that he said in his entry interview that he was forced to hand over his boat to the LTTE in 2008. Nonetheless, taking into consideration the country information referred to above, the implausibilities, the changes in his evidence, and the fact that he did not refer in his earlier interview to any incident in which he was detained and interrogated, let alone seriously mistreated, I am of the view that these factors outweigh the somewhat consistent nature of his claims. I am not satisfied that in March 2009, his boat was taken by members of the LTTE, the SLN found out, and he was detained, questioned, subject to severe physical abuse, and dumped for dead in the jungle. I have formed the view that the applicant has fabricated this claim as a basis for his claims for protection.
16. It follows that I do not accept the applicant's claims that following this, he spent the remainder of his time in Sri Lanka in hiding. My view of this is further strengthened by the inconsistent evidence he gave in his SHEV interview about this period. He stated in his written statement that in order to go underground, he used a fake Sinhalese name and identification as he knew this was the only way he could survive. In his SHEV interview, his evidence changed. He said he obtained a new National Identity Card (NIC) but that it was in his own name and also had his village on it, however, the village address was fake. When the delegate asked him why he couldn't give a false name, he said he'd be in trouble with the authorities if he was stopped at checkpoints with a false ID. Leaving aside for the moment the change in his evidence, it is in my view implausible that the applicant would have been able to avoid the attention of the authorities if he had been of adverse interest by the simple expedient of not using his own address on the replacement NIC while correctly stating his name and village.
17. I am satisfied that the applicant has fabricated all of his claims for protection and I do not accept that at the time he left Sri Lanka, the applicant was a person of interest to the authorities on the

basis that one of his boats was taken by the LTTE for the transporting of weapons and that he is wanted by the authorities in relation to providing assistance to the LTTE. It follows that I do not accept that since he left Sri Lanka the authorities have gone to his sister's and deceased father's houses to ask where he is.

18. The applicant claims that the government believes that he is a supporter of the LTTE. For the reasons set out above, I do not accept that the Sri Lankan authorities have ever held any suspicion about the applicant on the basis of support for the LTTE.
19. The applicant has not made claims for protection based on his race and I do not consider that any such claim arises on the facts. Although he is half Tamil (and speaks Tamil) his evidence is that his father was Sinhalese and he carries his father's name. The applicant spoke in his SHEV and entry interviews in Sinhalese. Of Sri Lanka's ethnic groups, Sinhalese are in the majority (74.9 percent).⁵ I am satisfied that the applicant is perceived as Sinhalese, would be perceived as such on his return and that he is not at risk of harm on the basis of his ethnicity.
20. I have taken into consideration the applicant's circumstances and the country information before me. I have found that the applicant was not a person of interest to the Sri Lankan authorities at the time he left and have rejected as a fabrication his claim that in March 2009 he was required to hand over a boat to the LTTE, the SLN became aware of it, and consequently subjected him to interrogation and severe mistreatment, as a result of which he has a profile with the authorities. Overall, I am not satisfied that there is a real chance of serious harm to the applicant on his return to Sri Lanka now or in the reasonably foreseeable future.

Illegal departure/returning asylum seeker

21. The applicant claims he will be persecuted because he will be perceived as a failed asylum seeker. For the reasons set out below, I do not accept that the applicant is at risk of persecution as a returning asylum seeker. However, I accept that he departed Sri Lanka illegally and that having done so, and the fact that he will be returning on a temporary travel document, means that the Sri Lankan authorities will become aware that he made a claim for asylum in Australia. Both of these things will have repercussions for him on return to Sri Lanka.
22. Departing by other than an authorised port of departure (seaport or airport) is an offence under Sri Lanka's *Immigrants and Emigrants Act* (the I&E Act) and returnees who depart the country irregularly are generally considered to have committed an offence under the I&E Act rendering them liable to arrest and prosecution⁶ (see below).
23. Involuntary returnees arriving at the airport in Colombo are scrutinised by the Sri Lankan authorities which includes checks against immigration and intelligence databases.⁷ All returnees are treated according to these standard procedures regardless of their ethnicity and religion, and are not subject to mistreatment during their processing at the airport.⁸ The applicant claims that he will have to clear airport security and in giving his name, he would unveil himself to the authorities following which he will be subjected to the same torture as before. I have rejected as fabrications his claims for protection. I have found he was not a person of interest at the time he left Sri Lanka and I do not accept that submission. Some sources have reported cases of Sri Lankan asylum-seekers who were allegedly detained and ill-treated or tortured after having been forcibly returned to Sri Lanka on rejection of their asylum claims or who voluntarily

⁵ DFAT "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

⁶ *ibid*

⁷ *ibid* at 5.19

⁸ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.20

returned.⁹ However, to the extent that ethnicity has been identified as a risk factor for harm on return it appears to apply to Tamils with any connection to the LTTE or pro-separatist activities.¹⁰ Tamil ethnicity as a risk factor for mistreatment on return was similarly identified in an article provided by the applicant with his SHEV application.¹¹ The applicant's name is that of his father (who was Sinhalese) and he communicated in his SHEV interview in Sinhalese. I have rejected his claim that he would be perceived to be associated with the LTTE. I am satisfied he will be perceived as Sinhalese on return and I find that these risks do not apply to him.

24. In cases of illegal departure, the person can be charged under the I&E Act and, in most cases, is arrested at the airport.¹² Returnees are transported to the closest Magistrates Court at the earliest available opportunity after investigations have been completed. Those arrested can remain in police custody at the CID airport office for up to 24 hours after arrival, and if a Magistrate is not available before this time (eg because of a weekend or public holiday), may be held at a nearby prison.¹³
25. If a returnee pleads guilty, they will be fined and released.¹⁴ If they plead not guilty, returnees are immediately granted bail by the magistrate on personal surety or may be required to have a family member act as guarantor.¹⁵ There are rarely any conditions in relation to the bail and if there are, they are imposed on a discretionary basis; the person will only need to return to court when the case against them is being heard (or if required to give evidence as a witness in another case).¹⁶
26. There is no evidence before me to suggest that the penalty or treatment faced by persons charged with illegal departure under the I&E Act varies depending upon their ethnicity, religion, status as returning asylum seekers, or imputed or actual political opinion. Returnees who are identified as having departed illegally are generally issued with a fine designed to act as a deterrent towards departing illegally in future which can be paid by instalment.¹⁷ On the basis of the country information, I find that if the applicant pleads guilty he will be fined and released and if he pleads not guilty, will be granted bail and required to return to court at a later time where, if he is found guilty, he will also be fined. The applicant has family in Sri Lanka and has not claimed that, if required, there would be nobody to guarantee his bail. I find the prospect of the applicant spending more than a few days in detention pending bail, including the period on remand prior to being brought before a Magistrate, to be remote. The applicant did not claim any inability to pay the fine and I find that as he has a history of employment, the imposition of a fine will not amount to serious harm.
27. Section 5J(5)(a) of the Act refers to a threat to a person's liberty as an instance of serious harm. I accept that prison conditions in Sri Lanka are generally poor due to old infrastructure, overcrowding and a shortage of sanitary and other basic facilities.¹⁸ Whether a risk of loss of liberty constitutes serious harm requires a qualitative judgment, including an evaluation of the

International Truth & Justice Project Sri Lanka (ITJP) "Silenced: survivors of torture and sexual violence in 2015", 7 January 2016 CIS38A801275; Freedom From Torture "Sri Lanka – Update on torture since 2009" 6 May 2016 CIS38A8012881.

¹⁰ ITJP "Silenced: survivors of torture and sexual violence in 2015", 7 January 2015 CIS38A801275

¹¹ The Guardian "Asylum seekers deported from Cocos Islands arrested by Sri Lankan police" 7 May 2016

¹² DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 5.21

¹³ *ibid*

¹⁴ *ibid*

¹⁵ *ibid*.

¹⁶ *ibid*.

¹⁷ *ibid* at 5.22

¹⁸ US Department of State, "Country Reports on Human Rights Practices for 2015 - Sri Lanka", 13 April 2016, OGD95BE926320

nature and gravity of the loss of liberty.¹⁹ In the applicant's case, I find that even considering the possibility that he arrives on a weekend and is detained until he can appear before a magistrate and then until bail is granted, the period of detention will be, at the most a matter of days. In my view, this does not rise to the level of a threat to his life or liberty, or to significant physical harassment or ill treatment, or otherwise amount to serious harm.

28. Considering the totality of the treatment that the applicant will experience including being detained and investigated for several hours at the airport, then potentially being detained on remand for a number of days during which he may be detained in poor conditions, and having to pay a fine, I find that this treatment does not amount to serious harm. Further, I find that the treatment of the applicant under the I&E Act is not discriminatory conduct but rather the application of a law which applies to all Sri Lankans. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.²⁰ In this case, the evidence does not suggest that the law is selectively enforced or applied in a discriminatory manner. Accordingly, I find that the investigation, prosecution and punishment for illegal departure under the I&E Act would be the result of a law of general application and does not amount to persecution within the meaning of s.5J(4). For these reasons, I am not satisfied that the applicant is at risk of serious harm on the basis that he is a returning asylum seeker or an illegal departee.
29. Assessing the applicant's claims overall, I am not satisfied that if he is returned to Sri Lanka, there is a real chance that the applicant will suffer serious harm for any of the reasons claimed.

Refugee: conclusion

30. 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

31. 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

32. 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.

¹⁹ *MIBP v WZAPN; WZARV v MIBP* [2015] HCA 22.

²⁰ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

33. I accept that, as a person who left Sri Lanka illegally and will be returning as a failed asylum seeker, on return he will be subjected to a series of investigative processes and that he will probably be detained and charged at the airport for illegal departure, and potentially detained briefly while awaiting a bail hearing. I also accept that he will be issued with a fine for the offence of illegal departure.
34. I am of the view, however, that the treatment he will be subjected to does not amount to significant harm. He is not a person of interest to the Sri Lankan authorities and I do not accept there is a real risk that the applicant will be mistreated while held at the airport or on remand or, in the worst case scenario, face a total period of detention of longer than a few days. I accept that for the period he is detained on remand, it is likely that he will be subject to poor conditions, a situation the Sri Lankan authorities are working to address.²¹ However, the evidence is that this period will be brief, at most a few days. Taking into consideration the entirety of this treatment, I am not satisfied that the acts or omissions of the Sri Lankan officials in this process amount to significant harm within the meaning of s.36(2A) or that they are intended to cause pain or suffering or extreme humiliation. The treatment does not consist of the death penalty or arbitrary deprivation of life. In the circumstances, I do not consider that it amounts to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment. Further, I am not satisfied that any aspect of what the applicant may face is intended to cause pain or suffering or extreme humiliation.
35. I am otherwise satisfied the applicant is not at risk of significant harm if he returns to Sri Lanka. I have rejected his claims relating to his supposed association with the LTTE and subsequent interest by the authorities. For the same reasons discussed above and based on the same country information, I am satisfied that he is not at risk of significant harm if he is returned to Sri Lanka.
36. I am not satisfied that there is a real risk of significant harm to the applicant if he is returned to Sri Lanka, now or in the reasonably foreseeable future for any of the reasons claimed.

Complementary protection: conclusion

37. 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

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

²¹ DFAT, "Country Information Report Sri Lanka", 24 January 2017, CISED50AD105 at 4.25

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.