



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

NEPAL
IAA reference: IAA19/07022

Date and time of decision: 17 September 2019 14:49:00
K Allen, 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 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 Hindu Gurung man from [Village 1] in the Lamjung District of Nepal. On 12 September 2017 he lodged an application for a Safe Haven Enterprise Visa (SHEV).
2. On 19 August 2019 a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV on the basis that the applicant is not a person in respect of whom Australia has protection obligations.

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.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He was born [in] Nepal and is of Gurung ethnicity and Hindu religion.
 - In 2001 a group of Maoists came to his home and told him they were going to use his spare room to store firearms and weapons. Additionally, the Maoists would sometimes stay in his house. Although his neighbours were aware of the situation he was too scared to say anything because the Maoists could have killed him.
 - About five to six months later the Nepalese Army (the Army) raided his house, located the weapons and accused him of supporting terrorists. He was taken to the Army barracks in Lamjung, detained, assaulted and released after [a number of] days.
 - Approximately four to five days after he had returned home there was a fight between the Maoists and the Army outside his village where 20–25 Maoists were killed. He was accused by the Maoists of providing the Army with information about them leading to their deaths and they threatened to kill him.
 - He went to the police to seek protection but was informed that as the country was in political turmoil and as the Maoists were attacking people everywhere they could not guarantee his safety. He decided to flee to India in 2001.
 - While he was in India the Maoists targeted his family so they moved to Chitwan, then Pokhara and finally Kathmandu. Two of his children were killed in the earthquake in Nepal in 2015. Even though his family have relocated on several occasions they still receive phone calls and letters asking for his whereabouts.
 - In 2009 or 2010, the Maoists informed his parents that they knew he was in [City 1] India so he quit his job and went into hiding and decided to leave India in 2013.
 - He cannot return to Nepal because he fears being detained, beaten and/or killed by Maoists.

Factual findings

Nepalese Identity

6. In support of his claimed identity as a Nepalese citizen, the applicant has provided: his birth certificate and translation which indicates that he was born in [Village 1], Lamjung in [date]; a Marriage Certificate and translation noting that he was married in Lamjung in December 2001; Birth Certificates and translations for his two children born in Lamjung; and his Nepalese Driver's Licence and translation. The applicant advised at his SHEV interview that he had a Nepali passport that he used to depart India in 2013 for [Country 1]. He claimed his passport was destroyed in [Country 2] en route to Australia. The applicant confirmed that his passport was issued in Lamjung from a government department at some stage before he was married in 2001. The delegate put to the applicant that if his passport was valid for 10 years, he would not have been able to use it to depart India as it would have been expired. The applicant had no adequate response for this. In all the circumstances, I consider it is likely the applicant maintained an address in Lamjung (as detailed below) and renewed his passport in Lamjung at some stage prior to travelling to [Country 1]. I am satisfied based on his documentation and his description of life in Nepal that the applicant is a Nepalese national as claimed and that Nepal is the receiving country.

Reasons he fled Nepal

7. When he arrived in Australia in 2013 the applicant claimed that he departed Nepal in 2001 after being threatened by Maoists and because of that he lived in India for 13 years before departing for Australia. He claimed that the Maoists had come to his home in Lamjung, asked for donations, asked for food to be prepared for them and hid their weapons in one of his rooms. He claimed that if he did not do what he was asked they had threatened to kill him. He claimed that the Army became aware that he was storing arms so they came and took all the arms and beat him for having them. He claimed that his house is now locked by the Maobadi and he and his family cannot go there. The Maobadi believe that the applicant informed on them to the Army. He also claimed to be a supporter of the Rastriya Prajatantra Party which is against the Maobadi.
8. In his 2017 SHEV application the applicant made similar claims. He stated that there was a large Maoist population in Lamjung District during the late 1990s and early 2000s. He was not a supporter of either the Maoists or the government, but was a supporter of the King of Nepal and a member of the Rastriya Prajatantra Party, who supported the King. He claimed he would speak to people in his village about the King and how to support the King. In 2001 a group of Maoists came into his home in central Lamjung and required his family to store their firearms and weapons and provide accommodation. Country information¹ supports the applicant's claim that Maoists were active in Nepal when he lived there. In 1996 the Unified Communist Party of Nepal (the Maobadi) began a nationwide violent insurgency against the government leading to a ten-year civil war. Almost 18,000 people were killed and over 1,300 disappeared before a peace accord was struck in 2006 following an agreement between the Maoists and an alliance of seven Nepali political parties. In the absence of any evidence to the contrary and based on country information and the applicant's consistency about the impact of the Maoists in Lamjung in 2001, I accept that the applicant was required to provide certain services to local Maoists such as donations, food and storage space. However, I also

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Nepal", 1 March 2019, 20190301094546, 2.3

note that conditions in Nepal have changed considerably since the 2006 peace accord. DFAT reported in 2019² that Nepal has enjoyed several years of political stability. A lively political environment provides an opportunity for diverse political parties and views, and an individual's membership of a political party, along with their ability to be identified as a member and to be politically active, is generally respected. DFAT assesses³ the risk of a return to widespread violence is low. DFAT assesses that political opponents of Maoists do not face violence, unless they participate in violent political demonstrations, in which case they face no greater threat of violence than other participants. The applicant has not claimed that his family have continued to be required to provide certain services to local Maoists since his departure from the country in 2001. I consider that this requirement for his family to provide assistance to the Maoists is now resolved and the applicant does not claim to fear that he will be required to provide such assistance on his return to Nepal. I have not considered this matter further.

9. The applicant has made a range of claims stemming from his interaction with the Maoists in 2001, essentially that he was harmed by the Army, and the Maoists have threatened and beaten his family as a consequence of his departure and that they want to find him to kill him. Overall, I consider that the applicant's claims in this regard are unsupported and inconsistent.
10. In his SHEV application, the applicant claimed that after about five or six months of the Maoists storing their weapons in his house, the Army raided his house one night in 2001 and when they found the weapons they accused him of supporting the Maoist party. They beat his parents and his wife and they took him from the home to the Army barracks in Lamjung for interrogation and they continuously beat him. He claimed that he was released after [a number of] days and warned not to provide the terrorists with any more support. The applicant did not make this claim in his Arrival interview in 2013 or SHEV interview in 2019. The applicant was repeatedly asked about his experiences in Nepal throughout the SHEV interview and he made no such claim. I consider that if he was detained and beaten by the Army over a period of days and that if his family was beaten, that he would have recalled such an event when asked. Based on that failure to raise or pursue this claim at interview and my other concerns about the credibility of the applicant's evidence as outlined below, I do not accept that this interaction with the Army occurred.
11. In his SHEV application the applicant made the further claim that about four or five days after he had returned home there was a very large fight between Maoists and the Army just outside of his village. About 20 or 25 Maoists were killed during the fight. The next day leaders of the Maoists came to his village so he hid in the jungle beside the village. The Maoists went to his home and told his family that he had given information to the Army, that he informed the Army that the Maoists were storing weapons in his home and because he was a supporter of the King that he had given information to the Army to help them fight the Maoists. They told his family they would kill him. He claimed he tried to seek help from the government in Nepal but the police told him they could not help him because the country was in political turmoil, the Maoists were attacking people everywhere and they could not guarantee his safety. He decided he had to leave Nepal so he fled to India and lived and worked in [City 1] until 2013.
12. In support of these claims the applicant provided two letters of support at his SHEV interview. One letter is from the [Organisation 1], Nepal, dated 27 June 2013, and the other is

² DFAT, "DFAT Country Information Report Nepal", 1 March 2019, 20190301094546, 3.41

³ Ibid, 3.45

from the [Organisation 2], dated 18 June 2013. Both letters have very similar wording stating the applicant was victimised by Maoist terrorists and compelled to leave his residence after repeated death threats. The delegate asked the applicant about these organisations and the similar wording in the letters at interview. He advised that the organisations are not connected but, as he was a Maoist victim he wrote and asked for the letters. His father took the letter he wrote to the organisations and he thinks they copied that letter. The delegate put to the applicant that the organisations said that his residence is in Lamjung and they appeared not to know the applicant or that he was not in Lamjung for 13 years. The applicant did not have a satisfactory response to that. As I consider that these organisations are not personally aware of the applicant or his circumstances, I place no weight on these letters of support. The applicant provided no other evidence in support of this claim such a news reporting or a police report. The applicant's account of this claimed event at interview was scant and lacked any compelling detail. I do not accept that the Maoists went to his home and told his family that he had given information to the Army including that he informed the Army that the Maoists were storing weapons in his home and that he had given information to the Army to help them fight the Maoists or that they told his family they would kill him.

13. The applicant claimed that because of the events outlined above, he went to live in [City 1], India, an area near the border of Nepal. In India he was living in constant fear that the Maoists would find him as they often came to India. He claimed his family told him that after he left Nepal, Maoists would go to his family home and threaten his family to reveal where he was because they wanted to kill him. He also claimed that they would beat his family. He claimed his family feared both the Maoists and the Army so they had to leave their village a few years after he had fled to India when the Maoists locked up their house. He claimed that his family moved to Chitwan but they continued to be harassed and threatened there by Maoists. He claimed that his family then moved to Pokhara and then to Kathmandu. He claims they still receive phone calls and letters from Maoists asking where he is some 19 years after he left the country.
14. In his SHEV interview the applicant stated that his family moved to Chitwan after he departed for India and that his children were all born in Chitwan after which time they moved to Kathmandu. The delegate put to the applicant that there was no information before her that his family were locked out of their house by Maoists and had to move to Chitwan where his children were born. The delegate noted that the applicant provided copies of his children's birth certificates and translations. One document notes that his [Child 1] was born at home in [Village 1], Lamjung [and] another document notes that his [Child 2] was born in hospital in [Village 1], [Lamjung]. When asked why the birth certificates list his children as being born in Lamjung instead of Chitwan, the applicant claimed that they had to be registered in his home village of Lamjung. While I accept that the children might have been registered in Lamjung this does not explain why the documents do not list the place of birth as Chitwan.
15. The applicant was asked why, if his family continued to be threatened, they did not join him in India. The applicant stated that his wife and children would travel to and from Nepal to India to visit him and they remained in Nepal to look after his property in Chitwan. The applicant also disclosed that he still has a home in Lamjung. I have had regard to the fact that the applicant provided no corroborating evidence to support the claim that his family ever lived in or owned property in Chitwan. I have also had regard to country information⁴ which notes that birth registration in Nepal is governed by the *Birth, Death and Other Vital Events Registration Act 1977*. Prior to 2005 there was a provision in the Act requiring children to be registered by male family members. This was struck down by the Nepali Supreme Court in

⁴ DFAT, "DFAT Country Information Report Nepal", 1 March 2019, 20190301094546, 5.40

2005 but it is reported that the decision has yet to be fully implemented in practice. I consider it very likely that the applicant's family were living in the family home in Lamjung when the applicant's children were born and that the applicant registered the birth of his children in Lamjung. I do not accept that his family were locked out of their home in Lamjung by Maoists or that they fled Lamjung to avoid threats from the Army or Maoists. I do not accept that the applicant's family moved to other places in Nepal to escape Maoists, particularly as he claims they are still targeted in various places in Nepal and they have not left for India or Australia. I do not accept as plausible that the Maoists would have any basis to have any interest in the applicant some 19 years after he departed India.

16. The applicant claimed that he moved to [City 1] in 2001 where he lived and worked. He claimed he had to cease work and go into hiding in 2009 or 2010 after the Maoists told his parents that they knew he was in [City 1]. It is reported⁵ that the open border arrangement with India, as per the 1950 India-Nepal Treaty of Peace and Friendship, allows large numbers of Nepal to travel to and from India each year or reside in India on a long-term basis. Country information⁶ is that this kind of relocation is a common experience for Nepalis. Millions travel each year to other countries seeking employment and other opportunities and to seek economic opportunity. Over half of all Nepali households have at least one family member currently overseas as a migrant worker or living in Nepal as a returnee and therefore relocation is a normal, expected circumstance of life. I accept as plausible that the applicant lived and worked in [City 1] in India between 2001 and 2013 as this accords with country information about the ease of Nepalis travelling to and working in India. However, I consider that his wife and family maintained the family home in Lamjung and the applicant returned to Lamjung at various times including to renew his passport and register the births of his children.
17. Further to this, I do not accept that the applicant was in hiding in India in the four years leading up to his travel to Australia because the Maoists found out he was living in [City 1]. At his SHEV interview the delegate why he did not relocate within India if the Maoists knew he was in [City 1]. In response the applicant repeated his claims and was unable to provide an answer to the question. The delegate then asked the applicant how he could have been in hiding from the Maoists as claimed between 2009 and 2013 and still have been residing at the same address in [City 1] and having his wife coming and going visiting him. He said they only knew he was in India, not [City 1]. The delegate asked the applicant why he could not go back to India where he had been unharmed from 2001-2013. He responded that sooner or later they would find him. I do not accept that the applicant fled Maoists in Nepal in 2001 because he was accused of providing information to the Army that led to Maoist deaths or that he is of any interest to Maoists, the Army or anyone else in Nepal.

Rastiya Prajatantra Party supporter/member

18. In his Arrival interview and SHEV application, the applicant noted that he was with the Rastiya Prajatantra Party. In his SHEV interview the delegate asked the applicant if he was still a supporter of the Rastiya Prajatantra Party and if he feared harm on his return to Nepal on that basis. He responded that he was still a member. The delegate asked the applicant again if he feared harm because of his party membership. In response he stated that he was a member of the party before he left Nepal in 2001. He did not claim to fear harm from anyone on his return to Nepal because of his former party membership or party support. Due to the vague information provided by the applicant about this claim and his claimed membership of

⁵ DFAT, "DFAT Country Information Report Nepal", 1 March 2019, 20190301094546, 5.18

⁶ Ibid.

this political party, I am not satisfied that the applicant is a currently a member of this party or that he was ever targeted for harm because of any previous membership. I am also satisfied that he does not claim to fear harm on his return to Nepal because of any political party association. This finding is consistent with the applicant not pursuing this claim when asked at interview. I have not considered this matter further.

Refugee assessment

19. 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

20. 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.
21. The applicant has not satisfied me that he was threatened by the Maoists or the Nepalese Army because: he was required to provide services to Maoists in or around 2001; or that Maoists blame him for the deaths of Maoist party members at the hands of the Army and for the confiscation of their weapons by the Army. I do not accept that the Maoists in Nepal have constantly harassed and threatened his family about his whereabouts since he left Nepal in 2001 or that his family have had to keep moving around Nepal to get away from them. I do not accept that the applicant received death threats which resulted in him going into hiding in [Country 1] and then moving to Australia in 2013 to avoid harm and protect his life. I do not find the applicant’s claims to be credible and I do not accept his claims for protection. I am not satisfied he faces a real chance of any harm for any of the reasons he has claimed or for any other reason in Nepal.
22. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

23. 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

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

Real risk of significant harm

25. Under s.36(2A), a person will suffer 'significant harm' if:
- the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.
26. I have found that the applicant does not face a real chance of harm in Nepal for any reason claimed or for any other reason. Real chance and real risk involve the same standard⁷. On the factual findings, I am similarly not satisfied that the applicant faces a real risk of suffering any harm, including significant harm, should he be returned to Nepal. I am not satisfied that as a necessary and foreseeable consequence of his return to Nepal that he would be at real risk of significant harm.

Complementary protection: conclusion

27. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the 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.

⁷ *MIAC v SZQRB* (2013) 210 FCR 505

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.