



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA19/07232

Date and time of decision: 30 October 2019 16:50:00
M Oakman, 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 Sinhalese of the Christian faith from the [Province 1], Sri Lanka. He arrived in Australia [in] September 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 16 May 2017. On 25 September 2019 a delegate of the Minister (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 left Sri Lanka because he fears being killed by the Special Taskforce (STF) and by the Sri Lankan government. He was member and supporter of the United National Party (UNP) and this led to problems with the governing party;
 - He had threats made against his life. Especially because [an official] was interested in land belong to his uncle and that was to be inherited by the applicant; and
 - He fears to return to Sri Lanka because the politicians who harassed and tortured him are still in power. Many politicians are still angry with him because of his political involvement.

Factual findings

Receiving country

4. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka from [Province 1]. I find that the applicant's receiving country is Sri Lanka. The applicant has consistently claimed, and I accept, he is Sinhalese and Roman Catholic.

Background

5. The applicant was born in [Province 1], in [year] and lived there throughout his life in Sri Lanka. The applicant married in 2010 and he and his wife have a [child] who was born in [year]. His mother, father, wife and [child] live in the family [home]. His father owns that home and works as a fisherman. The applicant's aunts and uncle also live in [the same town]. The applicant is in contact with his family in Sri Lanka. He attended school between [year] and [year], completing his O-levels. While in Sri Lanka he worked as a [fisherman]. He has worked in Australia as [an occupation] for the last three years.

Problems in Sri Lanka

6. In summary, the applicant claims he was an active member and strong supporter of the UNP which was the main opposition party at the time. This naturally angered the governing party. Threats were made against his life, especially because [an official] had an interest over land belonging to his uncle and which was to be inherited by the applicant. They were asked to leave the land.
7. On 2 February 2012 [an official], "SG", with six other armed men came to his house, one of them held a pistol to his head and asked him to kneel down. They hit him with [an object], dragged him to a van and took him to an unknown place. They said if he kept any interest in the land he was to inherit, he would be murdered.
8. He started working with a UNP councillor, "KM", during the 2011 provincial council elections. In June 2012 KM was taken into custody and jailed. The applicant was also issued with a search warrant for carrying weapons. He had never carried weapons. SG had influenced the authorities through the police to issue the warrant. He received a call from KM saying the applicant's life was in danger and he should not stay home. So he decided to go into hiding, moving from place to place. While he was in hiding SG came to his house with some supporters and took some of his photos and told his family that if they saw him they would kill him; he decided after this that there was no place for him in Sri Lanka anymore. Within two or three months of his arriving in Australia, maybe around December 2012 or January 2013, SG came to the house and threatened his family.
9. The delegate in her decision record indicated she had numerous concerns about the applicant's evidence and ultimately rejected his claims about his involvement with the UNP and KM and the problems with the land and SG. I share the delegate's concerns about the credibility of the applicant's evidence.
10. The applicant claimed in his SHEV application that he and his family suffered adverse attention from SG, including the February 2012 incident when SG and six other armed men came to his home, pointed a gun against his head, dragged him to a van, took him to an unknown location and then threatened to kill him if he pursued the land issue. However, at the SHEV interview the applicant denied he had ever met SG and said he had seen SG once, just passing in the street, and they had not interacted. When the delegate pointed out to the applicant that this information was inconsistent with his claim about SG coming to his house and a gun being pointed at his head, he said he cannot remember most of that incident, before saying SG had come to his home but he did not know it was SG until a neighbour told him. Neither explanation is satisfactory: he was able to give the exact date of the incident when he prepared his SHEV application (May 2017) but two or so years later at the SHEV interview (September 2019) he said he had trouble recalling the incident; and even if he only knew who SG was because the neighbour identified him, such identification would have been made around the time of the incident in 2012. The applicant's claim at the SHEV interview that he had never met SG, just passed him in the street, is a substantial inconsistency in his evidence. Additionally, the applicant claims he worked with KM in the 2011 election campaign and, at the SHEV interview, said he had met KM some 10-15 times. Despite having worked with KM and meeting KM on numerous occasions, the applicant failed to identify KM when shown a number of men's pictures, including KM's, at the SHEV interview. Even taking into account the period of time that has elapsed since he would have last seen KM in Sri Lanka, I consider his failure to identify KM from a photo to reflect very poorly on his credibility.

11. There are also a number of other problems with his evidence, as follows:
- In his SHEV application he claimed he was a strong and active member and supporter of the UNP. However, at the SHEV interview he said he only joined the UNP to try and get assistance with recovering his land, and he joined the UNP in 2007 or 2008. He was also vague and hesitant about the politics of the UNP. He claimed he organised meetings for the UNP, for which he was paid, but was only able to estimate that meetings occurred maybe every two months and said that his actual role entailed going door to door to encourage people to attend. When asked how he convinced people to attend a meeting if they did not want to, he said he would offer to fix their roof. I do not consider this response credible.
 - He provided a November 2012 letter of support from [an official] of the UNP, "JMP". The letter states the applicant is an active and ardent supporter and devoted member of the UNP; he had worked exclusively on all party activities in the District; was highly involved in UNP activities from the 2005 to 2011 elections; and he suffered threats and had to hide as a result. The letter is not consistent with the applicant's evidence about his UNP activities (joined in 2007 or 2008, not 2005; helped organise meetings, not all party activities) and makes no mention of the land dispute. Additionally, although the writer states the applicant is well known to him, at the SHEV interview he said he had met JMP only once. Given those issues I attach no weight to the letter.
 - I do not consider it credible that, if the land was taken in 2007 or 2008 (when he claims to have joined the UNP), the first adverse incident he would suffer as a result would be four or five years later in February 2012.
 - He claimed that it was [an official] who took the land. However, when asked at the SHEV interview to name of the person who took the land, he named the [official]'s brother and maintained he was the [official].
 - He said in his SHEV application (May 2017) that the land was taken for Air Force training. At the SHEV interview (September 2019) he inconsistently claimed a number of times that they took the land and built a hotel on it. He also added, after the natural justice break, that the land was first taken for Air Force training and then they built a hotel. I do not consider it credible that, prior to the break in the interview, he made no mention of the Air Force training usage of the land.
 - I do not consider it credible that he said SG came looking for him one more time, but gave different time frames for the visit in his SHEV application (while he was in hiding before leaving Sri Lanka) and at the SHEV interview (two or three months after he arrived in Australia). I also do not consider it credible that, if SG was threatening him because of his interest in the seized land that, as the land actually was his uncle's, SG did not also continue to threaten his family about pursuing the land issue.
12. In assessing the applicant's evidence I have taken into account the difficulties often faced by applicants for protection, particularly those for whom some period has passed since they departed their country of origin. However, the issues identified above go beyond minor errors and discrepancies that could be attributed to factors such as recall problems, misunderstandings in interpreted material, cultural communication issues, or a lack of cohesive narration due to trauma, and show significant and substantial credibility problems in the applicant's evidence. I do not consider the applicant to be a credible or reliable witness. I am satisfied he has fabricated his evidence in order to boost his claim to protection.
13. I reject as fabrications his claims that the applicant was a supporter or member of the UNP; that his uncle's land was seized by [an official] or anyone else; that SG and other armed men

came to his house in February 2012 or at any other time; that he knows, assisted or was involved with KM; that he was issued with a search warrant for carrying weapons; and he was in hiding in Sri Lanka before he left for Australia. It follows from rejecting these claims that I do not accept that he was of adverse interest to the STF, the Sri Lankan government, SG and his supporters, other political opponents of the UNP, or any other person, either before or after he left Sri Lanka. I prefer the evidence he gave at his arrival interview as to his reasons for leaving Sri Lanka, and find he came to Australia because he wanted a job and he was thinking about his child's future.

Asylum Seeker

14. The applicant claims to have left Sri Lanka in early September 2012 to travel to Australia in a boat organised by a smuggler. He does not have his passport with him in Australia. I find that, if he were to return to Sri Lanka, he may be considered a failed asylum seeker who departed illegally by the Sri Lankan authorities.

Refugee assessment

15. 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

16. 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.
17. The applicant is a Sinhalese fisherman who, on my findings, left Sri Lanka because he wanted to find a job and was thinking of his [child]'s future. Although he was after a job in Australia he was working in Sri Lanka and did not claim, and the evidence does not support a conclusion, that he or his family were ever unable to subsist in Sri Lanka. I found that he was not of adverse interest to the Sri Lankan authorities or any other person(s) before or after he left Sri Lanka. Having considered the applicant's own profile and history, in the context of the country information before me, I am not satisfied there is a real chance of the applicant suffering harm if he returned to Sri Lanka, now or in the reasonably foreseeable future.

18. I accept that, on his return to Sri Lanka, the applicant may be identified by the authorities as an asylum seeker who departed Sri Lanka illegally.
19. Entry and exit from Sri Lanka is governed by the *Immigrants and Emigrants Act 1949* (Sri Lanka) (IE Act). Under the IE Act it is an offence to depart other than from an approved port of departure. Penalties for leaving Sri Lanka illegally include imprisonment of up to five years and a fine of up to 200,000 Sri Lankan rupees. The Department of Foreign Affairs (DFAT) has been advised by the Sri Lankan government, but cannot verify, that no mere passenger on a boat has been given a custodial sentence. A guilty plea attracts a fine, which can be paid by instalments. If a passenger pleads not guilty the magistrate will usually grant bail on a personal surety or guarantee by a family member. Where a guarantor is required, the returnees may have to wait for the guarantor to come to court. Anecdotally, most passengers may spend years on bail and most are free to go after paying a fine. Although fines are often low, the cumulative costs of attending court over a protected period of time can be high.¹
20. Advice from DFAT is that upon arrival in Sri Lanka, involuntary returnees are processed by agencies including the Department of Immigration and Emigration, the State Intelligence Service, the Criminal Investigation Department (CID) and, at times the Terrorism Investigation Department, who check returnees' travel documents and identity information against immigration databases, intelligence databases and the records of outstanding criminal matters. Returnees are processed as a group and individuals have to remain until all returnees are processed.²
21. For returnees travelling on temporary travel documents, police undertake an investigation to confirm the person's identity, to see whether someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger and contacting their claimed home suburb or town.³
22. Where an illegal departure is suspected, the returnees are charged and arrested under the IE Act. As part of this process, most returnees will be fingerprinted, photographed and have a statement taken by the police. They are transported by police to the nearest Magistrates Court at the first available opportunity once investigations are completed, after which custody and responsibility for the individual shifts to the courts or prison services. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours after arrival and should a magistrate not be available before this time, for example because of a weekend or public holiday, those charged may be detained for up to two days in an airport holding cell.⁴
23. I accept that the applicant may be considered a failed asylum seeker from Australia on his return. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport. There is country information containing reports of some returnees being tortured.⁵ DFAT does not suggest that there is no risk and

¹ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Including "Situation Update: Sri Lanka Tamil Returnees", COIS, 5 September 2017, CRF00C22F109; "LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion (2015-November 2017)", Immigration and Refugee Board of Canada, 10 November 2017, OGO20B81694; "Unstopped: 2016/17

those other reports provide some examples of incidents of mistreatment. I accept that some asylum seekers with significant actual or perceived links to the LTTE may still be at risk of harm when processed at the airport. However, on my findings, the applicant is not such a person.

24. Taking into account my findings about his profile and the country information, I do not accept that the applicant will be at risk of adverse attention or that he faces a real chance of harm from the Sri Lankan authorities when scrutinised on his return to Sri Lanka, whether when processed at the airport or on his return home.
25. The Sri Lankan authorities remain sensitive to the potential re-emergence of the LTTE.⁶ DFAT states that high profile leaders of pro-LTTE diaspora groups may come to the attention of the Sri Lankan authorities for taking part in demonstrations and assesses that the authorities may monitor members of the Tamil diaspora returning to Sri Lanka depending on their risk profile and that returnees may be subject to surveillance. The UK Home Office (UKHO) indicates that although the Sri Lankan authorities may monitor overseas activities, they are only interested in significant involvement in pro-Tamil separatist diaspora activities and activity such as attending demonstrations overseas is not in itself evidence that a person will attract interest from the Sri Lankan authorities.⁷
26. The applicant, who is Sinhalese, does not claim that he was involved, significantly or otherwise, in any activities that might be considered as, or perceived to be, pro-Tamil separatist or pro-LTTE diaspora activities while in Australia. I am not satisfied that the applicant's profile, which as discussed is not one that places him at a real chance of suffering harm, will be increased by the fact that the applicant has lived for seven or so years outside of Sri Lanka and claimed asylum in Australia. Nor am I satisfied, given his profile, there is a real chance that he will be monitored because of his absence from Sri Lanka, if returned.
27. DFAT reports that refugees and failed asylum seekers face practical challenges to successful return to Sri Lanka. Many face difficulty in finding suitable employment and reliable housing, and refugees and failed asylum seekers have reported social stigma from their communities on return. DFAT assesses that returnees may face some societal discrimination upon return to their communities, and that continued surveillance of returnees contributes to a sense of mistrust.⁸
28. The applicant has many years of experience working as a fisherman [in] Sri Lanka and has worked for three years as [an occupation] in Australia. He has shown himself to be resourceful and resilient by adapting to life in Australia. The applicant is from [Province 1], where his wife, [child], mother and father still live in the family home, and I am satisfied that this is the area to which he will return. His father is working and owns the house in which they live. He has remained in regular contact with his family in Sri Lanka and I am satisfied he would have some basic support including housing available from his family, if needed. In light of those factors, I am satisfied that the applicant will be able to re-establish himself in [his hometown] without suffering harm in relation to any initial difficulties in obtaining housing and employment. Based on the country information, I accept that he may face some social stigma in Sri Lanka as a returned/failed asylum seeker. However, although social stigma, whether in the form of negative attitudes, a level of social isolation or otherwise, may be

Torture in Sri Lanka", International Truth & Justice Project, 14 July 2017, CISED50AD4849; and Freedom from Torture, "Sri Lanka - Update on torture since 2009", 6 May 2016, CIS38A8012881.

⁶ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

⁷ UKHO, "Country Policy and Information Note Sri Lanka: Tamil separatism Version 5.0", 15 June 2017, OG6E7028826.

⁸ DFAT, "DFAT Country Information Report: Sri Lanka", 23 May 2018, CIS7B839411064.

hurtful, I am not satisfied it amounts to significant ill treatment or any other type of harm that may be regarded as serious harm

29. I am not satisfied that there is a real chance that the applicant would face serious harm on his return as a failed asylum seeker from Australia. I accept that the applicant may be processed under the IE Act at the airport and may face court action and a fine under the IE Act as well. The country information states that all persons who depart Sri Lanka illegally are subject to the IE Act on return. That law is not discriminatory on its terms. Case law states that a generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination.⁹ In this case, the evidence does not support a conclusion that the law is selectively enforced or that it is applied in a discriminatory manner. I find that the processing, investigation, prosecution and punishment of the applicant under the IE Act would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
30. I am not satisfied that the applicant faces a real chance of persecution on the basis of being a returned asylum seeker from Australia who departed Sri Lanka illegally, now or in the reasonably foreseeable future.
31. Having considered the applicant's circumstances and profile as a whole, in the context of the country conditions in Sri Lanka I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

32. 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

33. 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

34. Under s.36(2A), a person will suffer 'significant harm' if:
 - the person will be arbitrarily deprived of his or her life
 - the death penalty will be carried out on the person
 - the person will be subjected to torture
 - the person will be subjected to cruel or inhuman treatment or punishment, or
 - the person will be subjected to degrading treatment or punishment.

⁹ *Chen Shi Hai v MIMA* (2000) 201 CLR 293; and *Applicant A v MIEA* (1997) 190 CLR 225.

35. I accept that, if he returns to Sri Lanka, while re-integrating the applicant may face some level of societal discrimination as a returned asylum seeker from Australia, in the form of social stigma. As acknowledged above social stigma may at times be hurtful, however, I am not satisfied on the evidence that any hurt he may suffer from social stigma will amount to severe pain or suffering, or pain and suffering that could reasonably be considered as cruel or inhuman in nature. Similarly, social stigma may be hurtful or harassing but it does not amount to extreme humiliation. I am not satisfied that it amounts to the death penalty, arbitrary deprivation of life or torture. I am not satisfied that any social stigma suffered by the applicant as a returned asylum seeker from Australia amounts to significant harm as defined in ss.36(2A) and 5 of the Act.
36. I have found that there is not a real chance of harm to the applicant, now or in the reasonably foreseeable future, taking into account his profile and history, if he is returned to Sri Lanka. As 'real chance' and 'real risk' involve the same standard,¹⁰ it follows that I am also satisfied that there is no real risk of significant harm if he is returned to Sri Lanka.
37. I accept that the applicant may be subject to investigation and processing under the IE Act at the airport and may also face possible action under the IE Act for his illegal departure. DFAT advises that, once a person is found to have departed illegally, they will be arrested by the police at the airport, have their fingerprints taken and be photographed. Returnees may be questioned for up to 24 hours at the airport and, subject to the unavailability of a Magistrate over a weekend or on a public holiday, may be detained in the airport holding cells for up to two days before they are taken to court. At court he may be subject to a bail surety or the magistrate may require a bail guarantor, in which case he may have to wait for a relative to attend court. If on bail the applicant may have to attend court on a number of occasions over time. A fine may be imposed. DFAT states that all returnees are treated according to the standard procedures, regardless of their ethnicity and religion, and understands they are not subject to mistreatment during processing at the airport and assesses that irrespective of religion, ethnicity, geographic location, or other identity, Sri Lankans face a low risk of mistreatment that can amount to torture. I am not satisfied the applicant will suffer the death penalty, arbitrary deprivation of life, or torture as a consequence of his illegal departure. The evidence does not suggest that the treatment and penalties the applicant may be subject to because of his illegal departure are intended to inflict pain or suffering, severe pain or suffering, or are intended to cause extreme humiliation, as required in the definitions of cruel or inhuman treatment or punishment or degrading treatment or punishment. I am not satisfied there is a real risk of significant harm on this basis, or when considered in combination with any treatment he may experience as a returned asylum seeker from Australia.
38. There is no suggestion that the applicant faces the death penalty for any reason. I do not accept that there is a real risk that the applicant would face being arbitrarily deprived of life or tortured for any reason, including as a returned asylum seeker from Australia. Nor do I accept that there is a real risk that he would be subjected to pain or suffering, severe pain or suffering or extreme humiliation intentionally inflicted, or caused. I am not satisfied that there is a real risk that the applicant will suffer significant harm.
39. Having considered the applicant's circumstances individually and cumulatively, I am not satisfied that he faces a real risk of significant harm.

¹⁰ *MIAC v SZQRB* (2013) 210 FCR 505.

Complementary protection: conclusion

40. 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.

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.