



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

STATELESS

IAA reference: IAA19/07299

Date and time of decision: 22 November 2019 14:58:00

S MacKenzie, 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 a Tamil male born in Tamil Nadu, India, to Sri Lankan parents. He arrived in Australia [in] June 2013 as an unauthorised maritime arrival. On 13 April 2016 the applicant, along with his parents and brother, lodged a valid combined application for a Class XE Subclass 790 Safe Haven Enterprise visa (SHEV) in which he claimed to be a citizen of a Sri Lanka and that feared harm in Sri Lanka.
2. A delegate of the Minister for Immigration (the delegate) refused to grant the applicant's visa on 4 April 2017, on the basis that he did not face a real chance of serious harm or a real risk of significant harm upon return to Sri Lanka.
3. On 8 November 2017 the IAA affirmed the decision not to grant the referred applicant a protection visa. On 8 October 2019 the Federal Circuit Court of Australia remitted the matter to the IAA for reconsideration.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material).
5. On 30 April 2017, in connection with the first review, the IAA received a written submission from a registered migration agent on the applicant's behalf (IAA submission). The IAA submission in part comprises argument on issues before the delegate and also refers to claims and evidence that were before the delegate and are part of the review material. To that extent I have had regard to the submission. The migration agent also provided a further submission on 6 May 2017 (in response to an earlier letter from the IAA) arguing that the IAA submission is compliant with the IAA Practice Direction, which I have also had regard to.
6. As part of the IAA submission, the migration agent referred to and provided a number of sources of country information¹ not before the delegate that pre-date her decision. The migration agent also refers to extracts of country information in an August 2016 published IAA decision. It is new information. Neither the applicant nor the migration agent provided reasons as to why this information was not and could not have been provided to the delegate or why it may be considered credible personal information. In the circumstances, I am not satisfied that this information was not, and could not have been, provided to the Minister before the delegate made their decision. I am also not satisfied that, as general country information, it is credible personal information. Further, I am mindful that the information is provided as evidence as to why the applicant cannot return to Sri Lanka and, for reasons outlined below, the question of the risk of harm to the applicant in Sri Lanka does not arise for consideration. In these circumstances, I am not satisfied that there are exceptional circumstances to justify consideration of this information.
7. The migration agent also raised a number of new claims not before the delegate. Firstly, it was claimed that the applicant's father was 'killed by the army'. Secondly, it was argued that

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Report Sri Lanka", 3 October 2014; International Crisis Group, "Sri Lanka: Jumpstarting the Reform process", 18 May 2016; United Nations, "Committee Against Torture - Concluding observations on the fifth periodic report of Sri Lanka", 7 December 2016; Human Rights Watch, "Country Summary Sri Lanka", January 2016; ACCORD, "Sri Lanka: COI Compilation", 31 December 2016

because the applicant was born in India he may not be a national of Sri Lanka, and that his receiving country is India. The migration agent was of the view that the IAA should get new information in connection with the applicant's nationality and put it to him for comment.

8. I have obtained country information about the status of persons born outside of Sri Lanka.² While this information was not before the delegate, I am satisfied there are exceptional circumstances for considering it because it is relevant to determining the applicant's receiving country which, having reviewed the applicant's claims throughout the SHEV application process and the arguments outlined in the IAA submission, appears to be a key issue of contention.
9. On 19 November 2019, I invited the applicant to an interview (the IAA interview) in order to obtain further information from him regarding his nationality and, noting that he had claimed in his SHEV application to be a citizen of Sri Lanka and that Sri Lanka was the country he feared returning to, the migration agent's assertion that his claims should be assessed against India. In the IAA interview, I asked the applicant specific questions relevant to the matters for determination and I consider some of his responses to constitute new information.
10. I also asked the applicant in the IAA interview as to the reasons why he could not return to India. Given his responses, which I also consider new information, I obtained country information from DFAT's 2018 report about India.³
11. Following the IAA interview, I provided the applicant a copy of the new information I obtained. In respect of the new information the applicant provided at the IAA interview, I am satisfied it constitutes credible personal information which may have affected the consideration of his claims. Although throughout the SHEV application process he claimed to be a citizen of Sri Lanka and that he feared returning to that country, for reasons below, I accept the migration agent's submission that the applicant's receiving country is India. In the IAA interview, the applicant advanced claims as to why he feared returning to India and I note this was the first time throughout this process he was asked why he could not return to that country. In all the circumstances, I am satisfied that there are exceptional circumstances to justify considering the new information. In light of the applicant's responses and claims at the IAA interview, I am also satisfied that exceptional circumstances exist to justify considering the 2018 DFAT report about India which was discussed with the applicant at the IAA interview and, as noted above, provided to him following it.
12. In the IAA interview, I asked the applicant about the new information in the IAA submission that his father was killed by the army. He responded that it was not true. Information in the review material indicates that the applicant's father travelled with him to Australia in 2013 and that he continues to reside here. Given this, and the applicant's response in the IAA interview when asked about it, I am not satisfied the claim about his father is credible information. It's inclusion in the IAA submission appears to be an error. I am not satisfied that there are exceptional circumstances to justify considering it.

Applicant's claims for protection

13. The applicant's claims can be summarised as follows:

² DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; Sri Lanka, "Excerpt of Citizenship Act", 28 March 2017, CISED50AD3702

³ DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830

- The applicant is Tamil male born in Tamil Nadu, India, to Sri Lankan parents;
- He has never lived in Sri Lanka;
- Growing up in India, he and his family faced discrimination on account of their caste and their profile as Sri Lankan refugees;
- If returned to India, the applicant fears harm due to his caste, his lack of citizenship, and his profile as a refugee of Sri Lankan origin.

Refugee assessment

14. 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

15. 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.

Identity / Receiving country

16. Since his arrival in Australia, the applicant has consistently claimed to be a Tamil born in India to Sri Lankan refugee parents. Included in the review material is a copy of the applicant’s family’s ‘Sri Lanka Refugees Identity Card’. The applicant has also consistently claimed that he has never been to Sri Lanka.

17. In the IAA interview, the applicant confirmed the following information consistent with information previously provided throughout the SHEV application process:

- a. He was born in Tamil Nadu;
- b. He has never been to Sri Lanka;
- c. He has never been issued an identity document for Sri Lanka;

- d. In India, his parents were given a small slip of paper as evidence of his birth which was lost during the journey to Australia;
 - e. His birth was never registered with the Sri Lankan authorities when he resided in India.
18. The applicant also claimed in the IAA interview that he had never taken any steps to become a Sri Lankan citizen. He indicated the reason for this was because of the stories his parents had told him about Sri Lanka.
19. Country information from DFAT states that while children born to Sri Lankan Tamil refugees in Tamil Nadu are eligible for Sri Lankan citizenship, to obtain the citizenship their birth must be registered with the Sri Lankan Deputy High Commission in Chennai and a citizenship application form submitted. DFAT also states that persons not registered for Sri Lankan citizenship run the risk of statelessness.⁴ Similarly, Sri Lanka's Citizenship Act indicates that although Sri Lanka allows for the acquisition of citizenship by eligible children born overseas to a Sri Lankan citizen parent, this is only after registration of the birth, in prescribed manner, at a Sri Lankan consular office in the country of birth or at the Office of the Minister in Sri Lanka.⁵
20. On the evidence before me, I accept the applicant's identity is as claimed. I also accept he has not taken the necessary steps to obtain Sri Lankan citizenship and that he is not at this time a citizen of Sri Lanka. Drawing on *VSAB v MIMIA* and in particular the more recent Federal Court judgment *FER17 v MICMA*⁶, case law indicates that the applicant is not recognised as a citizen, or a national, of Sri Lanka. Having considered all of the circumstances, I am not satisfied that, at the present time, the applicant is recognised by the Sri Lankan government as a national of that country. Country information from DFAT states that Sri Lankan Tamils from Tamil Nadu do not have a pathway or entitlement to Indian citizenship.⁷
21. Having considered the entirety of the evidence before me, I am not satisfied that, at the present time, the applicant is a national of Sri Lanka or any other country. I find he is stateless. I accept the applicant was born in Tamil Nadu, India, resided there as a refugee until he departed for Australia in 2013, and has never resided in Sri Lanka. In these circumstances, I agree with the migration agent's IAA submission and find that India is his country of former habitual residence and therefore also his receiving country. It is irrelevant to my consideration whether the applicant has a right to return to India.⁸
22. The applicant previously resided in Tamil Nadu since birth and has not indicated that he has any connection to any other part of India. If returned to India, I find this is the area to which he would very likely return.

Claims against Sri Lanka

23. As noted above, throughout the SHEV application process, the applicant stated that he feared returning to Sri Lanka. In summary, he claimed that he feared being imputed with links or familial links to the Liberation Tigers of Tamil Eelam and being harmed by the Sri Lankan government, Sinhalese, or other Tamils, on that basis. He also feared being harmed in

⁴ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

⁵ Sri Lanka, "Excerpt of Citizenship Act", 28 March 2017, CISED50AD3702

⁶ See *VSAB v MIMIA* [2006] FCA 239; *FER17 v MICMA* [2019] FCAFC 106

⁷ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report Sri Lanka", 24 January 2017, CISED50AD105

⁸ The definition of 'receiving country' in s.5(1) of the Act states that, where an applicant has no country of nationality, the receiving country is his or her country of former habitual residence 'regardless of whether it would be possible to return the non-citizen to the country'.

connection with his caste. However, having had regard to the applicant's status, the issues as to why he cannot return to Sri Lanka do not arise in this case. I am not satisfied that the applicant has the right to enter or reside in Sri Lanka and I have found his receiving country to be India. Further, there is no claim or evidence before me to indicate that the claimed events in Sri Lanka, or the reasons why he fears returning there, have any bearing on whether the applicant faces a real chance of serious harm or a real risk of significant harm upon return to India.

India

24. In his written statement dated 10 April 2016 (SHEV statement), the applicant stated that his father is from the Sakkiliyar caste and that he is also considered from this caste. He claimed that he was treated very badly in India because of his caste.
25. In his interview with the delegate on 29 March 2017 (SHEV interview), the applicant claimed that he was treated differently because of his low caste and due to his status as a Sri Lankan refugee. For example, he was made to sit on the floor at school and his family had to live in a house [number] kilometres from the main village.
26. In the IAA interview, the applicant again mentioned the difficulty he faced at school due to his caste. He said that due to their low caste and refugee status the family was unable to register to vote or obtain a ration card. I advised the applicant that, given his responses at interview and the country information, I might find that his receiving country is India and would therefore assess whether he could return there. He said he could not return to India due to his caste, due to his lack of citizenship, and because of his status as a refugee of Sri Lankan origin. He said he feared harm from civilians and that because there had been a lot of changes in India he did not know what the government would do to him.
27. When I initially asked the applicant in the IAA interview which caste he belonged to he said he was unsure. He only knew it was a "very low" caste. He also said he was unsure if he belonged to the same caste as his mother. He said he thought that his father belonged to a high caste, which differed from his evidence in his SHEV statement that he belonged to the same (low) caste as his father. He said that either way one parent belonged to a high caste and the other to a low caste and that was one of the problems he faced. When asked why that was a problem, the applicant said there was a lot of caste problems in India. When asked to clarify, he stated that he is from a different generation and indicated that if he chose to marry caste could be an issue.
28. When asked how he would be identified in India as a member of a low caste, the applicant said that the people where he previously resided were all of a low caste. He said that if he went to another place he would be asked for his caste, his name, and everything, and would have to provide those details. When asked what his response would be if he was asked as to which caste he belonged to, the applicant said "I think they said it was Sakkiliyar or something like caste". When asked how frequently he would be asked about his caste in India, he stated that India had a large population and that cultures are strictly adhered to. He mentioned in particular that caste was a measure of how one was treated when they attended temple services. When asked if caste impacted him outside of the temple environment, he indicated caste issues were frequent in other aspects of life. When asked to give an example, he said his father was a refugee and he would get honked at because of that.
29. I referred the applicant to DFAT's October 2018 report about India that assesses that people considered to be of a low caste can face a moderate level of official and societal discrimination, and asked whether he or his family suffered any other instances of discrimination when they

lived in India. In response, he referred to a previous incident in India where people attempted to enter the house and “do something” to his younger sister. Although he had made no mention of that incident previously in his SHEV statement or at the SHEV interview, I note the delegate appeared to refer to this incident (i.e. that his sister faced an attempted sexual assault) in her decision on the basis of the claims and evidence of other family members she was also considering as part of the combined application. The applicant also said that his family attracted negative police attention, for example, if there was a robbery in the area, the police would come due to their caste and refugee status.

30. According to DFAT, caste is predominately a Hindu concept but has become a cultural phenomenon that exists within other religions and across India’s many social, linguistic and religious communities. India is officially a secular and multi-ethnic country, and inter-faith and inter-caste marriages are legal; however, DFAT assesses that treatment of people in inter-religious or inter-caste marriages varies according to the families involved. In some cases the families of intending marriage partners may perpetrate violence against them. DFAT make no specific reference to the treatment of those from the Sakkiliyar caste but assesses that those considered to be of a low caste continue to face a moderate level of official and societal discrimination in India, including social segregation, exclusion from temples and educational institutions, difficulties in finding employment, and sexual assault in the case of women and girls.⁹
31. I find the applicant’s claim that on return to India he would be identified by the general population as belonging to a certain caste difficult to reconcile with his evidence in the IAA interview that indicated he was unsure himself as to what caste he or his parents belonged. I also note the country information from DFAT indicates that caste is primarily a Hindu concept and those of a low caste can be excluded from temples as indicated by the applicant in the IAA interview. However, the applicant’s evidence in the SHEV interview was that in India he followed Jesus and since arriving in Australia he has converted to Christianity through the sacrament of baptism. In any case, I am prepared to accept the applicant’s broadly consistent evidence that he is from a low caste and that he may be identified as such if returned to India. Having had regard to the country information from DFAT, I also accept his evidence in respect of his experiences in India, including in relation to an attempted sexual assault on his sister prior to the family’s departure from India in 2013.
32. I acknowledge the applicant’s evidence in the IAA interview that if he chose to marry caste could be an issue. As noted above, the applicant has also converted his religion and DFAT assess that while not illegal inter-religious or inter-caste marriages can be problematic depending on the specific circumstances. However, in the applicant’s case, there is no claim or evidence before me to indicate that he is intending to marry, either of the same or different religion/caste, in the foreseeable future. I find any claim that he would face any harm in connection with a future marriage speculative.
33. I also accept the applicant’s evidence in the IAA interview about the treatment of those from a lower caste in connection with attending temple. However, as noted above, the applicant has converted from Hinduism since his arrival in Australia and as such I consider the chance that he would face harm on this basis remote. The applicant has not claimed to fear any harm in India as a Christian, or as a religious convert, and I am not satisfied he would face a real chance of harm on this basis. DFAT report that Christianity has a strong presence in Tamil Nadu and assesses that most Christians in India live day-to-day without societal discrimination or violence. Christians engaged in proselytising, or perceived to be proselytising, particularly to

⁹ DFAT, “DFAT Country Information Report India”, 17 October 2018, CIS7B839419830

Hindus, face a moderate risk of official and societal discrimination, and a moderate risk of societal violence.¹⁰ The applicant has not claimed that he would seek to engage in proselytising if returned to India. There is no indication from DFAT that persons face harm in India solely for converting to Christianity on their own accord.

34. Prior to his arrival in Australia in 2013 the applicant was stateless and I accept that on return to India this would continue to be the case. I also accept he would continue to be identified as a refugee of Sri Lankan origin. While I accept the applicant faced discrimination at school in India as claimed, I am not satisfied he was denied an education due to his caste or for any other reason. The applicant's evidence in the IAA interview is that despite only attending school to year 8 in India he started school in Australia in year 11 and obtained his High School Certificate. DFAT report that approximately 95,000 Sri Lankan Tamils live as refugees in Tamil Nadu, with about 35,000 living outside of government run camps. DFAT also report that refugees living outside the camps are generally better off than those in the camps, often run successful businesses, and are better integrated into the local economy.¹¹ While the applicant has not claimed that he would be unable to find employment if returned to Tamil Nadu, I acknowledge DFAT's assessment that persons considered low caste can face difficulties in finding employment. I also considered that such difficulties could be exacerbated by being a non-national and/or of Sri Lankan origin. However, I note the applicant's evidence in the IAA interview that both his father and brother were employed in India, and since being in Australia the applicant has undertaken further education and learned new employment skills through his work in [an occupation]. I consider the applicant has some skills that will be conducive to him finding employment in India and, based on the information before me, I am satisfied that the applicant would have access to basic services and would not be denied employment or services to the extent that would threaten his capacity to subsist. While I accept that there is a chance the applicant may face discrimination, other than employment, on the basis of his caste and being regarded as a stateless Sri Lankan refugee, whilst regrettable, nevertheless, on the information before me I am not satisfied that it amounts to or would result in a real chance of serious harm to the applicant. And nor am I satisfied, on any information before me, that any such stigma or discrimination (employment or otherwise) would rise to a level of serious harm.
35. Overall, on the totality of the evidence before me, including the independent information and the applicant's particular profile and circumstances, I am not satisfied he faces a real chance of harm in India for any reason, including in relation to his caste, his lack of citizenship or statelessness, previous events in India, due to his status as a refugee of Sri Lankan origin, or any combination of these factors now, or in the reasonably foreseeable future.
36. The applicant does not have a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

37. 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

38. 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

¹⁰ DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830

¹¹ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244; DFAT, "DFAT Country Information Report India", 17 October 2018, CIS7B839419830

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

39. 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.

40. I accept the applicant may face some level of discrimination in India. However, having considered his own circumstances, and evidence discussed above, I am not satisfied that the treatment he may face would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. I also do not accept that such discrimination would involve pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering or that would cause extreme humiliation, even when considered in a cumulative sense.

41. I have otherwise found that the applicant does not face a real chance of any harm in India for the reasons claimed. Based on the same information, and for the reasons set out above, I find he does not have a real risk of suffering significant harm in India.

42. After having regard to the applicant's circumstances, I find that he does not face a real risk of suffering significant harm.

Complementary protection: conclusion

43. 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.