



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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SRI LANKA  
IAA reference: IAA17/01919

Date and time of decision: 18 July 2017 13:26:00  
Glen Cranwell, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) is of Tamil ethnicity from [Town 1] in the North Eastern Province of Sri Lanka. [In] March 2016, the lodged an application for a safe haven enterprise visa (SHEV).
2. [In] February 2017, a delegate of the Minister for Immigration refused to grant the applicant a visa.

### Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicant provided no new information and I have not obtained any new information.

### Applicant's claims for protection

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5. The applicant's claims are contained in the information referred to the IAA.
6. The applicant made detailed claims in a statutory declaration attached to his SHEV application, which can be summarised as follows:
  - In around 1996 or 1997, the Sri Lankan army came to his house, covered his eyes and tied his arms. He was taken in a van with other Tamil boys. He was asked to provide details about people who help the LTTE. The applicant stated that he did not know. His mother arranged for his release.
  - On Independence Day in 2004, the applicant was hit in the [body part] by shrapnel from a bomb.
  - Later in 2004, the LTTE came to the applicant's house and asked him to join. The applicant stated that he was not interested in joining or assisting the LTTE. Two weeks later, the applicant was asked to provide the LTTE with petrol, diesel and batteries. He felt he had no option but to assist.
  - In April 2004, the LTTE made the applicant assist with decorations for the Pongu Tamil celebration. Six months later the Sri Lankan army came around looking for all young Tamil men who attended the Pongu Tamil celebration. This was after a LTTE member shot a member of the Sri Lankan army.
  - In January 2005, the Sri Lankan army approached the applicant and accused him of giving goods to the LTTE. A few Tamil elders explained to the army that the applicant had nothing to do with the LTTE, and he was let go.
  - The applicant married his cousin [in] February 2005. Three days later he travelled to [Country 1].
  - In around 2005, his wife's [Relative A] was forcibly recruited into the LTTE. He was killed [in] April 2009. After [Relative A]'s death, the Sri Lankan army came to the applicant's home looking for him. He thought the army suspected him of LTTE involvement, and fled to [Country 2] before returning to Sri Lanka in December 2009.

- When the applicant returned to Sri Lanka, he was questioned by the CID about the location of his wife's [relatives]. The CID came to the applicant's house around [number] times. He was told that if he did not hand his wife's [relatives] over, he would be taken away. The applicant's wife's [relatives] did not wish to return to Sri Lanka, and the applicant decided to leave Sri Lanka.
  - The applicant claims that Tamils are discriminated against. A friend of his was [injured] by a Sinhalese man. The case was still before the courts, but the applicant did not expect that justice would be done.
  - The applicant fears torture from the CID because he did not hand over his [wife's relatives]. He also fears punishment for leaving Sri Lanka illegally.
7. In post interview submissions, the applicant's migration agent claimed that the applicant was passionate about the right of Tamil self-determination. He had assisted his father's [relatives]'s son, who was a politician advocated for Tamil rights. It was also stated that the applicant was an active Facebook user who posts photographs glorifying fallen LTTE cadres. Untranslated posts from an account in the name of [Mr B] were attached to the submission.
8. Relevantly, at the SHEV interview, the applicant stated that his wife had [number of relatives]. One was killed in 2009, and [number] returned from [Country 2] in 2013. The [returned relatives] live in [Town 1] and work as fishermen. The applicant also stated that he served cake at a celebration of the LTTE leader's birthday celebrations in 2004. He also stated that there were restrictions on Tamil fishing.
9. Relevantly, at the entry interview, the applicant stated that the CID was knocking on his door at night time as recently as [number] weeks before he left Sri Lanka. They were looking for his [relative] who was in the LTTE, they thought he was alive but he had died. He also stated that his [relative] was [a local office bearer] of [a "Tamil national political group"].

## **Refugee assessment**

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10. 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**

11. 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.

*Imputed association with the LTTE*

12. I have considered the risk of harm to the applicant if he returns to Sri Lanka on the basis that the authorities would impute him with a pro-LTTE or anti-Sri Lankan government political opinion.
13. I accept that:
- the applicant was detained and released in 1996 or 1997;
  - the applicant was coerced into providing assistance to the LTTE in 2004;
  - the applicant assisted with decorations in the Pongu Tamil celebration in 2004;
  - the applicant served cake at the LTTE leader's birthday celebration in 2004;
  - the applicant was accused by the army of assisting the LTTE in 2005 and released.
14. However, I consider these incidents to be remote in time and minor, and I am not satisfied that they would be sufficient to cause the applicant to be a person of concern to the Sri Lankan authorities now or in the reasonably foreseeable future.
15. I accept that the applicant's [body part] was injured in a bomb blast in 2004. However, I do not accept that this act of violence was related to the applicant.
16. I do not accept that the applicant was questioned by CID after his return from [Country 2] in December 2009. The applicant provided inconsistent versions of this claim. At his entry interview, he stated that the CID was looking for his wife's [Relative A] who had died. In his statutory declaration, the applicant stated that the CID was looking for [number] of his wife's [relatives] who had been in [Country 2]. I consider this inconsistency in who the CID was looking for to be significant. In these circumstances, I consider that the applicant has fabricated his claims of CID questioning so as to create a basis for his protection claims. In any event, I note that the applicant's wife's surviving [relatives] have since (in 2013) returned to Sri Lanka and have been able to work as fishermen without adverse attention from the authorities.
17. I do not accept that the applicant posts Facebook photographs glorifying fallen LTTE cadres. The Facebook posts provided by the applicant were not translated, and in those circumstances I am unable to place any weight on descriptions of the photographs contained in them. There is nothing on the face of the photographs to indicate that the persons were fallen LTTE cadres. In any event, I am not satisfied on the basis of the evidence provided that the Facebook account in the name of [Mr B] is operated by the applicant. The account is in a different name to the applicant, and I am unable to exclude the possibility that the posts were taken from someone else's account.
18. The DFAT country reports indicate that the overall situation for Tamils in Sri Lanka has improved since the end of the civil conflict in 2009. There have been improvements in the security situation in the North and the East since the end of the conflict, however military and security forces continue to have presences in these regions. DFAT advises that the monitoring and harassment of Tamils in these areas has decreased significantly under the current

government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments.

19. There is no evidence of official laws or policies that discriminate based on ethnicity or language, including in the context of access to education, employment and housing. Both DFAT and the UNHCR assess that Tamil civilians who live in former LTTE areas in the North and East, including Tamils that provided low level support to the LTTE, may be monitored by Sri Lankan authorities, but are at a low risk of being detained or prosecuted.
20. I am not satisfied that the applicant's Tamil ethnicity, the minor incidents relating to the LTTE which occurred up until 2005, acts of violence unrelated to the applicant and/or his residence in a former LTTE controlled area would be sufficient to cause the applicant to be a person of concern to the Sri Lankan authorities. I reach that conclusion having regard to the information in the DFAT reports and UNHCR Guidelines in the referred material regarding the Sri Lankan authorities not imputing every Tamil with a pro-LTTE political opinion and that the Sri Lankan authorities have sophisticated intelligence gathering techniques. Supporting my finding is that there is no credible claim of any serious harm to the applicant for reason of his being a Tamil while he lived in Sri Lanka.
21. For the above reasons, I am not satisfied the applicant faces a real chance of serious harm from the Sri Lankan authorities due to an imputed pro-LTTE or anti-Sri Lankan government political opinion.

#### *Discrimination*

22. I have considered the risk of harm to the applicant if he returns to Sri Lanka on the basis of discrimination against him as a Tamil.
23. The UNHCR guidelines in the referred material no longer refer to a presumption of eligibility for protection simply on the grounds that they are Tamils. As noted above, the DFAT country report states that there is no evidence of official laws or policies that discriminate based on ethnicity or language, including in the context of access to education, employment and housing.
24. I note that the applicant has raised a claim that his friend was [injured] by a Sinhalese man, and that the case was before the courts. Although the applicant did not expect justice to be done in his statutory declaration, I consider this to be no more than speculation on the applicant's part. In these circumstances, I do not accept that the applicant's friend was discriminated against by the Sri Lankan legal system.
25. I also note the country information provided in the migration agent's submissions. However, this information pre-dates the 2017 DFAT report, and I prefer the more recent DFAT report over that information.
26. The applicant's SHEV application lists employment as a fisherman, most recently from 2009 until his departure from Sri Lanka in 2012. Based on the applicant's past history and the country information before me, I am not satisfied that the applicant would be subjected to discrimination or economic hardship which would threaten his capacity to subsist or other treatment that may be regarded as serious harm for the purposes of s.5J(5).

### *Pro-Tamil political opinion*

27. I accept that the applicant has a [relative] with a pro-Tamil political opinion. At the entry interview he stated that this [relative] was [a local office bearer] of [a "Tamil national political group"]. I consider that the applicant was referring to the [specified group]. I am also prepared to accept that the applicant has assisted his [relative].
28. I accept that the applicant has a genuine pro-Tamil political opinion and has been low-level supporter of the TNA. However, I do not accept that he would face a real chance of harm for expressing that opinion. I note the country information in the 2017 DFAT report regarding the improved political environment in Sri Lanka since the change of government in January 2015, that the TNA supported President Siresena's election, and that the TNA is the official opposition party. I am not satisfied the applicant will face a real chance or serious harm, from the Sri Lankan authorities or opponents of the TNA due to his having a pro-TNA political opinion, now or in the reasonably foreseeable future.

### *Fisherman*

29. I accept that the applicant worked as a fisherman at [Town 1], and that he would wish to continue work as a fisherman if he returns to Sri Lanka.
30. The applicant claimed that there were restrictions on Tamil fishing. The DFAT country report indicates that the military restricts access to some of the more abundant fishing areas. I do not accept that the applicant will be unable to find work as a fisherman if he returns to Sri Lanka, albeit the work he finds may be not as economically beneficial as fishing at the more abundant fishing areas. I do not consider the harm arising from any such discrimination would be so serious as to be serious harm when having regard to the non-exclusive instances of serious harm s.5J(5).
31. Given my findings relating to the absence of past harm to the applicant as a fisherman, I consider there to be only a remote and therefore not a real chance the applicant will face serious harm now or in the reasonably foreseeable future because he is a Tamil fisherman if he returns to Sri Lanka.

### *Illegal departure*

32. The applicant claims he fears harm if he returns to Sri Lanka because he departed Sri Lanka illegally.
33. I accept the applicant departed Sri Lanka without a passport. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA").
34. The DFAT report in the referred material indicate that returnees will be processed by the Department of Immigration and Emigration, (DOIE), the State Intelligence Service (SIS) and the CID based at the airport. Immigration officers check travel documents and identity information against the immigration database. SIS checks the returnee against intelligence databases. The CID verifies a person's identity to determine whether the person has any outstanding criminal matters. I am satisfied on the information before me that the applicant has no identification concerns, or criminal or security records that would raise the concern of these authorities.
35. If the authorities suspect the applicant has departed Sri Lanka illegally, he may be charged under the IAEA. As part of this process, most returnees will have their fingerprints taken and be photographed. They will then be transported by police to the closest Magistrates Court at

the first available opportunity after investigations are completed. The Court will then make a determination as to the next steps or each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. In the event that a magistrate is not available before this time, due to weekends or public holidays for example, those charged may be held at a nearby prison.

36. Penalties can include up to five years imprisonment and fines of up to SLR200,000. DFAT advises that in practice, penalties are applied on a discretionary basis and usually in the form of a fine. Advice from Sri Lanka's Attorney General's Department to DFAT is that no returnee who left Sri Lanka unlawfully as a simple passenger has been given a custodial sentence for their breach of IAEA. Fines are common, but the amounts vary depending on the circumstances of the case and are typically on the lower end.
37. On return to Sri Lanka, I find the applicant would likely be charged and fined under the IAEA and then released. In the event that the applicant elected to plead not guilty to the offence under the IAEA, he would either be granted bail on personal surety or a family member. There is no suggestion the applicant was anything other than an ordinary illegal departee from Sri Lanka. In that context, I find that he would not face any chance of imprisonment, but it is likely that he will be fined. On the evidence before me, I find the imposition of any fine, surety or guarantee would not of itself constitute serious harm. I have considered the possibility of a custodial sentence, but there is no country information before me that indicates that custodial sentences are being levelled against low profile illegal departees. In the context of a significant number of Sri Lankan nationals being returned to Sri Lanka, and the absence of any profile that would elevate the penalty the applicant would face, I find there is not a real chance that the applicant would face such a period of detention or imprisonment.
38. I note the country information indicates that while custodial sentences are not levelled against returnees, a person charged under the IAEA may, in some instances, be detained for several days pending an opportunity to appear before a magistrate. I note the Australian courts<sup>1</sup> have confirmed that whether a loss of liberty amounts to serious harm involves a qualitative judgment, involving the assessment of matters of fact and degree – including an evaluation of the nature and gravity of that loss of liberty. I have considered whether a detention of several days would constitute serious harm. While I accept that conditions in Sri Lankan prisons are poor due to a lack of resources, overcrowding and poor sanitation, I find that any questioning and detention the applicant may experience would be brief and would not constitute serious harm as inexhaustibly defined in the Act.
39. I am also satisfied that the provisions and penalties of the IAEA are laws of general application that apply to all Sri Lankans equally. The law is not discriminatory on its terms, nor is there country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced. Considered singularly or cumulatively, I am also not satisfied that any processes or penalties that the applicant may face as person who left Sri Lanka illegally and returning to Sri Lanka would amount to serious harm. Accordingly, I am satisfied that any process or penalty the applicant may face on return to Sri Lanka because of his illegal departure would not constitute persecution for the purpose of the Act.

#### *Failed asylum seeker*

40. I have considered the risk of harm to the applicant if he returns to Sri Lanka as a failed asylum seeker.

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<sup>1</sup> *MIBP v WZAPN, WZARV v MIBP* [2015] HCA 22, see also, *SZTEQ v MIBP* [2015] FCAFC 39.

41. I accept that if he returned to Sri Lanka, the applicant would do so as a failed asylum seeker. However, having regard to the country information in the referred material and in particular in the DFAT reports, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities for this reason. In particular, I note the information in the DFAT reports that thousands of Tamils have been returned to Sri Lanka since the end of the Sri Lankan civil war, including from Australia, although there have been reported instances of returnees being harmed, the information before me suggests those were people with substantial links to the LTTE or outstanding warrants. The information before me does not suggest the applicant is a person with that kind of profile.
42. I also note the country information provided in the migration agent's submissions. However, this information pre-dates the 2017 DFAT report, and I prefer the more recent DFAT report over that information.
43. For these reasons I am not satisfied the applicant faces a real chance of serious harm due to being a failed asylum seeker, now or in the reasonably foreseeable future, if he returns to Sri Lanka.
44. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution for reason or combination of reasons of his race, religion, nationality, membership of a particular social group and/or political opinion now or in the reasonably foreseeable future, if he returns to Sri Lanka.

#### **Refugee: conclusion**

45. 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**

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46. 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**

47. 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.

### *Illegal departure*

48. I found above that any questioning process, brief detention, fine or penalty the applicant would face on return to Sri Lanka due to his illegal departure would not be persecution. I found too the provisions and penalties of the IAEA are laws of general application that are not discriminatory in their terms or applied in a discriminatory way or selectively enforced. I have had regard to whether any harm the applicant may face arising for his committing an offence under the IAEA amounts to significant harm.
49. I am not satisfied that any brief detention, questioning, fine or other penalty would amount to significant harm as defined under the Act. I accept that the applicant may be remanded in custody for a short period either at the airport or at a prison, while waiting to be brought before a magistrate. I have found the applicant has no specific profile that would result in a longer detention, custodial sentence or additional interrogation. DFAT advises that the risk of torture or mistreatment for people suspected of an offence under the IAEA is low. I find that the likelihood that the applicant will be detained in prison is remote, but if he does I accept the applicant may experience poor prison conditions during his detention. Critically, I note that country information indicates the poor conditions are due to overcrowding, poor sanitation and lack of resources. I find there is no real risk that the applicant will be arbitrarily deprived of his life or be tortured. While the conditions are poor, I find there is no intention to inflict pain or suffering or extreme humiliation. In these circumstances, the poor prison conditions to which he applicant may be subject do not of themselves constitute significant harm as defined under the Act. I am not satisfied that, individually or cumulatively, any processes or penalties the applicant may encounter under the IAEA, would constitute significant harm as exhaustively defined under ss.36(2A) and 5 of the Act.

### *Discrimination*

50. For the reasons set out above, I am not satisfied that there is a level of societal discrimination against Tamils in Sri Lanka such that it would constitute significant harm as exhaustively defined in under s.36(2A) and 5 of the Act. Similarly, I am not satisfied that the level of discrimination against fishermen in Sri Lanka is such that it would constitute significant harm as defined.

### *Balance of claims*

51. In relation to the balance of the applicant's claims, I found above the applicant singularly or cumulatively does not have a real risk of serious harm on the basis of his being a Tamil, because he would be someone with an imputed pro-LTTE or ant-Sri Lankan government political opinion, because he has a pro-TNA political opinion or because he will return to Sri Lanka as a failed asylum seeker. For the same reasons, and applying the authority in *MIAC v SZQRB*<sup>2</sup> I am not satisfied the applicant will face a real risk of significant harm if he is removed to Sri Lanka

### **Complementary protection: conclusion**

52. 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).

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<sup>2</sup> (2013) 210 FCR 505.

## **Decision**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

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***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.

#### **91W Evidence of identity and bogus documents**

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
- (a) the applicant has been given a request under subsection (1); and
  - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
  - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
  - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
    - (i) refuses or fails to comply with the request; or
    - (ii) produces a bogus document in response to the request.
- (3) Subsection (2) does not apply if the Minister is satisfied that the applicant:
- (a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and
  - (b) either:
    - (i) produces documentary evidence of his or her identity, nationality or citizenship; or

- (ii) has taken reasonable steps to produce such evidence.
- (4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

...

**91WA Providing bogus documents or destroying identity documents**

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
  - (b) the Minister is satisfied that the applicant:
    - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  - (b) either:
    - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

...