



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA17/02913

Date and time of decision: 24 August 2017 10:14:00
Michelle Grau, 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 applicant is a Tamil male from [Northern Province], Sri Lanka. He applied for a Safe Haven Enterprise visa [in] November 2016.
2. [In] June 2017, the delegate refused the application because he was not satisfied the applicant met the definition of refugee or that there was a real risk the applicant will suffer significant harm upon return.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. No further information has been obtained or received.

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He is a young Tamil single male from [Northern Province], who lived in a high security zone.
 - In 2008 his problems began when he was stopped a number of times by army, questioned and harassed and beaten, slapped on his way home from the farm at least 15 – 20 times. His [Sibling 1] avoided it because [he/she] married and moved away, until his return in 2006.
 - Five to six times he was ordered to report to the army camp at night where he was questioned, beaten and slapped. At the beginning of 2009 he was detained for [number of] hours and beaten with a wooden baton and attacked on [area of body]. He lived in continual fear and once his [Sibling 2] had to go the army base to beg for his release.
 - [In] April 2012 he attended a [celebration] and was harassed and beaten after being taken to an army camp by the army for over [number] hours as he and his friends came from a high security zone area.
 - The harassment got worse after that and became almost daily. He became ill and fearful under the harassment and by September 2012 he was very weak and unable to work on the farm.
 - In September 2012 his family told him he was leaving Sri Lanka. Near the end of October he left by boat.
 - He cannot return because he will be detained as an illegal departee and his family cannot afford to bail him so he will be forced to remain in detention where he will be beaten and interrogated.
 - He cannot return to home village as the army patrols the area and regularly calls at his house where they harass his father and siblings and interrogate them about him. He is on army records as a person who departed illegally.

Factual findings

6. I accept the applicant is a Tamil male from the North. I accept that he faced harassment and beatings during the war as this was not uncommon in the context of the civil war.
7. However, I do not accept that the applicant faced harassment and beatings after the war or in April 2012 .
8. According to his application the applicant continued to live and work in the same area doing [various jobs] until October 2012. He was also doing farming work until October 2012. If the applicant had been subjected to weekly or daily physical harassment, I consider the applicant would have moved from the area.
9. Secondly, if he were suspected LTTE or of interest to authorities he would have been detained and sent to a rehabilitation camp after the war, which he was not. Further, the fact applicant was allowed to continue live in or near a high security zone during the war and afterwards suggests he was not of interest to the authorities. If he was of concern it is doubtful they would have allowed him to live in such a secure area.
10. Thirdly, the applicant's description of the harassment was not consistent and was vague and lacked details. For instance, in his arrival interview he claimed he was detained for [number] hours in October 2012 and was beaten with [weapons]. However, he made no mention of this in his statement or at his protection visa interview.
11. Further, when asked to describe the harassment and provide details, the applicant provided vague, repetitive and general responses. For instance, he said he was subjected to harm without reason. When asked for more details, he said they were taken and assaulted for no reason. When asked for more information, the applicant repeated when they were on the farm they took him, sometimes weekly, sometimes every day and assaulted us. The applicant said he was never accused of anything and he did not know why he was hit or assaulted.
12. The applicant's descriptions of the events related to events during the war such as checking the ID of residents in the area, questioning or hitting him when waiting outside the library, or when a student or when young.
13. The applicant referred to having [specific body parts assaulted] in a 2009 assault and use of bad language, hitting and kicking. While I accept that he was assaulted and harassed during the war and he had [the specified body parts assaulted] in 2009, I do not accept he was detained for [number of] hours or any lengthy period as the applicant's description was vague and lacked details. The applicant could not otherwise describe what he was asked or why he was being assaulted on that occasion or in any of the other claimed assaults since then.
14. His description of the [2012] detention at the protection interview was also vague and lacked details and not consistent with his statement. For instance, he said there was a fight between two groups and they stamped on his foot with a boot. He did not mention he was taken to a military base, slapped and pushed against the wall and kept for [number] hours. Further, he made no mention of this in his arrival interview.
15. Having listened to the applicant's interview, I consider the applicant has embellished his account of harassment and assault. I accept that he has been subject to some harassment during the war when travelling to the farm work, given he was a Tamil in the North. His descriptions about having to show ID, report and being harassed by the army, and having

[specific body parts assaulted] as a young person in the area were consistent. However, his descriptions otherwise were vague, general and inconsistent. I do not accept that he was ordered to report to the army camp or that he was assaulted or harassed daily or weekly since the end of the war. I do not accept he was singled out or targeted or accused of being LTTE. I do not accept that he was detained for [number] hours in 2009 or that he was taken to military base in April 2012 or that he was harassed daily or weekly since the end of the war. I do not accept that the army continue to harass his family or are looking for him.

16. I do not accept he was unwell and not able to do farming work as he indicated on his application that he was involved I farming and other work until October 2012. Further, there is no medical evidence that he was unwell.

17. It was evident also the applicant was able to continue to live and work in the area for all his life. He was not detained after the war and sent to a rehabilitation camp. I do not accept the applicant has an anti-government, LTTE or at risk profile.

Refugee assessment

18. 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

19. 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.

20. As discussed above, while I accept the applicant is a young Tamil male from the North who departed Sri Lanka illegally and was harassed during the war, I do not accept this continued after the war or in 2012 as claimed.

21. I have not accepted the applicant was detained and beaten in April 2012 or that he was subject to daily harassment after the war. I have not accepted that the army harass his family or are looking for him.

22. The applicant was not rounded up towards the end of the war or arrested or detained and sent to rehabilitation camps. If the applicant was suspected of LTTE or his family connected to LTTE, country information before the delegate indicates that he would have been rounded up and detained in rehabilitation camps. The fact that neither he nor anyone in his family was rounded up indicates they were not LTTE suspects.
23. I accept that he lived in a high security area and was questioned, beaten and harassed by authorities during the war. However, I consider these events remote in time. In particular I note this occurred in the context of the civil war that ended in 2009 and harassment was common by the army, particularly in or near LTTE areas. Further, the fact that the applicant was able to continue to live and work in the same area and in proximity to the high security area further reinforces that he was not of ongoing interest. If he were of interest, country information indicates that he would not have been released but would have been detained. I do not consider these events mean the applicant is now imputed with LTTE or anti-government sentiment or connections. Further, if he were of interest, he would have been rounded up at the end of the war and sent to a rehabilitation camp. I do not accept the applicant has an LTTE or anti-government profile.
24. I do not accept the applicant has had any LTTE involvement or links or associations or that CID, army or authorities think the applicant has LTTE connections. I do not accept the applicant will be perceived to have any imputed or actual LTTE associations upon return.
25. I am mindful of the information that people with significant links to the LTTE may still face a real chance of harm, if returned to Sri Lanka. However, I do not accept that the applicant has such LTTE associations or links. I do not accept the applicant or his family have been subject to monitoring or are of interest to authorities. I do not accept the applicant has any antigovernment or pro LTTE profile as I have not accepted his claims regarding such a profile. I do not accept he is of adverse interest to authorities or CID, or will be in the future. I do not accept that he has any criminal charges, warrants for his arrest, is suspected of being anti-government or involved in or interested in Tamil separatism or reviving the conflict or that he had any connection to or association with LTTE.
26. Based on current information contained in the review material it is evident the categories of persons at real risk were those who have had a significant role in post-conflict Tamil separatism, journalists, or human rights activists who criticised the government human rights record and those whose names appear on the "stop list" at the airport. I do not accept the applicant fits any of these profiles.
27. I do not accept the applicant has been involved or will be in the future in any post conflict Tamil separatism, human rights activism or criticism of the government. Further, as discussed above I do not accept the applicant is of interest to CID or the army, police or authorities or that anyone has searched for him or that his family was questioned about him or monitored. Having regard to his circumstances I do not accept the applicant faces a real chance of serious harm from CID, the army, police or authorities.
28. I accept that the applicant is a young Tamil male from the Northern province. I accept at least until the end of the civil war in 2009 that Sri Lankan citizens of Tamil ethnicity suffered disproportionately at the hands of the Sri Lankan authorities, particularly in North and East areas. I accept continuing detentions and torture against particular Tamils, who may be suspected LTTE or criminals, even since the end of the war.

29. However, the security and humanitarian situation in Sri Lanka has greatly improved since the applicant's departure from Sri Lanka. The DFAT reports in the review material 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. UNHCR 2012 eligibility guidelines also confirmed due to improved human rights and security situation there was no longer a need for group based protection mechanisms or for the presumption of eligibility for Sri Lankans of Tamil ethnicity.
30. DFAT assesses that the highest risk of monitoring, arrest, detention or prosecution include the LTTE's former leadership and former LTTE members suspected of committing terrorist or serious criminal acts or who have provided weapons to the LTTE. Since the end of the conflict thousands of LTTE members have been arrested, detained and sent to rehabilitation centres and the majority have been released. Those low profile LTTE members who have been released may be monitored but are generally not prosecuted. However, I do not accept the applicant fits such a profile. Therefore, I do not accept the applicant he faces a real chance of monitoring, arrest, detention or prosecution on the basis of LTTE links or suspicions or because he lived or worked in an LTTE controlled area during the war. I do not accept the applicant was or will be targeted as a Tamil from the north.
31. Further, DFAT advises that the monitoring and harassment of Tamils in day to day life has decreased significantly under Sirisena government. Politically, the new government has taken a more proactive approach to human rights and the issue of reconciliation than previous governments. The overall prevalence of monitoring has greatly reduced. Members of the Tamil community have described a positive shift in the nature of the interactions with authorities, including feeling able to question their motives or object to monitoring. On the basis of the country information and the applicant's circumstances, I find the chance of the applicant facing monitoring or harassment is remote.
32. Having considered the applicant's circumstances and the country information, I do not accept the applicant faces a real chance of monitoring, arrest, detention or prosecution on the basis of any perceived LTTE links. Further, I have found that the applicant was not arrested or detained by authorities on suspicion of being LTTE after the war which indicates he is not of interest to authorities and does not have a LTTE profile, actual or imputed.
33. I have considered the risk of harm to the applicant if he returns on basis of discrimination. As discussed above, the country information is there is no longer a presumption of eligibility of protection on grounds of being Tamil and 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. Based on the applicant's past education and employment history and the country information, I am not satisfied 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. Further, I do not accept he faces a real chance of persecution because of his race or ethnicity.
34. Based on the country information, I find that Tamils do not face a real chance of suffering serious harm solely on account of their ethnicity from the Sri Lankan authorities. Further, having considered the applicant's circumstances and the country information I do not accept that the applicant faces a real chance of persecution because of Tamil race or ethnicity, religion or membership of a particular social group as a young Tamil male or male Tamils, Tamil from a high security area in the North or in an area with high CID presence.

35. For the above reasons, I am not satisfied the applicant faces a real chance of serious harm from the Sri Lankan authorities, CID, other armed group, Sinhalese or unidentified persons or anyone now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Failed asylum seeker

36. The applicant claims the Sri Lankan authorities will harm him because he applied for asylum in Australia. I accept that if he returned to Sri Lanka, the applicant would do so as a failed asylum seeker. However, I do not accept that he faces a real chance of serious harm as a failed asylum seeker upon his return.
37. I have not accepted that he (or his family) has a LTTE or anti-government profile. I have not accepted the applicant was beaten, harassed or, detained after the war. I do not accept the army, authorities, CID or anyone have any interest in the applicant.
38. I note the information in the DFAT reports that 1000s 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 credible information before me does not suggest the applicant is a person with that kind of profile.
39. Having regard to the country information in the review material quoted by the delegate and in particular in the DFAT reports in the review material, I am not satisfied there is a real chance the applicant would be harmed by the Sri Lankan authorities because he has applied for asylum in Australia.
40. For these reasons I am not satisfied the applicant faces a real chance of harm from the Sri Lankan authorities, police, CID, army or anyone due to being a failed asylum seeker, now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Illegal departure

41. The applicant claims the Sri Lankan authorities will harm him as someone who departed Sri Lanka illegally. I accept the applicant departed Sri Lanka without a passport. For that reason, he has committed an offence under Immigrants and Emigrants Act ("IAEA"). I accept on the basis of country information that the applicant would be subjected to being charged, bailed and fined up to 50,000 rupees, although this amount may be paid in instalments.
42. The applicant claimed his family could not afford to pay the fine and therefore he would not be bailed. However, the applicant has a large family in Sri Lanka with [number of] siblings. His father is a farmer and his older [Sibling 1] is married with a family living in [location]. [Two other siblings] are married and preparing to move in with their [spouse's] family. The applicant's father lives with [the youngest siblings]. The applicant was also educated and completed high school and was previously employed as a farmer but also doing [various jobs]. I do not accept that the applicant or his family could not afford to pay the fine as the family is large, with the older [Sibling 1] and [Sibling 2]s living independently. Further, the fine can be paid off in instalments. Further, the applicant has been employed previously and there is no reason he could not earn an income in the future.
43. I have considered the applicant's circumstances and do not accept the fine amounts to serious harm because I consider he would be able to pay the fine because he has earned income in Sri Lanka previously and there is no evidence before me he could not do so in the future. I find given his circumstances and the country information he will be bailed and if needed.

44. Based on the country information and the applicant's circumstances I do not accept the applicant faces a real chance of torture, interrogation, mistreatment on arrival in Sri Lanka or during the questioning process to establish identity and bail. Further, I do not accept he faces any harm as a result of authorities checking with his home area about his identity as I have found he is not of adverse interest to authorities, CID police or anyone. I do not accept he will be harshly treated, even as a Tamil, asylum seeker or illegal departee as the country information is returnees are treated according to the standard procedures regardless of ethnicity. While there are reports of arrests and torture they were known as former LTTE members. As discussed above, I do not accept the applicant has an LTTE profile or that police are looking for him. Country information suggests the risk of torture or mistreatment is low and considered with the applicant's profile and circumstances I do not accept he faces a real chance of torture, interrogation or mistreatment upon arrival or during questioning or on return to his home area.
45. I accept if the applicant arrives over the weekend he may be placed in remand for a few days. However, I do not accept the applicant or Tamils are held longer than others.
46. I have considered the information about conditions in prison and accept they are generally poor, overcrowded and unsanitary. I do not consider the applicant has anti-government or LTTE profile or is of interest to authorities and do not accept there is a real chance of torture, assault or mistreatment if held on remand, or that any brief detention in these conditions amounts to serious harm.
47. Based on the applicant's circumstances and country information, I find that the chance of torture or mistreatment during questioning for the applicant or if he was held on remand or upon subsequent return home is remote. Further, I do not accept the applicant's questioning, brief detention and fine amount to serious harm.
48. In any event, I find that the Sri Lanka departure laws are laws of general application and therefore the enforcement of the laws do not constitute persecution. I do not accept that the I&EA provisions that deal with breach of the departure laws from Sri Lanka are discriminatory on their face, or disclose discriminatory intent or that they are implemented in a discriminatory manner. The country information indicates the Sri Lankan departure laws are applied regardless of ethnicity to all persons who are returnees and are not applied in a way that is discriminatory or selectively enforced against a particular group of those returnees. I do not accept the applicant or Tamils are held longer than others or treated differently.
49. I am not satisfied, that questioning, arrest, and the poor conditions in remand, or any subsequent monitoring or questioning and the application of a penalty for illegal departure amount to systematic and discriminatory conduct as required by s.5J.
50. After assessing all the evidence and the applicant's circumstances and being mindful of both the process and the outcome of the prosecution the applicant will face from the Sri Lankan authorities arising from his illegal departure, I am satisfied that the applicant does not face a real chance of serious harm due to his illegal departure, now or in the reasonably foreseeable future if he returns to Sri Lanka.
51. 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 from the Sri Lankan authorities, paramilitary groups, unidentified people for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Sri Lanka.

Refugee: conclusion

52. 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

53. 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

54. 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.

55. I have considered the applicant's circumstances whether he faces a real risk of significant harm upon return to Sri Lanka. As discussed above I do not accept that he (or his family) has an LTTE anti-government or at risk profile, or that he was detained and harassed daily or weekly since the end of the war or in 2012. I have not accepted that the applicant is of interest to the army, authorities or anyone.

56. I accept as a returnee to Sri Lanka who departed illegally, the applicant may face being questioned at the airport, arrested on charges of leaving the country illegally, potentially being remanded for a relatively short period pending a bail hearing and be fined up to 50,000 rupees for his illegal departure.

57. As discussed above, I do not accept that he or his family would not be able to afford to pay the fine as he has a large family, some of whom live independently and they have a farm and the applicant has been previously employed. Further, the fine can be paid off in instalments.

58. I have found 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. I do not accept that he would be precluded from travel abroad in the future.

59. 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, and he is likely to be fined, I find there is no intention to inflict pain or suffering, severe pain or suffering or extreme humiliation. In these circumstances, the poor prison conditions to which he applicant may be subject, and the fine imposed, do not of themselves constitute significant harm as defined under the Act.

60. I am also 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 am not satisfied that the treatment and penalties he may face as illegal departee amount to severe pain or suffering, pain or suffering that is cruel or inhuman in nature or extreme humiliation. I am not satisfied he will be subject to the death penalty, arbitrary deprivation of life, or torture.
61. 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.
62. For reasons set out above, I am not satisfied that the applicant faces discrimination, monitoring or harassment that would constitute significant harm. Further given the country information and the applicant's circumstances, I am not satisfied that the applicant faces a real risk of significant harm.
63. In relation to the balance of his claims which I have accepted, I find the applicant singularly or cumulatively does not have a real risk of significant harm on the basis of his age, being a Tamil, from Northern province, having lived in an LTTE controlled area, high security area, being harassed and monitored during the war, or because he is a failed asylum seeker. For the same reasons, and applying the authority in *MIAC v SZQRB*[2013] FCAFC 33 I am not satisfied the applicant will face a real risk of significant harm if he is removed to Sri Lanka.

Complementary protection: conclusion

64. 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

...

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.