



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05298

Date and time of decision: 21 December 2018 12:08:00
F Kerr, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Catholic Tamil from Sri Lanka. On 17 December 2015 he lodged an application for a Safe Haven Enterprise Visa (SHEV). On 6 July 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visas.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 28 July 2018 the applicant's representative provided information to the IAA comprising a submission and two country information reports. Insofar as the submission reiterates the basis of the applicant's claims for protection, expands on oral submissions made to the delegate at the applicant's SHEV interview, and takes issue with the findings of the delegate and evidence relied on in reaching those findings, it is not new information and I have had regard to it. The submission includes references to a legal decision which I am satisfied constitutes legal argument and not new information.
4. One of the country information reports provided to the IAA was the UK Home Office June 2017 report on Tamil separatism.¹ This report was considered by the delegate and is not new information.
5. Also provided was a copy of what is described as an "Advanced Unedited Version of the Concluding observations on the fifth periodic report of Sri Lanka" adopted by the UN Committee Against Torture (CAT) on 30 November 2016 (the CAT report). The CAT report was not before the delegate and is new information. It is country information and does not contain personal information in the s.473DD sense. The date of the CAT report indicates it pre-dates the delegate's decision and no explanation was provided as to why this new country information was not and could not have been provided to the delegate before the decision was made. There was other more recent country information before the delegate from credible, authoritative sources which provide a more up-to-date overall assessment of the current situation in Sri Lanka including the risk of torture for those suspected of LTTE connections. I am not satisfied that there are exceptional circumstances to justify considering this new information.

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He and his family were displaced multiple times during the war.
 - In January 2009 he was injured in shelling, resulting in severe [specified injuries] on his [Body Part 1].
 - He was detained at [specified] Internally Displaced Person's (IDP) camp [in] 2009.

¹ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OG6E7028826

- The authorities became suspicious of him because of his [specified injuries] and thought he was an LTTE cadre. He was transferred to a rehabilitation camp for LTTE cadres. He was interrogated, physically assaulted and forced to sign papers in Sinhala during his rehabilitation.
- He was required to report to the police station weekly after his release from rehabilitation and was interrogated several times by the CID and SLN.
- He feared being abducted by the Sri Lankan authorities because he heard other rehabilitated Tamils were abducted and missing.
- The last time he was required to report to the CID, he was questioned and [injured] with a hammer.
- The CID visited his wife to extort money, after he contributed money to the rebuilding of the local church.
- He will face social stigma as a rehabilitated Tamil imputed to be a former LTTE member and perceived to be a risk to national security and detained for questioning at the airport.

Refugee assessment

7. 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

8. 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 and background

9. The applicant has provided consistent information about his identity since his arrival in Australia although, as the delegate noted, there appears to have been some transliteration

errors in recording his name. I am satisfied the applicant's nationality and identity are as claimed and I find that Sri Lanka is the receiving country for the purposes of this decision.

Displacement and injury

10. The applicant claims that his family was displaced many times throughout the war and that on the last occasion, when they were displaced [in] Kilinochchi district, he was hit by a shell in January 2009 and seriously injured resulting in [specified injuries] [and], as discussed at his SHEV interview, ongoing [medical] issues. He claims that shortly after this, he and his family were detained at [specified] internally displaced persons (IDP) camp in [Village 1] from March 2009. It is uncontroversial that throughout the war many thousands of civilians were displaced; following the end of the conflict, many of them ended up in vast IDP camps run by the government such as [Village 1]. I accept that the applicant lived in a former LTTE controlled area, was displaced multiple times, was injured in shelling in January 2009 and was detained at [specified] camp in March 2009.

Detention in a rehabilitation camp

11. The applicant has consistently claimed to have been detained in a rehabilitation camp for two years from May 2009 and to have been subject to ongoing monitoring and investigation after he was released. In his SHEV interview he provided spontaneous answers to the delegate's questions about life in the camp and provided a number of additional, convincing details about his experiences while detained. The applicant struck me as truthful and credible. He has given as the only explanation for his detention in a rehabilitation camp that the authorities became suspicious of him due to the nature of his injuries. The reasons why he was detained were not explored in his SHEV interview and I have some doubt as to whether this, by itself, would be sufficient for the authorities to form a view that the applicant was an LTTE cadre given that there must have been many civilians fleeing fighting who had also been wounded.
12. However, he has provided a number of documents in support of the claim that he was detained for two years in a rehabilitation camp. I am unable to place any weight on the Ministry of Rehabilitation and Prison Reforms document. No translation has been provided and apart from one reference which coincides with the applicant's date of birth, I am unable to understand its contents. The International Committee of the Red Cross (ICRC) Detention Attestation and the ICRC Detention Card corroborate his claim to have been detained at least from [May] 2009 (when he was first visited by the ICRC) until his release "according to the authorities" [in] April 2011. He has also provided a copy of an International Organisation for Migration (IOM) Information Counselling and Referral Service (ICRS) issued to him [in] April 2011 and an undated letter from the Apostolic Administrator of Diocese of [District 1], [which] states the applicant been detained on suspicion of terrorist activities and released [in] April 2011.
13. Country information indicates that many detainees were separated from their families at reception points as they fled into government-controlled areas; others were arrested after arrival at IDP camps as a result of screenings conducted by the SLA, the TID and CID.² Any alleged association with the LTTE appears to have been grounds for arrest; the basis for arrests has included allegations by fellow IDPs and paramilitary groups in the internment camps, raising issues of credibility.³ A number of credible, authoritative sources have commented on

² UK Home Office "Sri Lanka Country of Origin Information (COI) Report", 7 March 2012, 3523

³ *ibid*

the opaque and seemingly arbitrary nature of the rehabilitation process.⁴ The ICRC had unhindered access to the camps until July 2009. It told international observers in 2010 that of the 10,000 to 11,000 people suspected of being linked to the LTTE and placed in rehabilitation camps in the last stage of the war, there was still no clear legal basis for their detention and no clarity on the rehabilitation process.⁵ Some observers noted that the rehabilitation period did not seem to reflect the level of involvement in the LTTE.⁶

14. He told the delegate in his SHEV interview that he was not a member of the LTTE nor was any other member of his family but it was not possible not to be a supporter because everyone except for young children and the elderly had to have basic training for 10 days. He wasn't sure when he completed his training with the LTTE but thought it was around 2005-2006; he confirmed he does not hold a political view that supports the LTTE. On release, he was required to sign a document in Sinhala which he claims is an admission that he was part of the LTTE.
15. According to official statistics, over 11,000 people with alleged links to the LTTE underwent the rehabilitation process – mostly former combatants, but also drivers, cooks and other aides.⁷ Rehabilitation is typically a one year program extended to two years for those considered highly radicalised.⁸ Country information indicates that monitoring after release from rehabilitation was routine, although the frequency varied according to the personal decisions of local commanders⁹ and may depend on the degree of the person's assessed LTTE involvement¹⁰ although different routines (home visits, reporting to camps, summoned to meetings, etc) were implemented in different areas.¹¹ Again, the applicant has provided credible, detailed evidence about his experiences after release of being monitored, subjected to travel restrictions, intermittent interrogations and random enquiries, all of which are consistent with the country information before me about what many rehabilitees

⁴ United Nations High Commissioner for Refugees (UNHCR) "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8; Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286; UK Home Office "Sri Lanka Country of Origin Information (COI) Report", 7 March 2012, 3523; Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345

⁵ Danish Immigration Service "Human Rights and Security Issues concerning Tamils in Sri Lanka", 71, 1 October 2010, CIS19345

⁶ Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

⁷ UNHCR "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum- Seekers from Sri Lanka", 21 December 2012, UNB0183EA8

⁸ Department of Foreign Affairs and Trade (DFAT) "DFAT Country Information Report Sri Lanka", 23 May 2018, CIS7B839411064

⁹ Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

¹⁰ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 5.29; Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

¹¹ Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

experienced¹² including being made to sign a document in Sinhala saying he had connections with the LTTE.¹³

16. In his SHEV interview the applicant made the new claim that just prior to leaving Sri Lanka he was subjected to questioning by the CID and they hit him [with] a hammer, damaging [him]. The applicant has not previously made this claim and I consider that if he had been assaulted in such a severe way, he would have said so earlier including in the written statement submitted with his SHEV application. I do not accept that he was hit with a hammer by the CID during questioning shortly before he left Sri Lanka.
17. While his evidence that his reporting obligations went from weekly to monthly suggests that the interest in him had begun to wane, he said he left Sri Lanka while still required to report to the local police station once a month. This was not a claim made in his written statement but as I consider the applicant generally credible, and as it consistent with the country information before me, I accept this is plausible. He also said that the CID had come asking after him and making enquiries of his wife. When he was asked what his wife told them - whether he was in Sri Lanka or somewhere else - he said they already knew he was in Australia; he did not say how or when they became aware of this. The delegate did not accept this claim because he did not refer to it in his SHEV statement; she also considered it implausible that the authorities would maintain such a level of interest in the applicant over 2012 to 2018 as to come as frequently as the applicant claimed. I think it likely the applicant has exaggerated the frequency of these visits and I do not accept that the CID continued to come after they found out he was in Australia but as I accept that he was subject to reporting requirements and left Sri Lanka while still expected to report, I also accept it is plausible that at least until they found out he was in Australia, they continued to visit his wife asking about him.
18. I do not accept that the CID has started asking his wife for money. The applicant suggested it was because he had remitted some money to the church for its restoration appeal. Remittances are Sri Lanka's major source of foreign exchange earnings; Sri Lankans living abroad remitted approximately USD7.2 billion in 2016.¹⁴ The applicant stated he had previously sent money to his wife on a number of occasions. I do not consider it plausible that the CID would suddenly have become aware that he had sent money to the church a month before his SHEV interview or that, given the remittance figures for Sri Lanka, that they would have any specific interest in monitoring the applicant's financial transactions. I do not accept that his wife has been subject to extortion demands by the CID.
19. Turning to what will happen to the applicant if he returns to Sri Lanka, the applicant claims, and I accept, that he left Sri Lanka illegally by boat. On arrival at Colombo international airport, returnees travelling on temporary travel documents are subject to a series of investigative checks to confirm their identity and ascertain if someone was trying to conceal their identity due to a criminal or terrorist background or trying to avoid court orders or arrest warrants.¹⁵ Returning passengers may be interviewed, the person's claimed hometown police may be

¹² See, for example, UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED850AD3780; UK Home Office "Sri Lanka Country of Origin Information (COI) Report", 7 March 2012, 3523; Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

¹³ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED850AD3780

¹⁴ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 2.7

¹⁵ ibid at 5.29

contacted so could their claimed neighbours and family; criminal and court records may be checked.¹⁶

20. Some people who did not comply with an order to report (monitoring) did not face any consequences.¹⁷ However, I consider that it is possible that the applicant would come to the adverse attention of the authorities because of the circumstances in which he would return to Sri Lanka. The country information indicates that on arrival at the international airport in Colombo, the applicant will be detained and questioned under routine procedures that apply to all returnees travelling on temporary travel documents and that the applicant's background will be checked against intelligence records and with authorities in his local area. I find that when the applicant is questioned and investigated on return, there is a real chance that his history will come to light, and that he will be subject to further investigations in relation to his past and imputed links to the LTTE.
21. There have been significant improvements in the security situation in Sri Lanka since the applicant left. The current focus of the Sri Lankan authorities is on identifying Tamil activists in the diaspora working towards separatism and preventing the resurgence of the LTTE or similar separatist organisations. Generally, past connection to the LTTE does not of itself warrant protection unless the person is perceived to have had a significant role in that organisation, or if they are perceived to be active in post-conflict Tamil separatism.¹⁸ The UK Home Office has assessed that returnees who have a previous connection with the LTTE are able to return to their communities without suffering ill-treatment, but acknowledges there continue to be reports of arrests and detentions, although the scale and extent is difficult to quantify due to the paucity of reliable information.¹⁹
22. It is apparent from the country information that the Sri Lankan authorities continue to maintain some level of interest in former LTTE members and supporters. The government remains sensitive to the potential re-emergence of the LTTE throughout the country.²⁰ DFAT states that modest numbers of former LTTE members continue to be detained and prosecuted within Sri Lanka's criminal justice system.²¹ The government maintains 'stop' and 'watch' lists; those on 'stop' lists include individuals who have an extant court order, arrest warrant, or order to impound their passport. 'Watch' lists include names of those whom the security services consider to be of interest, including for suspected separatist or criminal activities; those on a watch list are likely to be monitored.²² The airport maintains a list of persons-of-interest by law enforcement agencies that have violated Sri Lankan law; the list is updated regularly to facilitate security agencies.²³
23. Notwithstanding some reduction in the size of the military presence in the north, there is still a large military presence in Tamil areas.²⁴ Tamils in those areas continued to report in 2016 that security forces regularly monitored or harassed members of their community, especially young

¹⁶ Ibid

¹⁷ Landinfo "Sri Lanka: Human Rights and security issues concerning the Tamil population in Colombo and the Northern Province" 1 December 2012, CIS25286

¹⁸ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OG6E7028826

¹⁹ Ibid at 2.3.12

²⁰ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 3.35

²¹ Ibid at 3.60

²² Ibid at 3.37

²³ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OG6E7028826

²⁴ UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED50AD3780;

and middle-aged Tamil men.²⁵ A 2015 survey by the United Nations High Commission for Refugees (UNHCR) reported that 49 per cent of refugee returnees in the north had received a visit at their homes for a purpose other than registration, with almost half of those visits from the police.²⁶

24. The applicant is not a former member of, or worker for, the LTTE nor does it appear he has any other connections to the LTTE which would raise the authorities' suspicion. I have accepted, however, that he spent two years in rehabilitation, was subject to reporting requirements, travel restrictions, and enquiries over the following year and that he left Sri Lanka while still under reporting obligations. All of this indicates that notwithstanding his release, he was still viewed with some suspicion by the authorities up to the time of his departure. After he left, the authorities continued to make enquiries with his family. The most recent DFAT report does not support that those with [specified injuries] are at any increased risk of attention on return to Sri Lanka²⁷ and I am not satisfied that he may be at any increased risk on that basis. However, because of the combination of the other circumstances which I have accepted I consider that there is a real chance that the applicant would come to the adverse attention of the authorities either on arrival at the airport or once he is returned to his home area in the north of Sri Lanka.
25. While I have not accepted that the authorities came looking for the applicant after they found out he was in Australia, I consider that his disappearance from his home during the period when he was still subject to reporting obligations means his situation is still unresolved as far as the authorities are concerned. I also find that because of his past and the authorities' interest in him, there is a real chance that he would be of adverse interest to the authorities if he were to return to Sri Lanka. I find that once he reaches his home area, his arrival will be verified by the CID or police within a few days and in that process, he will be identified as a rehabilitee.
26. I consider that there are sufficient credible reports of the mistreatment of Tamils with real or suspected LTTE connections while in police or military custody, including after returning to Sri Lanka from overseas, to support a finding that there is a small but nevertheless real chance that the applicant would be at risk if detained by authorities during the verification process and subjected to mistreatment while in detention. The Sri Lankan Human Rights Commission, civil society and Tamil politicians stated that ill-treatment and torture by the Sri Lankan Police continues to occur, primarily as a result of out-dated policing methods including the reliance on confessions by prosecutors.²⁸ The UK Home Office has stated that although the number of torture complaints has greatly reduced, new cases of Tamil victims continue to emerge and police reportedly often continue to resort to violence and excessive force, particularly when extracting confessions.²⁹ It has assessed that if a person is detained by the Sri Lankan security services there remains a real risk of ill-treatment or harm requiring international protection.³⁰ The International Truth and Justice Project's "Unstopped" report indicates that while torture complaints have continued to decrease over the years since the change of government, the authorities continue to conduct investigations into suspected LTTE supporters with

²⁵ US Department of State "Country Reports on Human Rights Practices for 2016 Sri Lanka" 3 March 2017 OGD95BE926876

²⁶ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 5.40

²⁷ Ibid at 3.67

²⁸ DFAT "DFAT Cable response: UN Special Rapporteur (Ben Emmerson) on human rights and terrorism in Sri Lanka" 14 August 2017, CISED50AD5239

²⁹ UK Home Office "Country Policy and Information Note Sri Lanka: Tamil separatism" Version 5.0, 15 June 2017, OGD6E7028826 at 2.3.38

³⁰ Ibid at 3.1.7

concomitant reports of torture being used to extract confessions.³¹ According to the Tamil National Alliance (TNA), abductions still happen in the north and east and people who have been in rehabilitation can be taken back into custody.³²

27. Considering all of the above, I am satisfied that there is small but nonetheless real chance that in the course of investigation, the applicant will be detained and subjected to physical ill-treatment amounting to serious harm. I find that the conduct of the authorities in inflicting such harm is systematic and discriminatory for reason of the applicant's imputed political opinion in support of the LTTE or Tamil separatism. As the harm arises from past events and security information already held about the applicant, I am not satisfied the applicant is able to take reasonable steps to modify his behaviour in order to avoid persecution.

28. DFAT advises that Sri Lankan security forces exercise effective control throughout Sri Lanka.³³ The harm will be inflicted on the applicant by the Sri Lankan authorities on his return. In these circumstances, I am satisfied that effective protection measures would not be available to the applicant and that the real chance of harm the applicant faces relates to all areas of Sri Lanka. The applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

29. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

³¹ International Truth & Justice Project "Unstopped: 2016/17 Torture in Sri Lanka" 14 July 2017, CISED50AD4849

³² UK Home Office "Report of a Home Office Fact-Finding Mission Sri Lanka: treatment of Tamils and people who have a real or perceived association with the former Liberation Tigers of Tamil Eelam (LTTE)", 31 March 2017, CISED50AD3780 at 9.2.4

³³ DFAT "DFAT Country Information Report Sri Lanka", 23 May 2018 CIS7B839411064 at 2.32

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.