



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA18/05565

Date and time of decision: 18 December 2018 13:23:00
J McLeod, 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 citizen of Sri Lanka. He arrived in Australia [in] September 2012, lodged an invalid application for a Protection Visa in 2013 (the 2013 application) and a valid application for a Safe Haven Enterprise Visa (SHEV) on 28 July 2016. He was interviewed in relation to his SHEV application on 29 May 2018 in the presence of his representative and a delegate of the Minister for Immigration and Border Protection (a different officer) refused to grant the visa on 20 August 2018.

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) ('the review material' or 'referred material') including inter alia, the applicant's 2013 application, a post-interview submission from the applicant's representative and other supporting documentation.
3. On 13 and 28 September 2018, the IAA received further information from the applicant's appointed representative including submissions and several documents pertaining to the applicant's physical and mental health.
4. The submissions in part reiterate information that was before the delegate and address the delegate's decision and findings, and to that extent, may be referred to as argument about matters that were before the delegate and therefore not new information.
5. The documents given to the IAA include inter alia, a report from the applicant's[counsellor] ([December] 2016), a Diagnosis Ticket from the [Hospital 1] ([August] 2011), and a letter of referral to a specialist at [Hospital 2] from the applicant's General Practitioner ([April] 2018). These were already before the delegate; they do not constitute new information and I have had regard to them.
6. The rest of the medical documentation (and submissions in regard to such) given to the IAA is new information. The representative submits that the information pertains to the applicant's personal vulnerabilities of poor physical and mental health which were raised, albeit in less detail at the primary stage. I accept this, and I take into account that the applicant was not questioned or otherwise invited to provide information about these claims at the SHEV interview, that there is no indication that any health claims were considered by the delegate and that the new information either post-dates or closely pre-dates the decision. I accept this information reflects the applicant's current health situation and his ongoing health needs and is relevant to this review. I accept it is credible personal information which was not previously known and may have affected consideration of the claims. and taking into account the factors mentioned above, in these particular circumstances I am satisfied there are exceptional circumstances to justify considering this new information.
7. The applicant's representative has also provided a copy of an email sent to the departmental officer who interviewed the applicant dated 10 September 2018, just prior to the SHEV Interview. The email relates to the applicant's physical and mental health and advises the applicant's wife and son have been experiencing ongoing harassment from the Sri Lankan authorities, most recently in the month prior. It is arguable as to whether this is new information but in the event that it is, I accept it is credible personal information which may

have affected consideration of the applicant's claims. I take into account that the representative did put the information before an officer involved in the case and that the information is relevant to this review. I am satisfied there are exceptional circumstances to justify its consideration.

Applicant's claims for protection

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

- He is a Tamil Hindu citizen of Sri Lanka.
- From 1990 – [January] 1997 he lived in [Country 1] as a refugee. 12 or 13 days after he returned to Sri Lanka, he was arrested on suspicion of involvement in the Liberation Tigers of Tamil Eelam (LTTE). He was imprisoned for about a year. He was then released and lived briefly with his sister but was re-arrested. He was held in [Prison 1] from [1998] – [2000] and was registered by the International Committee of the Red Cross (ICRC). Numerous times in prison he was threatened, severely beaten and tortured as the authorities thought he was an LTTE member and wanted information about some hidden weapons.
- After leaving prison in 2000 he moved in with his sister in [Town 1]. The police would randomly beat him. He went back to [Country 1] to escape the beatings, but stayed only briefly before returning to [Town 1], as he faced problems from [police force] and returned to get married.
- He moved to [City 1]. The police would beat him because he was Tamil; once he was hospitalised for [number] days as a result. As they had all his details on record they would also immediately come to question him whenever there was a bomb blast or other incident. This happened regularly.
- He worked as a [occupation doing specified work] and the police and army extorted him. He had to give them some food and [amount] LKR each time he left or re-entered [City 1], or they would damage his [Equipment 1] and destroy his [Equipment 2]. This ended up being most of his pay, after this he would only have [amount] LKR for his family.
- He became so fearful for his life with the ongoing persecution of him. In 2012 he became aware that there was a way to leave Sri Lanka so he sold his possessions and raised the money.
- His wife moved to [Country 1] because the police were threatening her as they believed he had gone to train with the LTTE. Since they left, the police destroyed the shop that was attached to their house.
- His wife and son have returned to Sri Lanka and have continuously been questioned (including in 2018 [number] month before the post-interview submission was provided) and threatened by un-uniformed and unknown people regarding his whereabouts. They have had to relocate monthly due to these visits and questioning.
- He fears being killed and/or arbitrarily detained, tortured, beaten, harassed and otherwise harmed in Sri Lanka because of his Tamil ethnicity and his imputed membership and association with the LTTE, his past arrest, detention, torture and harassment arising from those perceived connections, and because he would be returning as a failed asylum seeker who he departed illegally.

- He has significant physical and mental health concerns. He sustained permanent injuries including to his [Body Part 1] and [Body Part 2] and elsewhere from the mistreatment in prison and from the beatings in [City 1]. He is receiving treatment in Australia including surgery and ongoing pain medication. He is also badly scarred. He also suffers from [Medical Condition 1], [Medical Condition 2] and [Medical Condition 3] associated with the trauma he experienced in Sri Lanka, current events in Sri Lanka and his fear of return.

Factual findings

9. There are no concerning issues as to the applicant's identity. I accept it is as claimed. I accept he is a Tamil Hindu citizen of Sri Lanka who originates from the Northern Province. I accept he has no ongoing entry or residency rights in [Country 1] where he twice resided as a refugee and that Sri Lanka is his receiving country for the purpose of this review.
10. The delegate accepted most of the applicant's claims including inter alia, that he was twice imprisoned and subject to torture between [1997] and [2000] and that he was subject to ongoing harassment from Sri Lankan security forces up until his departure in 2012. However as the applicant was not arrested again, the delegate considered the applicant was not of any particular individual interest to the Sri Lankan authorities. The delegate thought it possible that the applicant was contacted in Australia but did not accept this was a genuine call from the Sri Lankan authorities and as the applicant's wife has been able to travel lawfully between Sri Lanka and [Country 1] in recent years he did not accept she was being harassed by Sri Lankan authorities for his whereabouts.
11. I have reflected on the applicant's claims and evidence with careful consideration. The applicant has been broadly internally consistent and has provided convincing evidence with regards to most aspects of his claims. At the SHEV interview he provided detailed, apparently spontaneous recollections which I found compelling. His accounts are also plausible when considered against the country information before the delegate about Tamils in the Northern Province during and in the aftermath of the war.
12. I accept (as did the delegate) the applicant's claims regarding his two bouts of arrests and imprisonment between 1997 and 2000 and the mistreatment including torture he described therein. I accept the applicant was released from his second bout of imprisonment in 2000 and then lived with his sister in [Town 1]. I accept that after a brief period he went illegally to [Country 1] to escape random beatings he was facing from the police. I accept that during his 18 months in [Country 1] he faced questioning and enquiries from the [police force] in [Country 1] investigating whether he had LTTE connections and that he was required to report fortnightly to their office. I accept he travelled illegally back to Sri Lanka, again to [Town 1] where over the next couple of years he was regularly arrested and held for a number of hours each time by the Sri Lankan Army (SLA) who interrogated and beat him in their custody, that they monitored his movements and forced him to transport them around on his [vehicle] without payment. I accept he moved to [City 1] in 2003 and faced further problems there including further beatings which resulted in some hospitalisation, being questioned whenever a security incident occurred and that the SLA and police extorted him, using his truck and requiring bribes of money and food when he entered and exited [City 1] and making threats for non-payment. I accept this continued up until his departure from Sri Lanka.
13. I have had regard to the fact that the applicant has no actual links to the LTTE, that he gave little details of his imprisonment, that many Tamils in the Northern Province reported being

monitored and harassed and that despite suffering some harassment from the authorities, the applicant's wife and child have seemingly been able to travel between [Country 1] and Sri Lanka without incident. But while I concur with the delegate's findings for the most part, having careful regard to all the evidence and the applicant's particular circumstances, I do not share the view that the lack of formal arrest or repercussions against him in the years preceding his departure is indicative of a lack of personal interest in him. I take into account that the applicant was immediately regularly taken away and questioned following any security incident, was severely beaten by the SLA in 2011 and was forced under threat of harm to pay bribes totalling more than [percentage] of his take home pay plus some [goods] to the SLA and police to facilitate his movement in and out of [City 1] and to go about his [work]. I also note that in the period preceding his departure, he was not going to his house in [City 1] as he feared he could not stay peacefully in his home and that his wife was visited by the authorities following his departure and their house was burned down. While he was not subject to formal arrest, charge or rehabilitation in this period I nonetheless accept he was known to, and of sustained interest to the SLA and police in [Town 1] and [City 1].

14. I accept the applicant lived in the Northern Province and was subjected to multiple occasions of serious harm and threats from the authorities on the basis of imputed LTTE associations stemming back to the 1990s, and also arising on the basis of his race, age, gender and residence in the north, and that this continued up to the point of his departure. I accept too that he was sought subsequently prompting his wife and child to go to [Country 1]. I have some reservations about the applicant's claims that his wife and child have had to relocate monthly since returning to Sri Lanka. I consider this to be an embellishment, but I accept they have been subject to some monitoring and questioning about the applicant's whereabouts by the authorities in [City 1], and [Town 2] where they have also recently lived .
15. Notwithstanding these reservations I find that when all the factors are considered cumulatively they show the applicant was of adverse interest to the Sri Lankan authorities when he left Sri Lanka and that he has been of ongoing concern to them since his departure.

Refugee assessment

16. 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

17. 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.
18. At its most basic level, the applicant's profile is that of a Tamil male from the Northern Province of Sri Lanka. The Australian Department of Foreign Affairs and Trade (DFAT; 2014) and other sources before me indicate that during the war, more Tamils (mostly in the north and east) were detained under emergency regulations and the Prevention of Terrorism Act (PTA) than any other ethnic group. DFAT assesses that this was primarily due to LTTE members and supporters being almost entirely Tamil and that there were also likely instances of discrimination in the application of these laws, with LTTE support at times imputed on the basis of ethnicity. I accept this is what happened to the applicant, and that his imprisonment and subsequent detention, questioning, beatings and other interactions with the authorities over time compounded with the result that he remained on the security forces' radar, such that he was among the first targets of questioning following any security incidents in [City 1] and was victim to ongoing extortion.
19. I have taken into account that since the applicant left in 2012 the situation for Tamils in Sri Lanka has improved significantly, both politically and socially under Sirisena's presidency. DFAT (2018) indicates that Tamils now face a low risk of official or societal discrimination on the basis of their ethnicity; they have gained a substantial level of political influence and their inclusion in political dialogue has increased; there has been a noticeable demilitarisation of the north and east; and the prevalence of monitoring and harassment of Tamils (even in former LTTE controlled areas) has greatly reduced.
20. Recent guidance from the United Kingdom Home Office (UKHO; 2017) indicates that with the LTTE now effectively a spent force, the Sri Lankan government's focus has shifted to identifying persons perceived to be a threat to the integrity of Sri Lanka due to a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka, journalists or human rights activists critical of the government, individuals who gave evidence to the 'Lessons Learned and Reconciliation Commission' implicating the Sri Lankan security forces, armed forces or the Sri Lankan authorities in alleged war crimes, and persons named on the airport's 'stop' list. However notably, the PTA still hasn't been repealed and it is evident from the review material that despite the shift towards more high profile targets, the government still keeps a close eye on the north and east of the country and is sensitive about possible Tamil separatist activity and a potential LTTE re-emergence of the LTTE as well as certain other types of political activism. DFAT's 2018 reporting indicates that Tamils continue to claim that authorities monitor public gatherings and protests and engage in targeted surveillance and questioning of individuals and groups. It indicates continued surveillance of Tamils in these areas (which are still militarised albeit to a much lesser extent these days), particularly those associated with politically sensitive issues such as missing persons, land release and memorial events, and those with links to foreign groups, including some in the Tamil diaspora. The UKHO and DFAT report that authorities also collect and maintain sophisticated intelligence on former LTTE members and supporters and use 'stop' and 'watch' electronic databases to alert the security forces to those of particular interest.. Reporting from various sources including the United States State Department (USSD), DFAT, the UKHO, the Austrian Centre for Country of Origin & Asylum Research and Documentation (ACCORD) Human Rights Watch, Freedom from Torture (FFT) and the International Truth and Justice Project (ITJP) United Nations Special Rapporteur Ben Emmerson and various news outlets also indicates that government forces continue to detain suspected LTTE sympathisers and there

continue to be reports (albeit in smaller numbers) of mistreatment including abductions, arbitrary detention, torture and police use of excessive force / violence - particularly against Tamils - perpetrated by Sri Lankan police and security forces.

21. I accept the applicant lived in the Northern Province and was subjected to multiple occasions of serious harm and threats from the authorities (of both a formal or official nature and unofficially) on the basis of imputed LTTE associations stemming back to the 1990s, and also arising on the basis of his race, age, gender and residence in the north, and that this continued up to the point of his departure. I accept too that the authorities have demonstrated an interest in the applicant subsequently, including in the past year. Even though he does not have a history of involvement or actual association with the LTTE, given his past and the recent approaches, I accept there is a real chance that he would be of some interest to the Sri Lankan authorities on his return in relation their previous interest in him. He would also be identifiable to authorities at the airport as a failed asylum seeker from Australia who departed Sri Lanka illegally.
22. Based on the information provided by DFAT in 2018, upon arrival in Sri Lanka, the applicant will be processed in a group with other returnees over several hours. An investigative process will be undertaken by authorities who will confirm the applicant's identity and background and investigate whether he is a person of interest. I accept this may involve interviewing him, contacting the police in the applicant's home area in [City 1]/[Town 1], contacting his former neighbours and his family, checking criminal and court records and checking him against sophisticated intelligence databases. I accept that through their enquiries and investigations in this process, the authorities will become aware of the applicant's history, including his previous bouts of imprisonment, and detention and questioning and monitoring, and their attempts to locate him following his departure. I accept that this would trigger further investigation processes which may entail detention and questioning.
23. Relevant here, is the applicant's sustained record of poor physical and mental health, as documented from medical specialists, [not-for-profit, community organisation] and other sources in material that was given to the delegate, and also subsequently to the IAA. The applicant's physical health issues aside, I note the [not-for-profit, community organisation] reporting prepared from the then total of 39 face-to-face counselling sessions indicates the applicant suffers from [Medical Condition 1] and that his daily life and functioning has been detrimentally impacted. He is said to exhibit inter alia, [Symptom 1], [Symptom 2] and [Symptom 3], especially [in specified situations]. He is also reported to have [Symptom 4]. The representative submits that any period of detention would significantly aggravate his vulnerable physical and psychological state and that his reactions while in custody are of particular concern, given the likelihood of his manifesting avoidant behaviour which may heighten the suspicions of the authorities while he is being questioned.
24. As noted above, there are reports of physical violence against Tamils whom the authorities suspect of having LTTE links while in police or military custody and this includes scenarios involving Tamils returning to Sri Lanka from overseas. Some of these reports also allege incidents of torture, enforced disappearance and other mistreatment against Tamils by Sri Lankan authorities following the 2015 change of government although overall, the number of allegations of mistreatment in these circumstances remains low and has reduced since 2015. However, in their reporting, the authoritative sources considered by the delegate and myself openly admit that they do not routinely monitor the situation of returnees (at the airport nor subsequently). Nonetheless DFAT is aware that over the past few years there have been reports of authorities including police checking on returnees. There is anecdotal evidence that

there had been regular visits and phone calls by the Criminal Investigation Department to failed asylum seekers as recently as 2017.

25. Notwithstanding the improvements which came with the Sirisena government, the shift in primary focus of the security agencies and the reduction in the numbers of reports of abductions, torture complaints and police use of excessive force against Tamils, the UKHO still considers that in the event that a person is detained by Sri Lankan security services, there remains a real risk of ill treatment or harm and that persons perceived to sympathise with the LTTE continue to be intimidated, harassed, arrested, detained and tortured.
26. It is not my assessment that the applicant has any kind of high profile or that he has been constantly searched for in earnest by any security forces over the past few years but they sustained their monitoring of him, and continued to harass, question, threaten and extort him for substantial proportions of his livelihood over several years up until he left, and then questioned and monitored his wife in subsequent years, including with a recent approach in 2018. I consider he would still be of some interest to them and that they will hold him in custody for further investigation and taking into account the reporting as to the applicant's potential behaviour emanating from his mental state and [Symptom 4], and taking into account the reporting from authoritative sources as to the continuance of physical harm in certain circumstances, I cannot discount the possibility that he may face physical harm in custody as he has before.
27. I accept that some mistreatment amounting to serious harm still continues in certain circumstances and for the applicant, I find the chance is not remote. I accept there is a small but real chance that the applicant will be subjected to mistreatment in the course of questioning, on arrival and/or on return to his home area, where country information indicates that he may be monitored and visited by the authorities. I find that he faces a real chance of a threat to his liberty, and of physical ill-treatment or physical harassment of a nature amounting to serious harm within the meaning of s.5J(4)(b) of the Act. I am satisfied that the conduct of the authorities in inflicting such mistreatment is systematic and discriminatory, and that it would be inflicted on the applicant for the essential and significant reason of his imputed political opinion, arising from the cumulative factors detailed above. I accept the applicant faces a real chance of harm amounting to persecution within the meaning of the Act.
28. DFAT advises that the security forces maintain effective control throughout Sri Lanka. As the harm feared by the applicant would be inflicted by the authorities, I find that effective protection measures are not available to the applicant and that the real chance of harm relates to all areas of Sri Lanka. Given the real chance of harm arises as a consequence of his imputed political opinion based on his race and compounded past events I am satisfied there are no reasonable steps the applicant can take to modify his behaviour so as to avoid a real chance of harm in Sri Lanka.
29. The applicant has a well-founded fear of persecution within the meaning of s.5J.

Refugee: conclusion

30. The applicant meets the requirements of the definition of refugee in s.5H(1). The applicant meets s.36(2)(a).

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*.

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.