



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08880

Date and time of decision: 9 March 2021 09:54:00
D Power, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) is a Sinhalese male from Sri Lanka. On 8 June 2017, he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 27 November 2020, a delegate of the Minister for Immigration refused to grant the visa. The delegate did not accept that the applicant had previously been targeted by people against whom he was due to testify in court as part of a land dispute. The delegate also found that the applicant did not have a well-founded fear of harm or a real risk of significant harm due to the unauthorised disclosure of his personal details on the internet, as a former asylum seeker, or as someone who departed Sri Lanka illegally.

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:
 - The applicant was raised by his grandmother as a child.
 - His own mother and father fought often. The applicant and his grandmother eventually went to live with his maternal uncles in [City], in Southern Province.
 - He left Sri Lanka because he witnessed his uncles being attacked by a group of men in March 2012. He was targeted by these unknown men after it became known he planned to testify about the attack in court.
 - On the day of the attack in question, the applicant's uncles were hosting a barbeque at their house with a group of friends. The applicant was also there with two of his own friends. He was about [Age] years old at the time.
 - A group of approximately 12 men came to their house and attacked his uncles. His uncles were attacked because of a land dispute with these men. The men had tried to take over their family land and produced a bogus deed to support this claim. These men were local drug dealers.
 - His uncles were injured as a result of the attack and went into hospital.
 - His uncles sought redress through the courts over the attack. They asked the applicant to be a witness to the attack and the land dispute issues. He was notified in April 2012 that he had been called as a witness and that the court hearing was to be held in May 2012.
 - Because he was listed as a witness, the applicant also became a target of the men who attacked his uncles. These men tried to attack the applicant in April 2012. After the attack, the applicant went to stay with his brother in [Town].
 - Due to ongoing fears about his safety, his uncles arranged for the applicant to depart Sri Lanka for Australia.

- The court case is still pending and the applicant is still required to attend court and give evidence.

Refugee assessment

6. 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

7. 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.
8. I accept that the applicant is a Sinhalese male from Sri Lanka. The applicant has given a consistent account of his identity and provided a copy of his birth certificate confirming his identity. I accept that his identity, ethnicity, and nationality are as claimed, that he is a national of Sri Lanka, and that Sri Lanka is his receiving country for the purposes of this review.
9. The applicant comes from [City] in Southern Province¹. He says that when he was younger, his parents were always fighting. Unable to tolerate the discord, he went to live with his maternal uncles.
10. The applicant was living with his uncles at the time of the incident that he claims led to him leaving Sri Lanka. The applicant stated that on the day in question, his uncles were having a barbecue. Present at the barbecue were various friends of his uncles as well as two friends of the applicant. The applicant had finished his [school] exams and was about [Age] at the time.
11. The applicant says that about a dozen people suddenly showed up at the uncles’ house. The applicant did not know who these people were. He said that at first these people were only

¹ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

talking with his uncles but that a little while later fighting broke out. He said that the fighting went on for some time between the two groups.

12. When the intruders started attacking his uncles, most of the other people at the barbecue fled. However, the applicant claimed that he remained with his uncles. He claimed that he stayed until the elder of his two uncles told him to run away. Eventually, some of the uncles' friends returned and took the uncles to hospital.
13. The applicant claimed that he did not know any of the people involved. He further stated that he would not recognise them today if he saw them. However, he also claimed that these people were selling drugs but had never been caught by the police. When asked why these people had attacked his uncles, the applicant stated that they wanted the uncles' land. He further claimed that these people had a fraudulent deed and claimed the land as theirs.
14. The applicant also claimed that after the attack, his uncles sought to bring the matter to court.
15. The applicant said that once it became known that he was planning to give evidence in court, he was also targeted by the people who attacked his uncles. The applicant stated that he was walking along the road when a vehicle pulled up and some people began climbing down from it. The delegate asked the applicant how he knew the people were going to attack him. The applicant stated that in the vehicle there was an individual that he knew well and who had been present at the attack on the uncles.
16. After the attack, the applicant claimed that he did not go out in public. He stated that in April 2012, he went to live with his brother in [Town] (also in Southern province²) prior to departing Sri Lanka. He stated that there were no more incidents or attempted attacks on him before his departure.
17. There are a number of issues with the applicant's account.
18. The applicant claims that he never testified in court. He further claims that without his testimony, the court adjourned the case in 2012. However, he claimed that the case also remains active.
19. It is difficult to believe that the resolution of the case is entirely dependent on the applicant's testimony. By his account, his uncles, his uncle's friends, and two of his own friends were present at the barbecue. The applicant claims that the other people present were afraid to testify at the trial. However, the applicant also claimed that he was afraid to testify and, indeed, failed to attend the court and testify as scheduled.
20. The applicant was only a minor at the time who, by his own admission, had a limited knowledge of his uncle's affairs. There would also have been other evidence of what had allegedly occurred, including the uncles visit to the hospital in the aftermath of the attack, their own documentation proving their ownership of the land, and the many eyewitnesses to the attack.
21. It also seems every unlikely that the court, having decided not to proceed in the absence of the applicant's testimony, would nonetheless keep the case on the books for almost a decade.
22. It is also unclear why the uncles did not simply withdraw the applicant as a witness. The applicant said at interview that his uncles had made it clear to the applicant that he did not have to testify

² DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

if he did not wish to do so. After the alleged attack, the uncles made plans for the applicant to leave the country to prevent further harm to him.

23. Regarding the alleged attack on the applicant, he stated that it occurred around April 2012. A vehicle with a group of men in it pulled up alongside him. Men began climbing down from the truck. The applicant stated that he then ran away. He did not claim that he was physically harmed in the attempted attack. The delegate asked the applicant how he knew the men intended to harm him. The applicant stated that in the vehicle there was an individual that he knew well and who had been present at the attack on the uncles. However, earlier in the interview, the applicant had said that he did not know any of the people who came to attack his uncles. The applicant moved to [Town] to stay with his brother. He said that there were no further incidents prior to his departure from Sri Lanka.
24. Further, the applicant's uncles have remained in Sri Lanka unharmed, even though the case is allegedly still open. He stated that his uncles recovered from their injuries and have not been harmed since the night of the attack. They still own the land, although the applicant claims that the land is vacant and cannot be developed due to the ongoing dispute. He stated that his uncles are now fishmongers and spend a good deal of time at sea.
25. I note that DFAT stated in its most recent report that the judicial system is overburdened and that the limited number of qualified police, prosecutors and judges "combine to create long delays". DFAT further states that the average time between the commission of a serious offence and the conclusion of legal processes is 17 years. In the case of his uncles' dispute, the court moved with remarkable expedition. The uncles were attacked in March and had to go to hospital. By April, the applicant had been informed by the police that he was required to testify in court. By May, the court had convened and then promptly adjourned the matter because the applicant was unavailable to testify.
26. The applicant provided no evidence in support of his claims, or even a statement of claims, prior to his interview with the delegate. The applicant's then agent, in an email dated 1 June 2017, requested that the applicant be given a 60 day extension in which to lodge an application for protection "as he is required to contact Sri Lanka and collect evidence to present his protection claim". I note that the applicant was a minor when he arrived in Australia. However, by this date in June 2017 he was [age range] years of age and was represented by a migration agent.
27. The applicant had been aware of the need to procure documentary evidence to support his claims for more than three years prior to his interview with the delegate. However, at interview, he was unable to provide any documentation to support his claims.
28. The applicant stated at interview that he had not submitted a statement of claims because he was waiting for documents to come from Sri Lanka. At interview, he claimed that issues to do with the coronavirus had prevented the documents being obtained. He claimed that all the documents had been misplaced and would need to be obtained again from the relevant organisations. I do not consider that any of these explanations adequately explain why the applicant was unable to obtain any documentation in the three years that passed between the lodging of his application and his interview with the delegate.
29. Nonetheless, the delegate then provided the applicant 14 days after the date of the interview in which to supply any documentation he wished to be considered. She also reminded him to submit evidence of his identity,

30. The applicant subsequently provided documentary evidence of his identity in the form of a copy of his birth certificate and a copy of what appears to be an ID booklet. He also provided copies and accompanying translations of several documents, including:
- A document entitled “Summons to the witness”
 - A document entitled “Acknowledgement of Complaint”
 - A document entitled “Survey Plan”
31. It is difficult to accept that the applicant was unable to obtain any of these documents prior to his interview with the delegate on 4 November 2020. The appearance only now of these documents relating to the court case raises concerns about their authenticity. The documents themselves are light on detail and provide very little information about the nature of the court case or the people involved.
32. Notably, the applicant claims that he was provided a letter from the police in April 2012 stating that he was required to testify in court in May that year. The alleged court summons he produced is dated [date] July 2012. The Acknowledgement of Complaint is dated [earlier date] July 2012. The charges on the “summons” and the “acknowledgement of complaint” appear to be different. The summons refers to “injury with a weapon”, whereas the acknowledgement of complaint refers to “Stopping of a land sale”. The summons also states that if the applicant does not attend court on the said date without a reason, he will be issued with a warrant. The applicant has not provided a copy of a warrant or indicated that any such warrant has been issued.
33. The applicant did not provide the names of his uncles in Sri Lanka who were allegedly attacked (although his entry interview names two other uncles who he claims travelled to Australia with him). Therefore, the “Survey Plan” document does not establish that the land in question belongs to the applicant’s uncles or that it is currently contested in the manner the applicant claims. The notation on the “Survey Plan” indicates that the parcel of land was surveyed on 1 March 2011. Although the plan might help to establish ownership of the parcel of land in question, it could not therefore be a document requested or commissioned in support of a complaint allegedly lodged in 2012.
34. DFAT notes that document fraud is “common” in Sri Lanka and that it is aware of false documents being put forward by asylum seekers³. I do not accept the summons or complaint documents as credible. While the survey plan may be legitimate it does nothing to prove the ownership of the land or establish that there is any dispute connected with it.
35. I am not satisfied that the applicant witnessed an attack on his uncles or that he was caught up in a land dispute.

Unauthorised Disclosure of personal details

36. In their decision, the delegate noted that the applicant was one of a number of detainees whose personal information was inadvertently published by the Department in February 2014.
37. I accept that the applicant was subject to unauthorised disclosure of his personal details (the “data breach”) by the Department of Immigration. It is possible this information may have been accessed and viewed by the Sri Lankan government, or by other parties. However, there is

³ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

nothing to indicate that the applicant would be subject to undue attention from the Sri Lankan Government (or any other party) on account of seeking protection in Australia. The data breach occurred while the applicant was detained and some years before the applicant made a SHEV application in June 2017.

38. The delegate notes that the information disclosed about the applicant consisted of name, date of birth, nationality, unauthorised maritime arrival status and detention status, and did not include any details of the applicant's reasons for seeking protection. As noted above, the data breach occurred several years before the applicant made a formal application for protection. The applicant has not disputed this nor ever made any claim to fear harm as a result of the unauthorised disclosure of his personal details. I am not satisfied that the information released about the applicant would have disclosed whether the applicant had sought protection in Australia, or the nature of his claims.
39. A 2019 UK Home Office report quotes the International Organisation for Migration (IOM) as stating that claiming asylum abroad would not be considered an offence by Sri Lankan authorities⁴. The Sri Lankan government has repeatedly stated that refugees are welcome to return to Sri Lanka, comments publicly affirmed by former Prime Minister Wickremasinghe on a visit to Australia in February 2017⁵. The information before me does not suggest that any individuals returning to Sri Lanka have been targeted for reasons relating to the data breach.

Illegal departure from Sri Lanka

40. The applicant is Sinhalese, an ethnic majority in Sri Lanka that comprises approximately 75% of the population⁶. He has spent all his life in Southern Province prior to coming to Australia. He has not ever claimed to have had any involvement with the Liberation Tigers of Tamil Eelam (LTTE)⁷ or that he was ever suspected of any involvement with the LTTE. As noted above, I do not accept that he witnessed an attack on his uncles or that he had any involvement in an alleged land dispute prior to departing Sri Lanka. He confirmed at interview on more than one occasion that he did not have any other reason to fear returning to Sri Lanka.
41. The applicant noted in his entry interview that he did not have any involvement in crewing the vessel that brought him to Australia. There is nothing before me to suggest that he was involved in facilitating that journey. There is no evidence he has been charged with any immigration offences in Sri Lanka nor is there any evidence he ever faced such charges in Australia. However, the applicant's entry interview indicates that he departed Sri Lanka illegally. I accept that he may be identified as a returning asylum seeker from Australia and that he would be regarded as having departed Sri Lanka illegally.
42. DFAT confirms that the Attorney-General's Department has directed that all passengers of people smuggling ventures be charged under the Immigrants and Emigrants Act (I&E) Act, not just those responsible for organising or facilitating the venture. DFAT also indicates that the I&E Act carries penalties of up to five years imprisonment⁸.

⁴ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

⁵ DFAT, "DFAT Country Information Report – Sri Lanka", 4 November 2019, 20191104135244

⁶ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

⁷ A militant group who launched an armed insurgency against the Sri Lankan state in 1983 in pursuit of Tamil statehood – the civil conflict that followed was said to have cost 100,000 lives before the group's final surrender in May 2009 (DFAT, 4 November 2019).

⁸ Ibid

43. However, the Sri Lankan Attorney-General's Department, responsible for prosecuting I&E offences, claims that no-one whose involvement was limited to being a passenger has received a custodial sentence⁹. Individuals charged under the I&E Act may be held for up to 24 hours after arrival, or in cases such as an arrival on a weekend or public holiday, up to two days at the airport¹⁰. DFAT states that it is not aware of any mistreatment of returnees during the entry procedure on return to Sri Lanka¹¹. As noted above, a 2019 UK Home Office report quotes the IOM as stating that claiming asylum abroad would not be considered an offence¹².
44. DFAT notes that in practice most cases result in a fine, sometimes as little as \$25 AUD for the first offence but usually between \$122 AUD and \$163 AUD¹³. I note that there is no indication (nor has the applicant claimed) that he ever left Sri Lanka illegally prior to coming to Australia and that this would therefore be the applicant's first offence. From there, outcomes depend on the defendant's plea. A guilty plea will attract a fine which can be paid by instalment and then the defendant is free to go¹⁴. A plea of not guilty will usually lead to the grant of bail on the surety of a guarantor or family member. Although bail may continue for many years, again the end result is usually the payment of a fine¹⁵. A recent UK Home Office report quoted the Sri Lankan Attorney General's Department as confirming that a fine is the punishment for those who departed Sri Lanka illegally but were not involved in facilitating the journey¹⁶.
45. The applicant has not indicated any reason why he would not plead guilty and pay a fine. The applicant remains in contact with his family and his entry interview indicates that his uncle paid for him to come to Australia. The applicant's protection visa application indicates that he is employed here in Australia as a worker in a recycling facility. Even in the event the applicant chose to plead not guilty, I do not consider that the applicant would be unable to obtain bail or pay the resultant fine (even in the event that he was unable to receive any financial assistance from his family) or that this would threaten his capacity to subsist. I note that even such fines as are levied can be paid in instalments¹⁷.
46. I consider that it is very likely the applicant will be detained only briefly at the airport, have to pay a relatively small fine or, alternatively, be released on bail, and pay associated costs (which may involve returning to court on one or more occasions). I do not consider that this treatment amounts to serious harm, nor does the available country information indicate that there is a real chance the applicant would be mistreated in any way while so detained.
47. In any event, I am also not satisfied that the treatment the applicant may experience as a consequence of the I&E Act is systematic and discriminatory conduct. The relevant sections of the I&E Act make it an offence to depart Sri Lanka from other than approved port of departure, usually a seaport or airport. These are measures aimed at controlling and regulating the flow of people across the border, and especially irregular migration. Regarding entry procedures generally, DFAT states that investigations can be undertaken on arrival to confirm a person's identity, and to determine if they have a criminal record or an outstanding criminal matter. As noted above, I do not accept that the "Summons to the Witness" document produced by the applicant is genuine or that the claims surrounding an alleged attack on his uncles are credible. I note that there is no evidence that the applicant has ever been charged with or convicted of

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

¹² UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹³ DFAT, "DFAT Country Information Report Sri Lanka", 4 November 2019, 20191104135244

¹⁴ Ibid

¹⁵ Ibid

¹⁶ UK Home Office, "Report of a Home Office fact-finding mission to Sri Lanka", 20 January 2020, 20200123162928

¹⁷ Ibid

any crime, either here or in Sri Lanka. DFAT notes that the entry processes noted above are standard procedures carried out “regardless of ethnicity and religion” and its understanding is that detainees “are not subject to mistreatment during processing at the airport”¹⁸. Similarly, the evidence does not indicate that the I&E Act itself is applied selectively or enforced in a discriminatory manner.

48. I am not satisfied that the applicant faces a real chance of harm in connection with an attack on his uncles, a land dispute, the unauthorised disclosure of his personal details on the internet, due to departing the country illegally, or on any other account.

49. I am not satisfied the applicant has a well-founded fear of persecution.

Refugee: conclusion

50. 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

51. 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

52. 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.

53. The expressions ‘torture’, ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are in turn defined in s.5(1) of the Act.

54. As set out above, I accept that the applicant will very likely be detained briefly at the airport on arrival, where he is likely to pay a relatively small fine or, alternatively, be released on bail, which may incur costs (and involve additional court visits or procedures). I accept that the applicant’s period of detention at the airport may extend over a weekend depending on when he arrives back in Sri Lanka¹⁹. However, information from DFAT quoted above does not indicate that returnees are subject to mistreatment during entry procedures or during the brief period the applicant may be detained prior to coming before a magistrate. The country information before

¹⁸ Ibid

¹⁹ DFAT, “DFAT Country Information Report – Sri Lanka”, 4 November 2019, 20191104135244

me does not include any accounts indicating that there is any intention to inflict severe pain or suffering, or pain and suffering that could reasonably be regarded as cruel and inhuman, or extreme humiliation. Nor I am satisfied there is a real risk of the death penalty being carried out, the applicant being arbitrarily deprived of his life or tortured in these circumstances. I do not consider that the consequences the applicant faces in regard to his illegal departure amount to significant harm.

55. In respect of the remainder of his claims I have otherwise found that the applicant does not face a real chance of any harm. Based on the same information, and for the reasons set out above, I find that the applicant does not have a real risk of suffering significant harm on return to Sri Lanka in connection with those claims.

56. After having regard to all the applicant's circumstances, and the country information noted above, I am not satisfied that he faces a real risk of suffering significant harm on return to Sri Lanka.

Complementary protection: conclusion

57. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
 - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
 - (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.