



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA21/08882

Date and time of decision: 15 March 2021 10:44:00
M Brereton, 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) claims to be a Sinhalese Buddhist from the Southern Province of Sri Lanka. He departed Sri Lanka illegally [in] November 2012 and arrived on Christmas Island [in] November 2012. On 29 June 2017, he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). On 10 February 2021, a delegate of the Minister for Immigration (the delegate) refused to grant the SHEV.
2. The applicant claimed to fear harm from unknown men who may be linked to the Janatha Vimukthi Peramuna (People's Liberation Front) (JVP). He claimed initially that he was targeted because of his brother's murder (by the JVP), but later claimed that it was due to his wife's affair with a JVP member.
3. The delegate accepted that the applicant is a Sinhalese Buddhist who departed Sri Lanka illegally. The delegate did not accept any of the applicant's other claims to be true. The delegate considered country information and was not satisfied that the applicant faced a real chance or real risk of relevant harm should he return to Sri Lanka.

Information before the IAA

4. I have had regard to the review material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
5. The applicant contacted the IAA on 1 March 2021 (with the assistance of an interpreter) and said that he had received the IAA notification letter but had not received a copy of the delegate's decision from the Department. He said he was concerned that the Department may not have considered certain information that he had sent to them. The IAA said it would send the applicant a copy of the decision and invited the applicant to read this and advise the IAA if he was still of the view that the delegate had overlooked or did not consider information. The applicant said that he understood this and that he will read the decision himself to check. The IAA said it would email the decision to the applicant and asked him to call back if he had not received it within 30 minutes. The applicant has not made further contact with the IAA.
6. I am conscious the applicant has expressed concern about the delegate overlooking matters, but it also appears he had not read the decision at the time he expressed those concerns. Moreover, the IAA review is a fresh assessment of all of the material before it. The applicant has not been in contact since that initial call to identify any information that may have been overlooked or indicated that he has additional evidence or information that was not before the delegate. In the circumstances I have decided to proceed to review this matter on the information before me.

Applicant's claims for protection

7. The applicant's claims as made in his SHEV application were:
 - He is a Sinhalese Buddhist from the Southern Province of Sri Lanka.

- [In] July 1988, his elder brother was shot dead. No one was charged but the family believes the brother was shot by members or supporters of the JVP. The brother had been objecting to the JVP putting up posters in the village.
 - In about 1990, another brother joined the JVP to investigate if it was responsible for the killing. This brother did not discover anything.
 - When the applicant got married, he was threatened that ‘they’ would do the same thing to him as happened to his brother.
 - He and his other brothers have received numerous threats over the telephone and with vans showing up at the house. In 2009 or 2010, a group of men came and asked for the applicant (who was out fishing) and said they wanted to harm him. This occurred on three or four occasions.
 - [In] July 2012, he attended an alms service for his brother. That evening, two men came to his house, called his name and knocked him unconscious. When he recovered, he saw that he was in hospital and had a cut on his back.
 - He went to stay with a friend after being released from hospital. His wife said she received calls from men who said they would kill the applicant. They said they would harm his children if they could not find him. He decided to flee Sri Lanka.
 - After he left Sri Lanka, men kept calling his wife and saying they would find him if he came back. They said they would harm the children if he did not come back.
 - His brother’s house has been robbed and his own house was attacked and damaged in 2013.
 - He fears harm from unknown people, possibly the JVP, because of his brother’s murder.
8. At the interview with the delegate on 14 October 2020 (the interview), the applicant said that he wanted to change his statement. He claimed that:
- He was deceived by his wife and has now learnt the truth. She was not threatened by JVP men. She was having an affair with a man (‘L’), who used to be in the JVP and was also a deserter from the Sri Lankan Army (SLA). L is now connected with criminals and gangsters.
 - His wife is living with L and has asked the applicant for a divorce.
 - He has had no contact with his wife for 3 years.
 - The attacks and threatening calls the applicant experienced were made by men associated with L and the applicant’s wife.

Refugee assessment

9. 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

10. 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.
11. The applicant has made consistent claims to be a Sinhalese Buddhist from the Southern Province of Sri Lanka. He has provided an (untranslated) National Identity Card and gave evidence at the interview with the assistance of a Sinhala interpreter. I accept his claims as to identity and origin and I find that he is a Sinhalese Buddhist from this part of Sri Lanka, and that Sri Lanka is the receiving country for the purposes of this review.
12. The applicant has changed aspects of his evidence but as I understand his evidence at the interview, he still claims that each incident occurred. What has changed is the motivation behind the incidents; he now believes these incidents arose because of his wife's affair with L, which he (the applicant) was unaware of when he first applied for the SHEV more than three years ago. He said that since he found out about the affair, his wife has asked for a divorce and he has had no contact with her for around three years. He said that his wife is now living with L in Sri Lanka.
13. I accept that the applicant's brother was shot dead in 1988 and that the family believe this may have been done by persons linked with the JVP. The applicant said initially that he and his other brothers had received threats from the JVP, but he now says that he was threatened by persons associated with L, because of the relationship with the applicant's wife. The applicant does not claim that L was involved in the death of the brother, or that L has been threatening the applicant for any reason linked to the JVP. I am not satisfied that the applicant and his other brothers were threatened by the JVP for any reason, including any reason arising from the death in 1988. I am not satisfied that masked men from the JVP came to the applicant's house in 2009 or 2010 asking about him and threatening to harm him. I am not satisfied that the applicant faces a real chance of harm from the JVP should he return to Sri Lanka.
14. The applicant has provided a copy and translation of a document purporting to be a police report, and a copy of a document purporting to be a hospital treatment record. The police report is dated 16 February 2014 and refers to the applicant being assaulted by unknown persons on the night of [Date] July 2012, injured and taken to hospital. It gives the applicant's age as [Age], which would have been correct as at 2012. It refers to the applicant as having attended the police station, which would have had to have occurred before November 2012 (when he left Sri Lanka). It is not clear whether the reference to February

2014 is an error but, in any event, I do not consider that anything turns on this in the present circumstances.

15. The hospital record is dated [date] October 2020 and refers to an incident on the night of [Date] July 2012. It states that the applicant was brought to hospital suffering a deep laceration that required suturing and anti-biotics. He was hospitalised for five days. The hospital record refers to the laceration as being an 'accidental cut injury' but the police report indicates that it was received during an assault.
16. Both documents appear to have been obtained after the applicant arrived in Australia (in 2012), but there is nothing else about the documents which indicates that they are false or fabricated. The date and outcome of the claimed incident is consistent across both documents and is consistent with the applicant's description of the event. The identities and motivations of the attackers are not speculated on in either document.
17. I accept that the applicant was threatened by L and/or persons associated with L. I am prepared to accept that persons associated with L may have come to the applicant's house and asked about him on one or more occasions. I accept that he was assaulted and hospitalised in 2012, and that his house was damaged after he left Sri Lanka. I accept that at the time, he believed that these incidents were linked to the JVP. However, I am not satisfied that these incidents were linked to the JVP. I am satisfied that they arose from L's relationship with the applicant's wife. I am prepared to accept that another of the applicant's brothers was robbed, but on the evidence before me I am not satisfied that this was linked to the JVP, or to the applicant's domestic issues with L and his wife.
18. I accept that the applicant has suffered physical injuries, threats, harassment and property damage in Sri Lanka. I am satisfied that this is conduct that may constitute serious harm as contemplated by the Act. However, I am satisfied that these incidents relate to family and domestic issues. I am not satisfied that the essential or significant reason or reasons for these incidents is, or are, reasons arising from the applicant's race, religion, nationality, membership of a particular social group or political opinion. I am not satisfied that the applicant has a well-founded fear of persecution from L, persons associated with L, or arising from L's relationship with the applicant's wife.
19. The applicant does not claim, nor does the evidence or information before me indicate that, he has faced, or may face, any harm, discrimination or harassment because of his Sinhalese ethnicity or his Buddhist religion in Sri Lanka.
20. The applicant will be returning to Sri Lanka as a failed asylum-seeker. The Australian Department of Foreign Affairs and Trade (DFAT)¹ and the United Kingdom Home Office² indicate that returning failed asylum-seekers would likely be questioned at the airport by immigration officials and may be passed to the Criminal Investigation Division (CID) based at the airport. CID would make additional checks with the local police in the area where the person claimed to be from, which may take a long time to conduct as there is no central police database. DFAT notes that the processing of returnees at the airport can take several hours, due to the administrative processes, interview lengths and staffing constraints. Returnees are processed in groups, and individuals cannot exit the airport until all returnees have been processed, although returnees are free to go to the bathroom and to talk to one

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

² United Kingdom Home Office, 'Report of a Home Office fact-finding mission to Sri Lanka', 20 January 2020, 20200123162928.

another during this time. For returnees travelling on temporary travel documents, police undertake an investigative process to confirm identity. This would identify someone trying to conceal a criminal or terrorist background or trying to avoid court orders or arrest warrants. This often involves interviewing the returning passenger, contacting police in their claimed hometown, contacting claimed neighbours and family, and checking criminal and court records. All returnees are subject to these standard procedures, regardless of ethnicity and religion. DFAT understands detainees are not subject to mistreatment during processing at the airport.

21. The applicant said that he had a Sri Lankan passport, but he did not use this passport when he left Sri Lanka. I accept that the applicant may therefore have departed Sri Lanka in contravention of the *Immigrants and Emigrants Act (1949)* (the I&E Act) and may be seen as having departed Sri Lanka illegally and charged under the I&E Act. DFAT understands that the CID unit at the airport makes most arrests. In the process, police will take photographs, fingerprints and statements from returnees, and further enquire about activities while abroad if returnees are suspected to be former members of the Liberation Tigers of Tamil Eelam (LTTE). At the earliest available opportunity after investigations are completed, police transport individuals charged with departing Sri Lanka illegally to the closest Magistrate's Court, after which custody and responsibility for the individual shifts to the courts or prison services.
22. Other (albeit older) information before me also indicates that persons who are not linked to the LTTE, Tamil separatism or similar activities have not been singled out or subjected to different treatment as returned asylum-seekers.³ The applicant is a Sinhalese and a Buddhist and there is no evidence or information before me which indicates he has been, or may be, suspected of any real or imputed association with the LTTE. I accept that the applicant may be charged and brought before the closest Magistrate's Court at the earliest opportunity, but DFAT notes that subject to magistrate availability, returnees may be held for up to two days in the airport holding cell. DFAT is not aware of mistreatment during this process. Once in court, the magistrate will determine the next steps to be taken.
23. I am not satisfied that the authorities will perceive the applicant as having been anything other than a mere passenger on his trip to Australia. According to DFAT, the Sri Lankan Attorney-General's Department has advised that no custodial sentences have ever been issued to such persons. I am not satisfied there is a real chance that the applicant would be imprisoned for any period. I consider, based on DFAT's reporting, that should the applicant plead guilty to departing illegally, he may be fined up to LKR 200,000 (approximately AUD 1,633), although well-placed sources have told DFAT this fine is usually between LKR 15,000 and LKR 20,000 (approximately AUD 122 and AUD 163), and fines can be paid by instalments.
24. If a not-guilty plea is entered, bail is normally granted to fare-paying passengers of a people smuggling venture. Bail conditions are discretionary and can involve monthly reporting to police at the returnee's expense, including for those who have subsequently relocated to other parts of the country. The magistrate would usually grant bail on a personal surety or guarantee by a family member and the returnee may need to wait for the guarantor to come to court. I am not satisfied there is any reason that the applicant would not be granted bail

³ Immigration and Refugee Board of Canada, 'LKA106007.E Sri Lanka: entry and exit procedures at international airports, including security screening and documents required for citizens to enter and leave the country; treatment of returnees upon arrival at international airports, including failed asylum seekers and people who exited the country illegally; factors affecting the treatment, including ethnicity and religion', 10 November 2017, OG020B81694; Freedom From Torture (FFT), 'Sri Lanka – Update on torture since 2009', 6 May 2016, CIS38A8012881; FFT, 'Tainted Peace: Torture in Sri Lanka since May 2009', August 2015, CISEC96CF13070.

on personal surety should he elect to plead not guilty. DFAT notes that while the fines issued for passengers of people smuggling ventures are often low, the cumulative costs associated with court appearances (if relevant) over protracted lengths of time can be high and disruptive to the returnee's lifestyle. The information before me does not indicate the applicant could not pay a fine, even if by instalment, and manage arrangements for any necessary travel and court appearance/s (should they be required), and nor am I satisfied that he would otherwise face serious harm arising from financial hardship relating to this in the reasonably foreseeable future. I am not satisfied that any surety imposed or reporting conditions, the imposition of fines, or any other costs associated with court appearance/s would constitute serious harm to the applicant.

25. Additionally, I am satisfied the processes and penalties the applicant may face would result from the lawful prosecution of a crime and there is no evidence before me that laws relating to illegal departure are discriminatory on their terms, are applied in a discriminatory manner or are selectively enforced. It does not amount to persecution for the purposes of ss.5H(1) and 5J(1) of the Act.
26. DFAT does not indicate that returned asylum-seekers who do not have other profiles (such as former high-level members of terrorist or separatist organisations) are subjected to any adverse interest or harm by the Sri Lankan authorities. Between 2010-11 and 2018-19, 3,716 Sri Lankan nationals returned from the Australian community or were removed from Australian onshore immigration detention centres to their country or origin or a third country. Many others returned from the United States, Canada, the United Kingdom and other European countries. DFAT reported that the former government had consistently stated that refugees are welcome to return and, in August 2016, released a 'National Policy on Durable Solutions for Conflict-Affected Displacement'. During a visit to Australia in February 2017, the then Prime Minister Wickremesinghe stated publicly that failed asylum-seekers from Australia would be welcomed back to Sri Lanka, although human rights groups greeted this statement with caution.
27. DFAT noted that most returnees incurred significant expenses or debt to undertake their outward journey and were apprehensive about finding suitable employment opportunities and reliable housing on return. Some received reintegration assistance in the form of financial support and transport assistance on their return to Sri Lanka. DFAT assessed that any reintegration issues experienced by returnees were not based on their failure to obtain asylum, but rather due to the employment and accommodation difficulties they may face.
28. DFAT was aware of anecdotal evidence of regular visits and telephone calls by the CID to Tamil failed asylum-seekers in the Northern Province, but there is no information before me indicating such visits are made to non-Tamils in other provinces. As noted above, the applicant does not have an adverse profile with the Sri Lankan authorities, and I am not satisfied that he will face ongoing visits or enquiries by the police should he return.
29. Having regard to the above, I am not satisfied that the applicant has a well-founded fear of persecution for any reason or reasons arising from his departure from Sri Lanka or his asylum claim. I am not satisfied that he has a well-founded fear of persecution for any other reason or reasons should he return to Sri Lanka.

Refugee: conclusion

30. 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

31. 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

32. 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.
33. 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.
34. I accept that the applicant has suffered serious harm from L or L's associates in the past. This occurred eight years ago, at a time when the applicant was living in Sri Lanka and with his wife. He claims, and I accept, that L wanted to intimidate and harm him so that L could be with the wife. The applicant and his wife are now estranged and have not spoken for three years. The applicant's wife has asked for a divorce and is living with L. I accept that the applicant may be worried about further harassment from L, including should the applicant seek to reconnect with his children in Sri Lanka. However, L and the wife are now living together, the wife is seeking a divorce and neither party is attempting to reconcile. The wife appears to have abandoned the property she shared with the applicant. L has not, on the applicant's evidence, made any further threats to harm the applicant if the applicant returns to Sri Lanka, or attempts to contact his children. Having regard to all the circumstances, I am satisfied that the risk of the applicant coming the adverse attention of L or L's associates and suffering harm as a result is remote. I am not satisfied that the applicant faces a real risk of significant harm from L or L's associates should he return to Sri Lanka.
35. I accept that having departed Sri Lanka illegally, the applicant may be charged for committing an offence under the I&E Act. I accept that he may be questioned, held in an airport holding area for a period (which may be up to two days) and may have to pay costs associated with penalties or court proceedings. I am not satisfied that these processes, or the penalties imposed, amount to significant harm, in that they do not involve being arbitrarily deprived of life, subjected to the death penalty or tortured. Nor does the information indicate that there is an intention to inflict pain or suffering that could reasonably be regarded as cruel or inhuman in nature, or severe pain or suffering, or to cause extreme humiliation, or otherwise amount to significant harm as defined in the Act.

36. I have found that the applicant does not face a real chance of harm for any other reason or reasons. As 'real chance' and 'real risk' equate to the same threshold,⁴ and for the same reasons as given above, I am not satisfied that the applicant faces a real risk of significant harm for any other reason or reasons.

Complementary protection: conclusion

37. 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.

⁴ *MIAC v SZQRB* (2013) 210 FCR 505

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.