



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA18/06049

Date and time of decision: 18 February 2019 15:24:00

J Bishop, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant claims to be national of Vietnam and identifies as Catholic. He is [age] years old and arrived in Australia [in] March 2013.
2. On 22 May 2017 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). On 28 November 2018 a delegate of the Minister for Immigration refused the applicant's visa. The delegate determined that the applicant did not have a profile of interest and did not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Vietnam.
3. During the SHEV interview the applicant provided an updated address for receiving correspondence in the future. However, for whatever reason, the delegate's decision was sent to the applicant's old address. On 4 December 2018 the IAA sent the applicant an acknowledgment of referral letter to his old address and that letter was returned to sender on 10 January 2019.
4. On 10 January 2019 the IAA contacted the applicant about his correspondence being returned. The applicant informed the IAA that the correspondence had been sent to his old address. The applicant provided his new address which was the same address he had provided during his SHEV interview. The applicant also provided an updated email address.
5. On 10 January 2019 the IAA sent to the applicant – via his advised email and postal address - the delegate's decision. Based on the evidence before me, I am satisfied that the applicant did not receive notice of the delegate's decision until 10 January 2019. To give the applicant time to provide submissions and/or new information if he wished to do so, I have delayed finalising this decision.

### Information before the IAA

6. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). No other material was provided to the IAA.

### Factual findings

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7. The applicant was interviewed by Vietnamese officials when he was in immigration detention. The Vietnamese government issued the applicant with a Laissez-passer using his claimed name and date of birth. For the purposes of this decision, I am prepared to accept the applicant is who he claims to be.
8. I accept the applicant is a citizen of Vietnam and find that the receiving country is Vietnam.
9. I accept the applicant's mother and brother live in Vietnam.
10. I accept the applicant will be returning to Vietnam as a failed asylum seeker.
11. I accept the applicant left Vietnam legally using a passport issued by the Vietnamese government that included his name and photograph.

12. I accept some of the applicant's personal details were breached and published on the Immigration Department's website in 2014.

*The applicant's religion*

13. During the applicant's arrival interview he was asked what religion he was and he responded Catholic. When the applicant was asked why he left Vietnam he responded that his family had difficulties and religious reasons. When the Department officer asked for further information about his religious reasons he responded that he himself didn't have the reason of religion. He had heard – and found out through the internet and newspapers - that the communist regime bashed Catholic people and/or Catholic priests. However, the applicant's statutory declaration dated 27 October 2016 states that he did not say during his arrival interview that he didn't "have the reason of religion."
14. The applicant said during his SHEV interview that he considers himself to be a devout Catholic. He attended mass two to three times a week, helped the priest and [served in the church] when he was living in Vietnam. In Australia, he attends church once a week – either on a Saturday or Sunday – at [named] parish.
15. When the delegate asked the applicant when was the last time he attended church he responded last Sunday<sup>1</sup>. The delegate asked the applicant to tell him about the sermon on that day and he responded the sermon was long and he didn't pay attention. The delegate asked the applicant to explain the concept of the Holy Trinity and he responded that he didn't understand the question. The delegate asked the applicant to tell him about God and the Holy Trinity in his faith and he responded that he thinks about God as a sacred person. The delegate asked the applicant who is the mother of Jesus and he responded the Lady Maria. When the delegate asked the applicant what he knew about the 10 commandments he responded that he didn't remember and he knew some prays. The delegate asked the applicant if he could tell him what the 10 commandments were about and he responded helping each other, not harming each other, that people who are rich should share with people who are poor and about loving each other. When the delegate asked the applicant to tell him what his favourite story in the bible was he responded he didn't know. He said he only says prayers. The delegate put to the applicant that he should know a story from the bible if he attended church and he responded that he goes to church to pray and listen to the sermon. The delegate asked the applicant who Moses was and he responded he didn't know. He knew about the 12 disciples but couldn't remember all of them. The delegate asked the applicant what he could tell him about Adam and Eve. The applicant responded that Adam and Eve lived with fruit trees and were allowed to eat all the fruit except one. Adam was seduced by the serpent and ate the forbidden fruit. Because Adam ate the forbidden fruit humans are punished. The delegate asked the applicant to tell him about the Holy Spirit and he responded that the Holy Spirit is like the messenger for Jesus Christ. The delegate asked the applicant what day Jesus died on the cross and he responded that he only remembered his date of birth and didn't know when he died. The delegate asked the applicant when Christians or Catholics remember Jesus' crucifixion and he responded Easter. When the delegate asked the applicant how he celebrated Easter he responded that he attended masses. When the delegate asked the applicant what happened at the Easter mass he did not provide a response.
16. During the SHEV interview the delegate put to the applicant that he had concerns that he was a Catholic. The delegate put to the applicant that he said during his arrival interview that religion was not one of his reasons for leaving Vietnam. The delegate put to the applicant that

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<sup>1</sup> I note the SHEV interview was conducted on a Tuesday.

he claimed to attend church/mass two to three times per week in Vietnam and once a week in Australia and that he considered himself a devout Catholic. However, he was unable to tell the delegate how he celebrated Easter, he was unable to provide much information about the 10 commandments and he didn't know what the sermon given the last time he purportedly attended church was about. The delegate put to the applicant that he would expect a devout Christian to have this knowledge about Christianity. After the natural justice break the delegate put to the applicant again that he didn't think he was a Catholic and asked the applicant if he wanted to respond. The applicant responded that he really was a Catholic and had a baptismal certificate from the church. The delegate asked the applicant where his baptismal certificate was and he responded in Vietnam. The delegate asked the applicant to provide a copy of his baptismal certificate after the SHEV interview but the applicant did not do so. Likewise, the delegate asked the applicant to provide a copy of his family registration booklet and national identification card – both of which would have specified the applicant's religion – but he did not do so.

17. The applicant's evidence about his religion was overall vague, general and lacking in detail. He was unable to tell the delegate what happens at an Easter mass. He was unable to tell the delegate what the sermon of two days ago was about despite saying that he went to church to pray and listen to the sermon. Likewise, the applicant was advised at his arrival interview in 2013 and during his SHEV interview in 2018, to provide documents such as his household registration but he has not done so. I am prepared to accept that the applicant has some connection to Catholicism and identifies as a Catholic. However, I do not accept the applicant is a devout Catholic or that he attends church as often as he purports.

*The applicant protesting in Vietnam*

18. The applicant was asked during his arrival interview if he was part of a particular social or religious group – for example a youth social group - and he responded no. However, the applicant's statutory declaration dated 27 October 2016 states that he, his family and others were Catholic and wanted to go to church in [Village 1] and pray for peace but were stopped by the provincial police in [2012]. He was a member of the local Catholic youth group and - because the police would not allow the people from the village to go to church and pray for peace - the Catholic youth group organised a demonstration and he participated in that demonstration. The police attacked many people who took part in the demonstration but did not attack the applicant. The applicant was detained for several hours at the police station in [District 1]. He was not harmed during his detention but was told before his release that if he took part in any more demonstrations he would be arrested. The applicant states he had to report to the police about two to three months after he was detained. He states that about three or four months after he reported to the police, he left Vietnam with his father.
19. During the SHEV interview the applicant was asked his reasons for leaving Vietnam and he responded that Catholics did not have the freedom to practise their religion. He said 'we' were under pressure and 'they' took land from the Church to make it a tourist area. When the delegate asked how that affected him he responded that he was in the Catholic youth and would participate in the protests. He said the police beat some of the protestors and put some people in jail. When the delegate asked the applicant what happened to him he responded that he participated in the protest and the police asked him to go to the police station at a later date but he did not go. He was not arrested. When the delegate asked the applicant if he was detained he responded that he wasn't. He was asked to come to the police station and he came to Australia about one or two weeks later.

20. The delegate put to the applicant that when he was asked during his arrival interview if he was ever arrested or detained by the police or security organisations he responded no. Likewise, when the applicant was asked during his arrival interview if the police and security or intelligence organisations impacted on his day to day life in his home country he responded no. The delegate put to the applicant that in his statutory declaration he states he was arrested and detained however his oral evidence was that he was never arrested or detained. The delegate put to the applicant that those inconsistencies raise doubts about whether his claims of attending a protest were genuine.
21. After the natural justice break the applicant said that during his arrival interview he was afraid and not sure. He said after that interview he has given more information about his reasons for leaving Vietnam to the Department.
22. On one account the applicant was arrested, detained, required to report to the police some two to three months after being detained and left Vietnam three to four months after reporting to the police. On another account the applicant was never arrested, never detained and asked to go to the police station but did not go. He left Vietnam one to two weeks after he was asked to go to the police station. The applicant has given significantly inconsistent evidence about what happened to him when he purportedly attended a protest in 2012 and I do not accept any of those inconsistencies can be attributed to the applicant being afraid and 'not sure' during his arrival interview. Based on all the information before me, I do not accept the applicant was a member of the Catholic youth. I do not accept that the Catholic youth organised a protest, that the applicant participated in that protest or that the applicant was ever arrested, detained or required to report to the police. I do not accept the applicant was ever told he would be arrested if he protested again. The significant inconsistencies in the applicant's evidence raise doubts about his overall credibility.

#### *Consequences of returning to Vietnam*

23. During the SHEV interview the delegate asked the applicant what would happen to him if he returned to Vietnam and he responded that he would be arrested because his mother is very active in Catholic activities. When the delegate asked what activities his mother was involved in he responded participating with other parents and protesting with others against the authorities. When the delegate asked why his mother participates in protests in Vietnam the applicant responded because 'we' are Catholics and under pressures and the authorities want to take the property of the Catholic Church. When the delegate asked the applicant when his mother last participated in a protest he responded that he didn't remember.
24. When the delegate asked the applicant if there were any other reasons he couldn't return to Vietnam he responded that his mother has received a letter twice since he left Vietnam asking her to attend to the authorities because he left Vietnam and is now in Australia. He said his name is on a list of being against the communists. When the delegate asked why the Vietnamese authorities would think he is against the communist because he is in Australia the applicant responded that he attended a protest in [Australian City 1] and that protest was on [the Internet]. He was protesting about [details deleted]. When the delegate asked the applicant if he had any evidence of him participating in this protest he responded that it was on [the Internet]. When the delegate asked the applicant if he could provide the link to the [video] he responded by provided vague details on how it could be found on the internet. The applicant said that he can be seen in the video, that he was interviewed in the video, that he said 'we' are under pressure for being Catholics in Vietnam in the video and that he identified himself and provided his name in the video. When the delegate asked the applicant how he knew about the [video] he responded that a friend called him and showed him [the video]. He

said the Vietnamese authorities know about you when you are on [social media] or [the Internet]. The delegate asked the applicant if he could provide the link to the video and he responded that he didn't know any link. The delegate put to the applicant that he would give him an opportunity to provide evidence he attended the protest and that he needed to find the video and send the link to him within the next seven days. The applicant did not provide the delegate with any link to any videos.

25. The delegate put to the applicant that during his arrival interview he said that he left Vietnam because he needed money to help support his family and that his family had borrowed money for his education. The delegate put to the applicant that when he was asked if they were the main reason he left Vietnam he responded yes. The delegate put to the applicant that he was concerned he had left Vietnam for economic reasons. After the natural justice break the applicant said that the reason he left Vietnam was that he had 'some requests' to go to the authorities given to his mother by the Vietnamese police and he is on a list of people who have left Vietnam and gone to Australia.
26. The applicant's evidence about participating in a protest in [City 1] in 2015, being interviewed and appearing in a [video] was vague, general and unconvincing. He was given ample opportunity to provide the link to the purported video but did not do so. I have doubts about the applicant's overall credibility. I do not accept the applicant ever attended a protest in 2015, ever appeared in a [video] about that protest during which he identified himself by providing his name and/or said Catholics were under pressure in Vietnam. I do not accept the applicant's mother has ever been involved in protests, has ever been requested by the Vietnamese authorities and/or police to attend because the applicant left Vietnam and went to Australia or that the applicant is on any list for being against the communists or for leaving Vietnam and going to Australia.

## **Refugee assessment**

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27. 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**

28. 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.
29. The most recent DFAT report<sup>2</sup> assesses that religious observance and practise only becomes an issue when it is perceived to challenge the authority or interests of the CPV<sup>3</sup> and its policies. Political and human rights activists who openly criticise the Vietnamese government, the CPV and its policies are at high risk of attracting adverse attention from authorities; however, the treatment from authorities generally depends on the individual's level of involvement. Individuals who are known to authorities as active organisers or leaders of political opposition are at high risk of being subject to intrusive surveillance, detention, arrest and prosecution. DFAT assesses low-level protesters and supporters often feel intimidated by police presence, and are sometimes detained and released the same day by authorities. There have been a few reported cases of uniformed and plain-clothed officers using violence to break up protests in 2016, such as beating protesters with batons to disperse crowds.
30. I was prepared to accept the applicant has some connection to Catholicism and identifies as a Catholic. However, I did not accept the applicant is a devout Catholic or that he attends church as often as he purports. Likewise, I did not accept he was a member of the Catholic youth. I did not accept that the Catholic youth group organised a protest, that the applicant participated in that protest or that the applicant was ever arrested, detained or required to report to the police. I did not accept that the applicant was told he would be arrested if he protested again. I did not accept the applicant ever attended a protest in 2015, ever appeared in a [video] about that protest during which he identified himself by providing his name and/or said Catholics were under pressure in Vietnam. I did not accept the applicant's mother has ever been involved in protests, has ever been requested by the Vietnamese authorities and/or police to attend because the applicant left Vietnam and went to Australia or that the applicant is on any list for being against the communists or for leaving Vietnam and going to Australia. Based on my findings and the country information as outlined above, I do not accept the applicant has any adverse profile that would give rise to any adverse interest in him by the Vietnamese government/authorities because of his religion now or in the foreseeable future.
31. I accepted that the applicant left Vietnam legally using a passport issued by the Vietnamese government that included his name and photograph. The most recent DFAT report states that it has no information to suggest that people known or believed to have sought asylum in another country are mistreated by the Vietnamese government on their return<sup>4</sup>. The DFAT report states:
- Article 91 of the *Penal Code 1999* states that 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. Returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. In December 2016, a new Memorandum of Understanding (MOU) was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security, which provides a formal framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea'<sup>5</sup>.
32. In February 2014, over a period of about eight and a half days, the full names, gender, citizenship, date of birth, date when immigration detention began, the location of immigration

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<sup>2</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED850AD4597.

<sup>3</sup> Communist Party of Vietnam

<sup>4</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED850AD4597 at 5.21.

<sup>5</sup> Ibid.

detention, boat arrival details and the reason for being unlawful (for example illegal maritime arrival) of approximately 9,250 people were inadvertently published on the Immigration Department's website (the data breach). I accept that limited details about the applicant – as outlined – were capable of being accessed on the website for a period of eight and a half days. However, even if the data breach had not occurred, and whether or not the applicant's details were in fact accessed by the Vietnamese government/authorities, those details – apart from details about when and where the applicant was detained - would have been otherwise evident to the Vietnamese authorities upon his return to Vietnam. During the SHEV interview the applicant said he would be arrested and put in jail because of the data breach. He was concerned his family in Vietnam would be harmed and, if he returned to Vietnam, it would be very difficult for him to live there. The applicant's claims are vague and general. I have found that the applicant does not have a profile of any concern and I am not satisfied that the applicant faces a real chance of any harm on the basis of seeking asylum and/or because of the data breach now or in the foreseeable future.

33. I accept that there are credible reports of some returnees being held for a brief period upon their return to Vietnam for the purpose of being interviewed by the Ministry of Public Security (MPS) officials to confirm their identity where no documentation exists. Other cases involve individuals detained by authorities in order to obtain information relevant to the investigation of people smuggling operations<sup>6</sup>. DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations.
34. The applicant's SHEV application indicated that he has never been charged, convicted or wanted for an offence in Vietnam. The applicant has not claimed and there is no evidence before me to indicate that he has ever been involvement in people-smuggling operations. I am not satisfied that the applicant would be at risk of serious harm as a consequence of this routine investigation now or in the foreseeable future.
35. Based on all the information before me, I am not satisfied that, having regard to the applicant's profile he would face a real chance of persecution now or in the foreseeable future if he returned to Vietnam for any of the reasons claimed.

#### **Refugee: conclusion**

36. 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**

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37. Under s.36(2)(aa) of the Act, 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.

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<sup>6</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597.



### **Real risk of significant harm**

38. 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.

39. I have found that the applicant is not a person of adverse interest to the Vietnamese authorities. I am not satisfied that the applicant would suffer significant harm as a consequence of being subjected to the routine investigation – as outlined above – upon his return to Vietnam.

40. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Vietnam (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future for any of his claimed reasons.

### **Complementary protection: conclusion**

41. 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**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***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.