



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

**Decision and Reasons**

**Referred application**

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VIETNAM  
IAA reference: IAA18/06067

VIETNAM  
IAA reference: IAA18/06069

VIETNAM  
IAA reference: IAA18/06068

Date and time of decision: 17 January 2019 09:20:00  
I Sheck, Reviewer

**Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

*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 applicants are citizens of Vietnam. The applicant left Vietnam in May 2012 and arrived in Australia [in] October 2012. He married [in] March 2016. On 24 March 2016 he lodged an application for protection visa (PV). The applicant's son was born in Australia on [date] and his daughter was born in Australia on [date]. The children's details have been added to his application.
2. On 29 November 2018 a delegate of the Minister for Immigration (the delegate) refused to grant the visas. The delegate accepted that the applicant was present at a protest [in] November 2011, but did not accept that he was of any interest to the police or Vietnamese authorities due to this attendance. The delegate also accepted that the applicant is of Catholic faith and departed Vietnam illegally. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm for these or any other reasons.
3. The applicant made the primary claim for a PV; the applicant's son and daughter rely on the claims presented by the applicant and are also relying on the family unit criteria.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

### Applicants' claims for protection

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5. After his arrival at Christmas Island the applicant was interviewed by an officer of the then Department of Immigration and Border Protection (now the Department of Home Affairs) on 31 October 2012. The applicant provided details of his claims at questions 89 to 96 of his PV application and in a statement dated 6 February 2016. On 31 July 2018 the applicant attended an interview ("the PV interview") with the delegate, at which his then representative was present. The applicant claims:
  - He is of Roman Catholic faith;
  - [In] 2011 he became aware of a disturbance at his local church. When he attended the church he found the parishioners being beaten by police and thugs. He asked them to stop and was beaten himself. A week after this event he was summoned to appear at the local police station. When he attended he was interrogated, beaten and tortured. He was told that he must abandon his Catholic faith or be sent to a re-education camp. He was then released and told to return the next day. He did not return but fled the village and stayed at his [relative's] farm 1000 kilometres away;
  - Public Security officers sought the applicant at his parent's home and the home of his[relative]. In May 2012 he departed Vietnam for [Country 1], [Country 2] and then Australia. He is wanted by the police and if he returns to Vietnam he would be arrested and imprisoned;
  - If he returns to Vietnam he would be harmed for leaving illegally and seeking asylum. He would be interrogated and asked what he had done overseas or in Australia, to whom was he connected.

## Factual findings

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6. I accept that the applicant's background is as follows: he was born in Ha Tinh province in northern Vietnam and resided in [Village 1] in that province from birth until October 2011. His parents and older brother remain in Ha Tinh province. He is of Catholic faith and Kinh ethnicity. He completed [number] years of schooling. During and after his studies he assisted his parents on their rice farm. From 2005 he worked on the farm for six months of the year and in [Industry 1] during the "off season" for the remaining six months. From October 2011 he was working and living in [Village 2], Ha Tinh, some [number] kilometres from his family home, undertaking [Industry 1] work. He married in Australia in March 2016. His wife holds a student visa. The applicant's son was born in 2016 and his daughter in 2018.
7. The applicant has consistently claimed to be Catholic and I accept that he is. He further claimed that when in [Village 1] he was [senior member] of the local Catholic Youth Group. I accept that he was. At the PV interview the applicant confirmed that he had attended church every morning while living in his home village of [Village 1]. When he moved to [Village 2] he only attended Sunday mass each week. The delegate asked the applicant whether anything had ever happened to him because of his church attendance. He replied that it had not. The applicant has not indicated that he has been prevented in any way from practising his Catholic faith and I find he has not.
8. The applicant's central claim is that he had to flee Vietnam as he came to the attention of the authorities in [2011]. In his arrival interview the applicant stated that [in] 2011 the authorities were undertaking some work near [Church 1] in [Village 2]. They said they were digging for irrigation but the reality was to cause damage to the parish property. The authorities were also bashing the parishioners. In his PV application and statement the applicant outlined the events of [that day] in great detail. He stated that he was at his boarding house when he heard shouts outside and saw a number of people running to the church. He asked what was happening and was told that the authorities were trying to occupy the church land. There was some variation to this evidence in the applicant's PV interview. He initially stated that he saw and heard the confrontation at the church. In answer to the delegate's question the applicant stated that his boarding house was seven to ten minutes from the church by bicycle. When asked how he could have heard shouts from the church the applicant responded that at around 7am he heard people running from the church into the rice fields. He could see the fields from his room. He went to the church and there were 400 to 500 parishioners there. They were outnumbered by uniformed and plainclothes police, who were beating them. The authorities had a machine "like a bobcat" or bulldozer and they were trying to excavate around the church to make the church collapse.
9. The applicant then claims that he was summoned to the police station or office of Public Security [few days later]. At his PV interview the applicant claimed that he had provided the Department with a summons but this does not form part of the review material. The delegate asked the applicant how he had been identified by the authorities, out of a crowd of some 400 to 500 people. The applicant responded that a plain clothes policeman came to his job and said he had to attend. He also stated that police were doorknocking in the village [in the preceding few days] to see if anyone was there who was not registered as a temporary resident however he was already registered. The delegate repeated her question three more times however the applicant's responses did not address the question.
10. The applicant then claims that from 9 am to 5 pm [specified day in] 2011 he was interrogated, beaten and tortured. The authorities wanted him to make a statement "that the parish priest was the conspirator". When asked by the delegate what the priest was supposed to have

conspired about the applicant responded that he was asked “whether the priest had asked him to attend the crowd”. The applicant additionally claimed in his 2016 statement that the authorities told him to abandon Catholicism and not to attend mass at [Church 1]. He was told that if he did not renounce his religion he would be sent “to the re-education camp or the concentration camp”. He was asked to sign a statement but did not do so. At 5pm they released him and told him to return the following day. He did not return but instead left [Village 2] the next morning and travelled to his [relative] in Gia Lai province.

11. The applicant’s evidence on his central claim is unconvincing. As his boarding house was seven to ten minutes cycle away from [Church 1] this would conservatively equate to around two kilometres. The applicant has variously stated that he saw people “running to the church” and that he saw people “running from the church into the rice fields”, however these statements are entirely implausible due to the distance involved. He could not see the church from his boarding house. The applicant initially stated in 2012 that the authorities were digging irrigation ditches on church land, however in his 2016 statement claimed that “Bulldozers were excavating around the church. No one would be allowed to enter the area”. In his PV interview in 2018 he claimed that the excavations around the church were being made so that the church would collapse. The increasing embellishment of this claim leads me to doubt that it occurred.
12. Of further concern is the applicant’s claim that he was called in or summonsed to the police or public security station on [specified day in] 2011. He has provided no independent evidence of such a request. The applicant claims that there were 400 to 500 parishioners at the [altercation] and that they were outnumbered by the police. There would also presumably have been municipal workers present attempting to undertake the digging. The total number of people present would therefore have been over a thousand. The applicant had only been resident in [Village 2] for a month or so. He was not present at the outset of the protest and was not involved in any way in its organisation. Despite repeated attempts by the delegate he could not explain or even speculate as to how the authorities would have identified him in this crowd. I do not consider that this claim is at all plausible. I am therefore not satisfied that he was identified by the authorities or that he would have been of any interest to the authorities by virtue of his attendance at the church altercation or by having assisted any other protesters who were being beaten.
13. The applicant has provided great detail in his statement of claims regarding his mistreatment during [specified day in] 2011. As I have not accepted that he was identified or of interest to the authorities I do not accept that he was summonsed to attend a police or public security station on that day, that he was interrogated, beaten, tortured, forced to sign statements, told to renounce his faith or to cease attending [Church 1]. The applicant has further claimed that public security officers attended his family home some [number] kilometres away as well as the home of his [relative] in Gia Lai province, some 1000 kilometres away, seeking him. I conclude that these claims are also fabrications, due to the applicant being of no interest to the Vietnamese authorities.
14. As noted above, the applicant has variously claimed that the protest [in] 2011 was due to the authorities damaging the church land, to them restricting access to the church and to them attempting to demolish the church. Country information notes that protest activity does occur, often linked to land use and compulsory acquisition of land by the Government.<sup>1</sup> The applicant has not claimed that this was happening. In view of the inconsistencies and the

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<sup>1</sup> Department of Foreign Affairs and Trade (DFAT), “DFAT Vietnam Country Information Report”, 21 June 2017, CISED50AD4597; 2.30

fabrication of further claims, I am not satisfied that there was in fact any protest [in] 2011 in which the applicant was involved.

15. At the PV interview the applicant tendered a number of photographs. Each photograph shows a large number of people walking or posed holding or in front of various banners and flags. I infer that the applicant is present in each of these photographs. The applicant contended that he had attended protests in Australia. The delegate asked whether he had ever attended similar events in Vietnam and he replied that he had not. The delegate asked the applicant to tell her about the protests he had attended in Australia and the applicant replied: “[Political Organisation 1] held a protest. I joined them for the photo”. The applicant advised that he was not a member of [Political Organisation 1] or any other political parties. He was too busy with his work and family commitments. Aside from general statements that he hated the brutal communist regime and wanted to dethrone them, the applicant expressed no political views.
16. I accept that the applicant has attended a number of protests or rallies as claimed. I am also satisfied that he has not been a speaker at any rallies, nor was he in any way involved in their organisation. I am not satisfied from the evidence before me that any of these events were monitored by the Vietnamese government, that they were reported in Vietnam or that participants would be imputed with a particular political opinion on return to Vietnam. The applicant does not claim to be a member of any political parties. The applicant has stated that he did not take part in any activities against the State prior to departing Vietnam at [age] and I find that he did not. I am not satisfied that the applicant would have any interest in participating in activities against the State on return to Vietnam.
17. The applicant has stated that he departed Vietnam illegally, across the land border to [Country 1], in May 2012. He also states that he has never held a passport. I accept that he departed Vietnam without a passport.

## **Refugee assessment**

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18. 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**

19. 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.
20. I have found that the applicant is a Vietnamese national; accordingly, Vietnam is his receiving country. I accept that the applicant is of Catholic faith. Some 7% of the Vietnamese population who declare their religion or belief are Catholic.<sup>2</sup> The Catholic Church is a registered church in Vietnam, and is one of 14 distinct religions that hold full government recognition and registration.<sup>3</sup> The situation for Catholics has continued to improve in recent years.<sup>4</sup> DFAT assesses that religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the Communist Party of Vietnam (CPV) and its policies.<sup>5</sup> The applicant has not claimed that he was at any time prevented from praying or attending church and I do not find that there is any real chance that he would be prevented from practising his religion in the future. The applicant did not make any suggestion that he has modified his religious practice in the past to avoid harm or concealed his views, or would need to do so in the future. He does not face a real chance of harm on the basis that he is of Catholic faith.
21. The applicant contends that he will be imputed with the political opinion of being against the Vietnamese government due to his recent participation in protest activities in Australia. I have accepted that he has attended mass rallies or protest events as a participant only. I am not satisfied on the evidence before me that the applicant will participate or have any interest in participating in any conduct in which he would be perceived to be a political activist on return to Vietnam. I am not satisfied that the applicant faces a real chance of any harm on the basis that he would be considered to be a political activist.
22. The applicant has also claimed that he will be arrested and imprisoned, should he return to Vietnam, due to having departed illegally and having sought asylum in Australia. I accept that if the applicant returns to Vietnam the authorities will know or will assume that he has applied for asylum in Australia, due to the manner of his return. Country information indicates that 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>6</sup> If the applicant is returned to Vietnam involuntarily, the Vietnamese authorities will inevitably be made aware of his personal details and will assume that he is a failed asylum-seeker.
23. The Constitution of Vietnam provides for freedom of movement, however there are penalties for Vietnamese nationals who depart the country unlawfully, including without travel documents or with false passports. Fines for departing without a travel document range between VND 2 Million and VND 10 Million (AUD \$120 to \$600)<sup>7</sup>, however DFAT understands that people who have paid money to organisers of people smuggling operations are not subject to such fines.<sup>8</sup> I accept the applicant departed Vietnam without a passport in violation

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<sup>2</sup> DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 2.7

<sup>3</sup> Ibid; 3.9

<sup>4</sup> Ibid; 3.9

<sup>5</sup> Ibid; 3.10

<sup>6</sup> Ibid; 5.15

<sup>7</sup> Ibid; 5.16

<sup>8</sup> DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 5.21

of Vietnamese law. 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the *Penal Code 1999*, however, DFAT is unaware of any cases where this provision has been used against failed asylum seekers.<sup>9</sup> Returns to Vietnam are usually done on the understanding that the returnee will not face charges as a result of their having made asylum applications.<sup>10</sup> The referred information does not indicate that differential treatment is being applied by the Vietnamese Government to failed asylum seekers known to be Catholics compared to non-Catholics. I do not accept that there is a real chance that the applicant will suffer serious harm on return to Vietnam. I conclude that possible imposition of a fine and a brief period of detention does not constitute serious harm in this case. I am not satisfied on the basis of the country information that the applicant faces a real chance of persecution on the basis that he departed Vietnam illegally, that he has spent time in Australia or that he unsuccessfully sought asylum in Australia. The review material is silent on whether the applicant's young children would also be detained, however there is nothing to indicate that they would be separated from their parents or otherwise harmed and I conclude that they would not.

24. I am not satisfied that the factors as discussed above cumulatively raise the applicant's or his children's profiles to a level such that any of them would face a real chance of serious harm on return to Vietnam. As noted above the applicant's son and daughter have not made any other claims independent of those raised by the applicant and for the reasons given in relation to the applicant, I am not satisfied that they face a real chance of serious harm on return to Vietnam.

#### **Refugee: conclusion**

25. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

#### **Complementary protection assessment**

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26. 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.

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

27. 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.

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<sup>9</sup> Ibid; 5.15

<sup>10</sup> Ibid; 5.15

28. I have concluded above that the applicants do not face a real chance of harm on the basis of the applicant's religion, his protest activities in Australia or as asylum seekers returning from Australia. As 'real risk' and 'real chance' involve the application of the same standard,<sup>11</sup> I am also not satisfied that the applicants would face a real risk of significant harm for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.
29. As noted above, based on the information from DFAT, I accept there is real chance, and therefore real risk, that the applicant may be briefly detained and interviewed on arrival for his unlawful departure from Vietnam in 2012. However, on the basis of that information, I am not satisfied being briefly detained and interviewed, or possibly fined, constitutes significant harm as defined. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, on the evidence, it does not amount to pain or suffering, severe pain or suffering or extreme humiliation. I have concluded that the applicant's young children will not be separated from their parents or otherwise harmed. I have also found there is nothing in the applicant's profile which would lead him to face any extended detention or other harm that would amount to significant harm during this process. I am not satisfied the applicants face a real risk of significant harm on return to Vietnam on the basis of the applicant's illegal departure.

#### **Complementary protection: conclusion**

30. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

#### **Member of same family unit**

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31. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the *Migration Regulations* 1994 to include a child of the family head.
32. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

#### **Decision**

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The IAA affirms the decision not to grant the referred applicants protection visas.

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<sup>11</sup> *MIAC v SZQRB* (2013) 210 FCR 505



## Applicable law

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### ***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.