



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA19/06738

Date and time of decision: 9 July 2019 11:10:00

J Maclean, 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 citizen of Vietnam. He arrived in Australia as an unauthorised maritime arrival in May 2013. In August 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 4 June 2019 on the basis that the applicant was not a person in respect of whom Australia has protection obligations.

Information before the IAA

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

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He is a citizen of Vietnam, born in the [named] Ward, Phu Loc District of the Thua Thien Province, and of Kinh ethnicity.
 - In April 2013 his father arranged for him to travel to Australia. Initially his father did not tell him why he was going to Australia, but sometime after arriving in Australia his father told him he was worried he would be kidnapped by some underworld people because of loans his father could not pay back.
 - His father explained that when his mother was sick he took their land documents and got a loan from a bank for his mother's treatment, and he also took some loans from people in the underworld. Whilst the applicant was in Ho Chi Minh City his father received a letter from the bank asking for repayment of the loan or the house would be seized. After the applicant left Vietnam the bank took the property.
 - His father also told him he left their home area to go to Ho Chi Minh City to get away from the money lender people. He believes his father is still somewhere in Ho Chi Minh City working as [an occupation 1], that he has not paid off the debts, and the people he owes money to are still looking for him so he cannot return to [his ward].
 - If he left Vietnam illegally he is concerned he will be detained if returned to Vietnam as it is against the law in Vietnam to flee the country. He has heard of other failed asylum seekers being detained on return.
 - He is also afraid that if someone is looking for his father they may also come after him. He does not feel authorities in Vietnam will protect him, and he will be arrested if he returns to Vietnam, and is concerned the person his father owes money to may be connected with the authorities.

Refugee assessment

5. 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

6. 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.
7. The applicant has consistently claimed he is a citizen of Vietnam who was born in the Phu Loc District of the Thua Thien Province of Vietnam in 1996, and that he is of Kinh ethnicity. Although he has provided no documentation to support his identity, his evidence was provided with the assistance of a Vietnamese interpreter, and I consider the narrative he provided is consistent with his claimed identity. I am satisfied there is no issue regarding his identity, that his identity is as claimed, and he is a Vietnamese national for the purpose of this assessment, and Vietnam is the receiving country.
8. I accept the applicant’s broadly consistent evidence regarding his background and early life in Vietnam. He lived with his mother and father in the Phu Loc District. He attended school in the local area until [Grade] in 2007, when he was [age] years of age. He ceased his schooling after his mother passed away of an illness in 2007. After leaving school he continued to live with his father, and worked for various farmers in the local area until sometime in 2010 when he went to Ho Chi Minh City to work in [industry 1] as [an occupation 1] for a private contractor. He continued this work until shortly before leaving Vietnam. His father continues to reside in Vietnam, however he moved from Phu Loc District after the applicant left Vietnam, and works in [industry 1], living [near wherever he is working]. The applicant believes his father is in Ho Chi Minh City. He does not know any other relatives in Vietnam, and has no siblings.
9. The applicant claims to fear harm on the basis of the debts incurred by his father. He claims he does not feel authorities in Vietnam will protect him, and that the people his father owes money to may be connected with the authorities.
10. With regard to the reason the applicant left Vietnam, during the Arrival interview the applicant is reported to have said that when he was living and working in Ho Chi Minh City his father called him and told him to go on a trip to Australia, without providing him with further reason, and that he did not have any personal reason for coming to Australia. However, in his

statement of claims the applicant indicates that after arriving in Australia his father told him he arranged for him to travel to Australia because he was worried the applicant would be kidnapped by underworld people he had borrowed money from, but could not pay back. His father explained that when his mother was sick he took their land documents and got a loan from a bank for his mother's treatment, and he also took some loans from people in the underworld. Whilst the applicant was in Ho Chi Minh City his father received a letter from the bank asking for repayment of the loan or the house would be seized, and after the applicant left Vietnam the bank took the property, and his father left their home area to go to Ho Chi Minh City to get away from the money lender people. He believes his father is still somewhere in Ho Chi Minh City working as [an occupation 1], that he has not paid off the debts, and the people he owes money to are still looking for him so he cannot return to [his ward].

11. During the SHEV interview the applicant said his father has many debts, that he thinks his father needed a loan firstly because he wanted to open a business, and also because his mother was ill. However, when questioned by the delegate he was unable to provide any more specific information about the size of any loan or when it was taken out, nor regarding whether it was the money lender or the bank who seized his father's property. Although he suggested his father is in hiding from the lender, the applicant's evidence during the SHEV interview appeared inconsistent about whether the lender knew where his father was. Initially when asked if his father had any further problems with the money lenders since leaving their home area, the applicant said 'they do not know where my father is', however immediately afterwards when asked if the money lenders know where his father is he said he thinks they know, but because his father does not have a stable address and is moving about they do not know exactly where he is, but they know he is trying to stay away from them.
12. Considered as a whole, I found the applicant's evidence about his father's loans, and about his father moving to Ho Chi Minh City and being in hiding to avoid the lenders, and sending the applicant to Australia because he feared he would be kidnapped, was extremely vague and unconvincing, and aspects were entirely implausible. Even taking into account that the applicant was a child of [age] years of age at the time he departed, I find it entirely implausible that the applicant, who had been living independently from his father for a number of years, and supporting himself by working in Ho Chi Minh City, would have left his home country and undertaken the difficult and dangerous journey to Australia, including several days at sea, without having some explanation for doing so. The applicant's evidence appeared to evolve during the SHEV interview to include an additional claim regarding his father borrowing money because he wanted to set up a business, however lacked any detail about when any loan was taken out, who gave the loan or loans, how much was borrowed, the nature of the purported business, and whether a business was ever actually commenced. In addition, no documentary evidence was provided to support that any loan was taken out, including from a bank, or any document to support that his father ever held land that could have been used as security for a loan. Given the young age of the applicant at the time he departed Vietnam, and the limited contact he had with his father in the years prior to his departure, I am prepared to accept his father may not have disclosed much information about any debts he had to his son at that time. However, I consider as a minimum, if the applicant were genuinely at risk of harm for the reason claimed, his father would have warned him of the risk, and provided at least a basic explanation as to why he was being sent to Australia. I also note that the applicant returned to his home area for a number of weeks prior to departing for Australia, which I consider he would not have done if there were genuine fears for his safety in his home area. In addition, noting it is over six years since the applicant departed Vietnam, and the applicant is no longer a minor, and as indicated in his SHEV application, he continues to have regular telephone contact with his father, I consider

the applicant would have obtained further information from his father about this issue, especially as it forms the substantive basis of his claim for protection. The applicant's evidence regarding people looking for his father was also vague and unconvincing, including no details about any particular incident, the date of any incident, or any indication of how his father is aware of this interest in him.

13. Along with his SHEV application the applicant provided a Country Information Package from the Asylum Seeker Resource Centre (ASRC). The package contains information regarding risk profiles for various groups of people, and references a number of documents, the most recent being dated in February 2017. Of relevance to the applicant's situation, the package claims Vietnamese authorities are often the perpetrators of human rights abuses, and State protection will often not be available for asylum seekers. The package also refers to concerns related to the Household registration system, known as Ho Khau, which will be discussed further below. Of note, the package refers to the 2015 DFAT Country Information Report for Vietnam. DFAT's more recent assessment of the situation in Vietnam post-dates the information referred to in the package provided by the applicant, and is based on on-the-ground knowledge and discussions with a range of sources in Vietnam.¹ The DFAT report is not an exhaustive country overview, however, I am satisfied it is an authoritative and credible document providing current and cogent information on the situation in Vietnam.
14. I have taken into account country information which supports that the practice of borrowing money from loan sharks at high interest rates is common in Vietnam,² and that there are reports of threats and violence against borrowers who cannot pay the debts.³ Other than the generalised assertion that people are searching for his father, it is not apparent to me the applicant ever indicated his father had been harmed by any person in Vietnam, including those reportedly searching for him, despite him continuing to reside in his home area for at least six years after his wife's death, prior to which I consider at least some of the alleged loan would have been taken out to fund her medical treatment. Overall, I am not satisfied the applicant's father owes money to any person in Vietnam, including a bank or money lenders, that the applicant's father moved from his home area because of fears relating to loans, that those loans were the reason the applicant was sent to Australia, or that the applicant is at risk of harm for the reason claimed. I am prepared to accept the applicant's father does not presently live in his home area and that he works [at different locations], and lives [near his workplaces].
15. In his statement of claims the applicant expressed concern that he would have no home to return to, and because of his father's circumstances, his father cannot return to the place of his birth and he may find himself having to move around Vietnam, and it would be difficult to find work in Vietnam. Noting that the applicant was living independent of his father, and working in the [industry 1], for a number of years prior to leaving Vietnam, and also that whilst in Australia he was able to secure work in a [business] for a period of time, I am satisfied he will be able to secure some form of employment and housing on his return to Vietnam, such that his capacity to subsist will not be threatened.
16. As noted above, the ASRC country information package refers to the Ho Khau or Household registration system used in Vietnam, which is a national register of all members of a household, and suggests the family registration of Vietnamese nationals who leave the country for more than 12 months is automatically cancelled and they become temporary

¹ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

² Viet Nam News, "Loan sharks feed off poor, naive workers", 11 September 2015, CXBD6A0DE18811

³ VietNamNet Bridge, " 'Black credit' besieges workers, students before Lunar New Year", 29 January 2016, CX6A26A6E9780

residents, who until they establish permanent residency have limited access to basic services such as health care, and face discrimination in hiring in public sector jobs. Apart from the reference to the Ho Khau in the ASRC general country information package, the applicant made no explicit claim regarding this matter. DFAT reports that the Ho Khau is used by officials to determine the level of services provided to villages and provinces, linking a person's right to access government healthcare, education and other services to their place of residence. Registration is also essential for obtaining employment with the government or state-owned enterprises. DFAT is aware of recent returnees receiving assistance from Vietnamese provincial authorities and IOM to reintegrate to their communities. The information before me does not indicate the applicant would not be able to obtain registration on return to Vietnam, and I reject the contention that he would be disadvantaged on that basis. I note the applicant previously worked in agriculture in his home area and also in [industry 1] in Ho Chi Minh City (where his father presently works in [the same industry]), and DFAT reports that agriculture employs around 44 percent of workers in Vietnam.⁴ I am not satisfied there is a real chance the applicant will be prevented from obtaining employment or denied other services such as health care. I am not satisfied he faces a real chance of any harm on this basis.

17. The record of the Arrival interview, conducted in June 2013, shortly after his arrival in Australia, indicates the applicant said he had no religion. During the SHEV interview the applicant said he did not declare any religion when he first came to Australia, but recently his father started following Buddhism. When the delegate asked if he follows any religion the applicant said he 'just follow(s) his father'. Although he said he identifies as a Buddhist, when asked if he had practised his religion since living in Australia he said 'no'. I am prepared to accept the applicant may identify as a Buddhist because his father does so, but I do not accept he has ever practised that religion. It is not apparent to me the applicant ever claimed to have suffered any problem related to religion whilst in Vietnam, or that he expressed any fear of harm on return to Vietnam relating to religion.
18. In his SHEV application the applicant responded 'yes' to the question 'Do you still have military service obligations in your home country?', and stated that he left before he was 18 years old, and if he had turned 18 when he was in Vietnam he would have had to do military service. The 2017 DFAT report indicates military service of 18-24 months is compulsory for males aged 18-25 years, however in practice DFAT understands that males must register with the military, but very few are called to serve for the full military service period.⁵ The applicant is now [age] years of age, and remains within the age group to whom compulsory military service applies, and I accept there is a real chance he may be required to complete a compulsory military service obligation. It is not apparent to me the applicant is opposed to serving in the military in Vietnam, that he would seek to avoid such service, or that during the protection visa process he ever articulated any fear of harm resulting from having a military service obligation, despite the delegate giving him a number of opportunities during the SHEV interview to provide details of the reasons he feared returning to Vietnam. In any event, there is nothing in the information before me to indicate the current law in Vietnam regarding conscription is discriminatory on its face, intent or application. The law is one of general application, applicable to all Vietnamese males equally, and I am not satisfied the applicant would be selectively targeted for military service, such that it would constitute persecution. In addition, there is no information before me to support that the applicant would face a real chance of being seriously harmed during any military service he might be required to undertake if returned to Vietnam.

⁴ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

⁵ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

19. During the SHEV interview the delegate noted the applicant had been sent a letter advising that a report containing some personal information about people in immigration detention had been released on the Department's website (the 'data breach'). Included in the referred material is a letter sent to the applicant, dated 4 June 2004, advising he was affected by a routine report being released on the Department's website which unintentionally enabled access for a short period of time to personal information about people in immigration detention on 31 January 2014, and inviting him to put forward any concerns he has about the data breach. The information released included his name, date of birth, nationality, gender, and details about his detention, such as when he was detained, the reason and location for detention, but did not include any contact information or information about his protection claims. On 18 June 2014 the applicant's representative (at that time) sent a letter to the Department responding to the invitation. The letter notes that the Department's breach may have alerted Vietnamese authorities the applicant has applied for asylum in Australia, which is considered a serious crime under the Vietnamese Penal Code, and draws attention to a number of asylum seekers who had 'been imprisoned recently' on return to Vietnam. During the SHEV interview the delegate asked the applicant if he wanted to provide any information or comment on the data breach issue, and he said 'how can I know'.
20. I accept the applicant was in immigration detention on 31 January 2014, that he was affected by a data breach, and that some of his personal information was unintentionally made available on the department's public website for a short period of time. Of note, the information did not include any details about his contact details or any information about his protection claims. I consider it is possible the Vietnamese government accessed the information, however that information would reveal no more than that the applicant was in immigration detention in Australia, and possibly (by inference) that he had sought asylum in Australia, which will be apparent in any case as a result of the manner of his return to Vietnam, and which for reasons discussed below, I do not accept will give rise to a real chance of any harm. I am otherwise not satisfied the applicant faces a real chance of any harm on return to Vietnam as a result of the data breach.
21. In his SHEV application, in response to the question 'How did you leave your home country?' the applicant notes he is 'Unsure if I left legally or illegally'. However, during the Entry interview, in his SHEV application, and during the SHEV interview, the applicant consistently referred to obtaining a passport in his name prior to leaving Vietnam. In his statement of claims he notes he had an identity card and passport when he left Vietnam, which he did by travelling to the [border], where he gave some guards his passport and identity document and they let him enter, after which he travelled by plane to [Country 1], and on to Australia by boat. In his SHEV application the applicant notes his passport was taken by the people smuggler on the trip to Australia. Taking into account all the information before me, I am satisfied that with the assistance of a people smuggler, the applicant left Vietnam legally using a Vietnamese passport in his name and entered [the neighbouring country], that he then flew to [Country 1] eventually boarding a boat and travelling to Australia. I am also satisfied he no longer has the passport he used in his possession.
22. The applicant claims he fears being detained if returned to Vietnam, because it is against the law in Vietnam to flee the country, and because failed asylum seekers have been detained on their return. The June 2014 letter from the applicant's representative refers to a list of political and religious prisoners in Vietnam, compiled by the 21st Session of the United Nations Human Rights Council (September 2012), who were imprisoned for 'fleeing abroad or defecting to stay overseas with a view to opposing the peoples administration'.

23. I have considered whether the applicant is at risk of harm on return to Vietnam as a returning asylum seeker. I accept the Vietnamese government may be aware the applicant sought asylum in Australia as a result of the manner of his return to the country. Information from DFAT indicates that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the Vietnamese *Penal Code 1999*. However, recent information from DFAT is that they are unaware of any cases where this provision has been used against failed asylum seekers. Current information is that returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. Moreover, DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum, nor does the information suggest people are harmed due to a prolonged presence in Australia. DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people smuggling operations, and reporting and monitoring is confined to returned political activists, and not those who have only sought asylum in another country. There is country information before me that some individuals have been imprisoned on return from Australia. However, the information suggests this was not because they were failed asylum seekers, but rather because they committed criminal offences such as people smuggling or inciting others to flee the country, were known political or religious dissidents or activists, or members of ethnic minorities.⁶ The information before me does not support that returnees are viewed suspiciously by the Vietnamese government, or assumed to hold anti-government views, because they left Vietnam, or as a result of spending time in Australia. The applicant is not a member of an ethnic minority, he has not indicated he has been involved in any activities, either in Vietnam or in Australia, such that he would be considered a religious or political activist or dissident, and I am not satisfied he would have a profile of interest on return, including as an anti-government dissident, such that there is a real chance he would be at risk of harm on that basis, including being imprisoned.
24. I am not satisfied on the evidence before me the applicant would face a real chance of serious harm resulting from any potential military service. I am also not satisfied the applicant would face a real chance of any harm on return to Vietnam for any other reason claimed, whether those claims are considered separately or cumulatively.
25. I am not satisfied the applicant faces a real chance of persecution on return to Vietnam, now or in the reasonably foreseeable future.

Refugee: conclusion

26. 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

27. 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

⁶ DFAT, "DFAT Vietnam Country Information Report", 31 August 2015, CISEC96CF13212; DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

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

28. 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.
29. I accept there is a possibility the applicant may be required to undertake compulsory military service. There is nothing in the country information to support the applicant would face significant harm as a result of undertaking that service. There is no evidence to suggest such military service would result in the death penalty, an arbitrary deprivation of life or torture, nor is there any suggestion the applicant would experience pain or suffering that could reasonably be regarded as cruel or inhuman in nature, severe pain or suffering, or cause extreme humiliation, such that it can be said the applicant will face a real risk of cruel or inhumane treatment or punishment or degrading treatment or punishment. Taking into account the applicant's attributes, including that he is a young man who has not indicated he suffers from any condition that might prevent him undertaking such service, I am not satisfied a compulsory military service obligation would constitute significant harm for this applicant.
30. For reasons discussed above, I have otherwise found the applicant does not face a real chance of harm on return to Vietnam, now or in the reasonably foreseeable future. As a 'real chance' equates to a 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm, for the same reasons.
31. Considering these claims individually or cumulatively I am not satisfied the applicants face a real risk of significant harm in Vietnam for the purposes of s.36(2)(aa).

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

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

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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