



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA20/08604

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Date and time of decision: 2 September 2020 12:40:00
C Wilson, Reviewer

Decision

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

Visa application

1. The referred applicants are a father¹ (the applicant) and son² from Vietnam. They arrived in Australia as unauthorised maritime arrivals [in] June 2013. They applied for Safe Haven Enterprise visas (SHEV) on 21 July 2017.
2. A delegate of the Minister for Home Affairs (the delegate) refused the applications on 24 July 2020. The delegate did not accept the applicants faced a real chance or real risk of harm because the applicant's land was taken, or for an imputed political opinion, or returning as failed asylum seekers who left Vietnam illegally.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. On 25 August 2020 the applicants' representative provided a written submission. The submission contains legal argument and comment on the delegate's decision. No new information was received.
5. The representative submits there are inaccuracies in the delegate's decision record, and that these errors have contaminated the delegate's consideration of the applicants' claims. The representative also submits the delegate's assessment of the applicant's credibility was erroneous. I accept there are some errors in the decision record, including the following: on page 1 the father's name and date of birth are incorrectly given as the son's name and date of birth; and on page 3 the delegate said the authorities had compulsorily taken both the applicant's properties when the applicant claimed they had only taken one. I have noted these errors and the applicants' corrections. However, I am not reviewing the delegate's decision or looking at errors therein. I am making a fresh decision on the applications for the SHEV.
6. I note the audio recording for the SHEV interview with the applicant held 7 August 2019 is not available. The delegate created a transcript of the interview and this has been provided to the applicants and referred to by them in their submission. I note also only the applicant was interviewed, and the son was not. However, the son was still a minor at that time, was only a young child when they came to Australia, and has never presented his own claims but relies on his father's. I have considered in circumstances where the audio recording is not available, and where the second applicant was not interviewed, whether I should exercise the discretion under s.473DC(3) to invite the applicants to give new information at an interview. In considering this, I note the applicants have not sought an interview, nor indicated they have new information to give at an interview. The applicants have not raised any concern about the lack of interview recording. They have not indicated there are any errors in the typed transcript, nor that the transcript fails to record any other claims or information put forward at that interview. I note the representative states in the submission that the delegate could have asked more open questions to elicit more information, but does not say what information was missed, and that this refers more to the delegate's lack of acceptance of the claim that the applicant was involved in physical altercations, which I have accepted. There is no indication the second applicant wanted to be interviewed by the delegate or wants to put new

¹ IAA20/08604.

² IAA20/08605.

information to the IAA. I have also taken into account the statutory framework, where except in limited circumstances I must review a fast track reviewable decision on the papers without interviewing the applicant: s.473DB(1). In circumstances where the applicants are represented by a migration agent and have not requested an interview nor indicated that there is any new information or clarification they seek to provide, I am not satisfied I should exercise the discretion under s.473DC(3) to invite the applicants to give new information at an interview.

Applicants' claims for protection

7. The applicant made claims for protection, for himself and for his son.
8. The applicants' claims can be summarised as follows:
 - The applicant is married with [number] children. His wife and [number] of his children remain in his home in Bai Ria-Vung Tau province. He came to Australia with one son, who was then age [age].
 - The applicants are of Kinh (Vietnamese) ethnicity and are Catholics.
 - The applicant owned two pieces of land for farming, one in [Town 1] and another in [Town 2]. He farmed the land to support his family.
 - In 2007 the applicant heard an announcement over a PA that the local authorities were going to take land in the [Town 1] area. Around 50-60 other people also owned land in the area, and they worked together to try to protect their land from the authorities. However the government sent in tractors to destroy the crops and then used police and the army to patrol the area. During demonstrations they were beaten by the soldiers. The soldiers attacked them with smoke bombs and batons, and the landowners fought back with wooden sticks. The applicant was [injured].
 - Despite the protests, half of the applicant's land in [Town 1] was taken. No compensation was paid. The government sold the land to [a] company who used it to plant [trees].
 - In early 2013 the applicant heard again by PA announcement that more land would be taken. He feared if more land was taken he would not be able to support his family. He also feared he would be beaten, even killed, because he may protest and get hurt again as in 2007.
 - For these reasons his wife arranged for him and one of their sons to leave Vietnam. The son he brought was malnourished and they thought he would have a better life in Australia.
 - After he left the police went to his home numerous times asking his wife where he was. She told them he was away working or on holiday. They started asking her for bribes and she feared as a woman without a husband she would be raped by them.
 - The applicants fear that if they return to Vietnam they will be arrested and detained at the airport because the applicant is a person of interest due to his past actions in 2007. The applicant has heard people go missing after arriving at the airport in Vietnam. Even if he can go home, the police there will investigate and question him. They will want to know where he has been and what he has been doing. He cannot relocate to find safety because the police are everywhere in Vietnam.

- Their personal information was released by the Department in the data breach in January 2014. The Vietnamese government will have access to this information and will suspect they have complained against the Vietnamese government.

Refugee assessment

9. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

10. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
- the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
11. I accept the applicants are citizens of Vietnam, based on the identity documents they provided. The applicant owns land in Ba Ria-Vung Tao province and his wife and [number] children still live there. I find Vietnam is their receiving country, and the village in Ba Ria-Vung Tao province is the place they are likely to return to.
12. The applicant claims half of his land in [Town 1] was seized by the local authorities in 2007. He claims he and the other landowners in his village tried to prevent this through protests and physical altercations with soldiers and police used by the authorities to seize the land. There is no country information before me regarding this incident in 2007 in [Town 1]. The applicant has not provided any, but the delegate also did not appear to search for any.
13. The Department of Foreign Affairs and Trade (DFAT) reports³ low level protests, occasionally involving violence, occur periodically in Vietnam due to land use and compulsory official land acquisition. Under the Vietnamese Constitution and the Land Law (2013) all land is Vietnam is formally owned by the State and can be compulsorily acquired at any time. DFAT does not report whether such land acquisitions include compensation, but the applicant claims the land in his village was acquired without compensation. I note also DFAT reports corruption is

³ DFAT, Country Information Report Vietnam, 13 December 2019. All further references in this decision to DFAT refer to information from this report.

perceived to be widespread in the ranks of Vietnamese police, public service sector and land administration affecting construction and development.

14. I accept the applicant has consistently claimed in his Entry Interview in 2013, SHEV application in 2017 and SHEV interview in 2019, that his land was taken without compensation by the local authorities and that he and other villagers protested and were involved in fights with the soldiers and police around the land seizure. Based on the consistency of his claim, and the country information from DFAT that occasionally violent protests do occur around land acquisitions, I accept some of the applicant's land in [Town 1] was taken and that he was injured in the protests in 2007. Apart from the loss of some land, there were no ongoing consequences for the applicant following the incidents in 2007.
15. The representative submits the land seizure in 2007 amounted to persecution, as it could not have been an act of a law of general application when no compensation for the land taken was paid. I am not deciding however whether the events in 2007 amounted to persecution. This decision is concerned with whether the applicants face a real chance of persecution in the reasonably foreseeable future.
16. The applicant says he left Vietnam in 2013 because he feared harm from more proposed land seizures by the local authorities. He claims he feared he would be physically harmed, even killed, in 2013 because he had taken part in the clashes with soldiers and police in 2007. I do not accept he would be singled out in his village by soldiers or police because he had taken part in protests that involved fighting in 2007. He has confirmed the threatened land seizures in 2013 did not eventuate. His family have not lost any land since he left in 2013, nor is there evidence anyone else in his local area has. There is no claim any one in his family or village was harmed in any action taken to protest the land seizures. There is no evidence further land seizures are planned in his local area. That he may again be injured in hypothetical protests if further land seizures arise in the future, that he may or may not choose to take part in, and may or may not become violent, is mere speculation. I find the chance of the applicant facing harm in the reasonably foreseeable future protesting land seizures, when there is no evidence any are planned, and no such action has been taken by the local authorities to do so since the events in 2007, is too remote to amount to a real chance. I acknowledge it cannot be said that land seizure could never occur again, but I consider it too speculative to amount to a real chance.
17. The applicant claims he is a person of interest and that the police have been to his house numerous times in Vietnam looking for him and asking his wife where he was. I do not accept he has given a persuasive explanation of why he would be of adverse interest to the police. The applicant was one of many people involved in the protests, in a clash in which the local authorities got what they wanted, and after which there is no evidence he, nor any other protestors, received adverse attention. The applicant described injuries he suffered in the protest but does not claim himself to have injured any soldiers or police, or that there was any other reason why he would have an ongoing adverse profile. DFAT advises activists known to the authorities as active organisers of protests or who openly criticise the state face a high risk of sanctions that can include surveillances, harassment, preventative detention, physical assault, travel bans, arrest, and prosecution. The applicant has not claimed to have received any such treatment after the events of 2007, which is consistent with his account of his low-level involvement in the protests. He was not an activist or organiser or openly critical of the state. I do not accept that his leaving Vietnam 6 years after he protested his land being seized in 2013 gave rise to him having an adverse profile. I also find his claims that the police were looking for him are lacking in detail and are not supported by any evidence. I accept it is plausible his wife has been asked where the applicant is, but this could have been related to

household registration, which is a system of registration in Vietnam administered by the police. There is no evidence, or claim, his family have been harmed or harassed in his absence. The applicant said in his interview in 2019 that the police visited his wife after the data breach in 2014, yet made no mention of this in his 2017 written application when he raised concerns about the data breach and separately raised the police speaking to his wife, but never connected the two events. I also consider it implausible the information in the data breach was accessed by the local police at that time and used in this way, but if in the unlikely event this did occur, I find he would have raised it in his application in 2017. For these reasons, I consider this was an embellishment at the interview. Taking into account the lack of detail and lack of evidence, I am not satisfied the police have an adverse interest in the applicant or have been asking his wife numerous times where he was. I find that if his wife was asked where the applicant was it was for reason of household registration.

18. The applicants claim they will be arrested, detained and harmed on return to Vietnam because they left Vietnam illegally and spent time in Australia, seeking asylum. They claim they will be imputed with an anti-government profile for these actions.
19. I am not persuaded the applicant was imputed with a profile of being anti-government due to the protests to prevent land seizures in 2007. The applicant has never described himself as a leader or organiser of the protests in 2007, or an activist in relation to any other issue in Vietnam. He was one of many landholders in his village who took part in the protests in 2007 to try to save their properties. At the SHEV interview he says there were several hundred protesting. He was not arrested or detained for his involvement in the protest. He was not harassed or monitored or of adverse interest to the local authorities for the next 6 years before he left Vietnam. There is no evidence any of the several hundred who protested in 2007 were ever harmed or of adverse interest for this reason after the protests. There is no information before me to indicate he nor his son have been involved in any activities in Australia to protest the Vietnamese authorities. I find neither applicants have an actual or imputed profile as persons who are anti-government because of the protests in 2007, and I therefore find they do not face a real chance of harm for this reason.
20. The applicants say they will be of interest, and imputed to be anti-government, because they are returning as failed asylum seekers who have been out of the country for many years. DFAT advises there is a criminal offence under Articles 120 and 121 of the Vietnamese Penal Code for 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration'. The offence attracts a period of imprisonment, which can be up to 20 years or life in serious cases. I do not accept the applicants seeking asylum in Australia amounts to or would be seen as an act with the view of 'opposing the people's administration'. I note DFAT advises they are unaware of any cases where failed asylum seekers returning from Australia have been charged with this offence. DFAT does refer to reports of cases of some failed asylum seekers being detained upon return to Vietnam from neighbouring states. Human Rights Watch reported in April 2017 that a Montagnard who had sought protection in Cambodia was detained for 12 days upon return to Vietnam, and the US Department of State reports in 2018 that ethnic and religious minorities, including Hmong and Montagnards, who fled to Cambodia or Thailand, had been pressured to return to Vietnam and then abused, detained or questioned on return. I have considered this information, but I note these reports refer to members of minority groups, which I do not accept the applicants are.
21. The applicants' illegal departure from Vietnam to travel to Australia is not an unusual act. There is a history of irregular maritime departures from Vietnam, including persons intending to travel to Australia. In 2016 a Memorandum of Understanding was signed between the Australian Department of Home Affairs and the Vietnamese Ministry of Public Security to

facilitate the return of Vietnamese nationals who had no legal right to enter or remain in Australia. DFAT reports that returns of Vietnamese citizens are done on the understanding the person will not be charged as a result of making an application for protection in Australia. As noted above, DFAT says there is no information that returnees from Australia are charged with a criminal offence of opposing the government. I do not accept anti-government profiles would be imputed to the applicants merely because they would be returning to Vietnam as failed asylum seekers.

22. DFAT also reports people involved in people smuggling are questioned by the authorities to determine their involvement in the operations. Whilst people smugglers can face penalties, the applicants were mere passengers and not organisers in a people smuggling operation. The applicants left illegally and could be fined up to AUD310 for crossing the national border without going through official exit procedures. However, DFAT advises the Vietnamese government typically views persons who paid money to people smugglers as victims of criminal activity, rather than criminals themselves, and as such are unlikely to be subjected to the penalties allowed in the law for illegally departing Vietnam.
23. DFAT advises returnees who left illegally can be questioned at airports on return. Returnees from Australia are only occasionally questioned, in an interview that generally takes one to two hours. The interview is focused on obtaining information about their illegal departure. DFAT says they are not aware of any cases of returnees from Australia being held overnight. There is nothing before me to indicate the interview at the airport could involve physical mistreatment. I do not accept a possible one to two hours interview about the people smugglers they used to depart Vietnam, or a possible fine, amount to serious harm.
24. Having regard to the information referred to above, I find the chance of the applicants facing criminal charges, arrest, detention longer than a few hours, or other harm for being out of Vietnam and returning as failed asylum seekers is remote. I accept there is a chance they may be fined an amount up to AUD310 and/or may be questioned for an hour or two at the airport. I find however such treatment does not amount to serious harm. I find they do not face a real chance of serious harm for reason of being returning failed asylum seekers who departed Vietnam illegally.
25. The applicants claim they are known to the Vietnamese authorities because of the data breach in Australia in 2014. They claim it will be suspected that they made complaints to the Australian government about the Vietnamese government. The data breach caused confidential information in relation to persons in detention in Australia being briefly accessible on the internet in early 2014. The information that was possible to access included names, dates of birth, nationality, gender, details about the detention, and whether other family members were detained. The applicants' SHEV application was not lodged until 3 years later, and no details of their claims for protection were released. I consider it unlikely the Vietnamese authorities accessed this information during the brief time it was available on the internet, but in the event they have the information, it provides no more than confirmation that the applicant were in detention in Australia at that time. That they might be seeking protection visas to remain in Australia may be inferred, but such information would also be apparent if their applications are unsuccessful and they are returned to Vietnam. For the reasons given above I do not accept seeking asylum in Australia gives rise to a real chance of harm in Vietnam. I find the applicants do not have a real chance of harm for reason of the data breach, nor do I accept their profiles would be heightened by it.
26. I note that in the delegate's transcript of the SHEV interview the applicant is recorded as saying in 'in 2014 a policer officer [came] to see us in detention in Perth...They did not know my name'.

When asked what did the police officer say to you, he is recorded as saying 'They came to see other people first. They didn't say to do anything'. On the limited information before me, it does not appear that the police officer came to interview the applicant but may have been there to visit other Vietnamese nationals. He did not refer to this incident in 2014 in his application for the SHEV in 2017. I acknowledge his statutory declaration dated 19 July 2017 states it was prepared with limited assistance and he would correct any mistakes and provide further detail at his interview. However, I would expect an incident as serious as being questioned by a Vietnamese police officer whilst in detention in Australia would be raised in his statement of claims, if he was in fact interviewed. His further information provided at the SHEV interview indicated the police did not know his name, had come to see other people first, and didn't say to him to do anything. Nothing further on this issue was mentioned in the submissions to the IAA. On the information before me, I find that if a Vietnamese police officer visited the detention centre where the applicant was held, I do not accept they were visiting to speak to the applicant or that he was of any interest to them. I do not accept this incident at the detention centre indicates he is a person of interest to the Vietnamese authorities.

27. I have considered whether cumulatively the incidents raised by the applicant amount to a heightened profile for him and his son. That is, the 2007 protests, leaving Vietnam illegally, a Vietnamese police officer visiting other persons in the detention centre in 2014, and the data breach in 2014. I find they are ordinary asylum seekers who had no profile prior to leaving Vietnam, and that these incidents, even cumulatively, do not give them an adverse or heightened profile.
28. The applicants indicated they identify as Catholics but made no claims that they feared harm for this reason. There is no suggestion in the representative's submission that such a claim arises on the materials, nor that the delegate erred in not addressing it. I find no claim to fear persecution for reason of their religion has been made nor arises on the material before me.
29. Although it was not expressed as a claim, I note the second applicant was said to have been chosen to come to Australia with his father because he was malnourished. There was no explanation why this child was malnourished, and others not. That the family were able to find the money to send two family members to Australia infers any malnourishment suffered by the second applicant was not due to lack of money. If he has any health condition causing him to suffer malnourishment this has not been identified, nor any relevant medical evidence provided. There is no information before me to indicate any family members remaining in Vietnam have or are suffering harm from a lack of access to food. No claims regarding the health of the second applicant have been expressly made in the application, nor raised in the submissions to the IAA. There is no claim the applicants will be unable to subsist if returned to Vietnam. If such claims arise on the materials before me, I am not satisfied on the information before me that there is a real chance of harm of the second applicant facing malnourishment or the applicants being unable to subsist if they are returned to Vietnam.
30. I find the applicants do not face a real chance of persecution for any of the reasons claimed, singularly or cumulatively.

Refugee: conclusion

31. 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

32. 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

33. 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.
34. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
35. I accept the applicants may be fined for leaving Vietnam illegally, or may be questioned for an hour or two about that illegal departure. There is no information before me to indicate ordinary returning failed asylum seekers are physically mistreated or otherwise harmed during such procedures. I do not accept they face a real risk of significant harm as defined in s.36(2A) on arrival in Vietnam for having left illegally.
36. I have found the applicants do not face a real chance of harm for reason of the land protests in 2007, an imputed anti-government opinion, returning as failed asylum seekers from Australia who departed Vietnam illegally, or the data breach, when considered singularly or cumulatively. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicants do not face a real risk of harm for any of the reasons claimed.
37. As noted above, the applicants indicated the second applicant came to Australia with his father because he was said to be malnourished. There is no medical information before me nor any indication this continues to be an issue for the second applicant. There were claims the family had less land on which to grow produce after the land seizures in 2007, but the applicants have not expressly made claims regarding their ability to subsist if they are returned to Vietnam. There is no information before me to suggest the remaining family members in Vietnam have any issue with access to food, nor any claim the applicants would be unable to subsist if they returned to Vietnam. In the event a claim is said to arise from the materials, I find on the information before me that there is not a real risk the applicants will suffer significant harm for reason of being unable to subsist.

Complementary protection: conclusion

38. 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

39. 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 parent and child.
40. As neither 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

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

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.