



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA21/08833

VIETNAM
IAA reference: IAA21/08835

Date and time of decision: 11 February 2021 17:40:00
S McNeill, 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, a mother and son. The mother (the applicant) claims to be a Vietnamese national. She arrived in Australia [in] June 2013 and married her husband (also a Vietnamese national) [in] January 2015 and their son was born on [date] in Australia.
2. On 22 February 2017 the family lodged a combined application for a Safe Haven Enterprise visa (SHEV). On 4 October 2018 the applicant and her husband were interviewed by a delegate (the interview officer) for the Minister of Immigration.
3. As the result of the Full Federal Court judgement in *DBB16*¹ of 6 August 2018, it was determined the husband was not an unauthorised maritime arrival and he is no longer included in this application.
4. On 22 December 2020 a second delegate (the delegate) wrote to the applicant pursuant to s.56 of the *Migration Act 1958* (the Act) inviting her to provide any further claims and or supporting information. After receiving no further information, the delegate refused to grant the visa on 6 January 2021.

Information before the IAA

5. I have had regard to the review material given by the Secretary under s.473CB of the Act.

Applicants' claims for protection

6. No claims have been put forward on behalf of the son and he relies on the membership of the applicant's family unit. The applicant's claims can be summarised as follows:
 - She was born in [year] in [Village 1], [District 1], Ha Tinh province, Vietnam.
 - She is of Kinh ethnicity and a Catholic.
 - In 2009 she opened a [shop] in [City 1] city. During this period, she fell in love with a man and they planned to get married; however, he was an adulterer with gambling problems. The man was a [Occupation 1] and a member of the Vietnamese communist party.
 - He forced her to give him money, threatening her that her business would face difficulties and he would send someone to create troubles and burn her [shop] down if she did not. One night she decided to end the relationship and he was physically violent towards her. She had no choice to escape him and went to 527,025 that night.
 - In Vung Tau she opened another [shop]. A few months later her ex-partner found her and threatened to kill her. A month later he asked for money. When she said she had none, he pulled out a sharp knife pressing it against her neck and threatened to kill her. When she gave him the money, he laughed and left her money.
 - Her ex-partner followed her everywhere and took all her money. The neighbourhood did not lease her their properties to run her business because of the potential threat to their properties; they did not want to know her. The local authority rejected her business

¹ *DBB16 v Minister for Immigration and Border Protection* [2018]

permit application. Her business was assessed as a source of trouble that created unrest to the law and order in the area.

- She reported her ex-partner to the police, but no action would be taken unless she bribed them and because he was a Communist Party member. Any money she gave the police would never be enough and they would request more. Because of these problems she decided to flee Vietnam.
- In Australia she, her husband and son have been involved with the Vietnamese community, Vietnamese Catholic church and anti-Vietnamese government organisations such as the Vietnam Reform Revolutionary Party (Viet Tan). She fears harm on this basis and because of her husband's suspected association with the Viet Tan and because he has evaded many police summonses. This will motivate her ex-partner to influence the Vietnamese authorities to imprison her.

Refugee assessment

7. 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

8. 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.
9. The applicant has provided copies of Vietnamese identity documents including her Vietnamese passport, birth certificate, National identity card and her driver licence. The applicant has consistently claimed to be a Vietnamese national and the documentary evidence clearly supports this. A copy of the applicant's son's Australian birth certificate has been provided which indicates the applicant and her husband, both Vietnamese nationals, are the child's biological parents. In his SHEV application form, the son's citizenship is listed as Vietnamese and there is nothing in the review material to suggest this is not the case. I am satisfied the applicants are Vietnamese nationals and that Vietnam is the receiving country for the purpose of this review.

10. Based on the consistent oral and documentary evidence before me, I accept the background details as follows: The applicant was born in [Village 1], [District 1] of Ha Tinh province, Vietnam in [year]. She is of Kinh ethnicity and a Catholic. Her family moved to Ba Ria Vung Tau Province when she was young, and she last resided in Vung Tau city prior to her departure from Vietnam. She completed her high school education and first worked as a factory [worker], then co-owned a couple of [shops]. She departed Vietnam illegally without her passport in May 2013 and travelled to Australia by boat arriving [in] June 2013.
11. In Australia, she met her husband after being released from immigration detention; they married [in] January 2015 in Perth, and the applicant son was born on [date]. The applicant has continued to practise her Catholic faith and has been involved with the church and Vietnamese community in Australia. The applicant's parents and four siblings (two brothers and two sisters) continue to reside in Vietnam.
12. The applicant's primary claim for protection is her fear of harm based on her prior relationship with a man she met in 2009 while working at her [shop] in [City 1]. She claims this man was a [Occupation 1] and member of the communist party, he was an adulterer who forcibly took money from her and had a gambling problem. After she ended the relationship, he was physically violent to her and the same night she escaped to Vung Tau. The man found her in Vung Tau, demanded money and threatened to kill her with a knife to her neck. The police sought bribes from her when she tried to report him. She also claimed to have problems applying for her business permit with the local authorities.
13. I have listened to the recording of the applicant's SHEV interview held on 4 December 2018 and the applicant's arrival entry (arrival) interview conducted on [date] July 2013 (Part 1) and 12 August 2013 (Part 2). I have significant concerns which cause me to doubt the veracity of these claims as discussed below:
 - The applicant in her written claims refers only to a 'man' she fell in love with and does not identify him by his name. At her SHEV interview the applicant was only able to state his first name of '[Mr A]' and when asked for his surname, she said she couldn't remember it. Questioned about her inability to recall his surname, the applicant stated in Vietnam many people had the same surname and they always addressed each other by their given names. I do not find this response satisfactory given this is the man which according to her written claims, she planned to marry and who caused her to relocate in the middle of the night to another town fearing for her life, who then again tracked her down, whom she knew for over three years, who she attempted to report to the police and who she feared for a significant period of that time.
 - The applicant's evidence regarding '[Mr A]' being a member of the communist party and [Occupation 1] was unconvincing. She provided a very general description of him, his work and their encounters. At her SHEV interview asked about his work, the applicant could only say he was working in another village for the government authorities. He only told her he worked in that village; she knew that village but had never entered it and she had never seen him in uniform. She found out he worked for [a specified government agency] after he stopped seeing her. Likewise when asked how she believed [Mr A] found her when she opened her shop in Vung Tau with her brother, the applicant said she thought maybe he worked for the communist party or something because when she opened her shop she had to register it and give the address. Her evidence here lacked conviction as to whether [Mr A] did in fact have a connection to the communist party or work as a [Occupation 1]. Given their plans to marry, it is difficult to believe the applicant would not be able to confidently provide more substantive information

regarding [Mr A]'s background. Questioned about the type of work '[Mr A]' did, the applicant stated she didn't ask him because she was too busy. She said she got up at 2am to go to the market, at 5am she came home and cooked things to sell, sold things for lunch and sometimes she did not have lunch until two to three in the afternoon. She also sold food at night, she cooked and sold things and sometimes she did not get to bed until 11 or 12pm at night; she had no time to go anywhere or do anything. Based on her oral evidence, the applicant would be working all day and sleeping only three to four hours a night. While I accept it is plausible a woman might enter a relationship with an adulterer and gambler, I am not persuaded she had time to develop a relationship to the point of marriage, without truly knowing more details about her partner's background or his profession or that she would continue to loan '[Mr A]' money based on their mere interactions at her work.

- At her SHEV interview the applicant stated after she ended the relationship, [Mr A] started beating her, threatening her, saying she knew what he did and he would beat her if she did not give him money and he would burn her shop down. She put up with this behaviour for two years and the last time he asked for money, she did not give it to him, he hit her, and she was so frightened. At 1am the truck came and moved her furniture and she went to live in Vung Tau with her brother 120 km away. I note in her SHEV application the applicant describes herself as a co-owner of both [businesses]; it is unclear who her other business partner or co-owner is in her first [business].
- In her SHEV application the applicant also claimed to be a co-owner of the second [business] in Ba Ria -Vung Tau province. At her SHEV interview the applicant stated after a couple of weeks she told her brother to find a place to open a different shop. They opened a shop and then a few months later [Mr A] reappeared and started threatening her. Asked whether she received the permit to the shop, the applicant said her brother had contacts and he went and applied for her. [Mr A] would return every two or three weeks and ask for money. Once she didn't pay him and he swore in front of her clients. The delegate noted the applicant had claimed in her written statement that her permit to run the business had been rejected. The applicant stated the first few times were ok, but then [Mr A] was disrupting her business and she was looking for another place of business but she didn't get the permit. Asked whether she lived with her brother at the time, the applicant said no, he worked and only came every now and then. Her staff worked during the day and she worked at night. I am not persuaded by this account. Firstly, I find it far-fetched [Mr A] would travel regularly 120 km to see the applicant and demand money on a regular basis. (I note in the post interview submission, her representative has stated the two locations are 150 km apart if traveling by road). I also consider the applicant has modified the narrative between her written claims and her SHEV interview. The applicant clearly claimed her permit was rejected and made no reference to her brother applying for the permit or that she sought to open a business in a different location in Vung Tau.
- Despite the interviewing officer telling the applicant at the end of her SHEV interview he had no credibility concerns regarding her evidence, I am not so persuaded. As pointed out by the delegate in her decision, the applicant made no reference to this claimed relationship with [Mr A] in her arrival interview. Asked why she left Vietnam, the applicant stated because she was not happy with the Vietnamese regime, her siblings worked for the government but did not have any benefits. They had no benefits when they retired, no house, their salaries are lower because they did not join the party. Catholics are not allowed to join the party. The IAA has received no further submission to date from the applicant in relation to this observation by the delegate.

14. Noting my concerns above, I am not convinced by the applicant's claims of ongoing threats of harm from an alleged member of the communist party and [Occupation 1] [Mr A] over an almost four-year period. While I consider it plausible the applicant has been involved in a relationship in the past that was violent, I am not satisfied this relationship was with the person identified as a member of the communist party and [an Occupation 1] ([Mr A]), was ongoing or causing her any problems at the time she departed Vietnam or that there is a real chance that seven and a half years after her departure from Vietnam a past partner would seek her out on her return. The applicant did not state [Mr A] had sought her out since her departure from Vietnam or that he had contacted any of her family members. I do not accept the applicant's neighbours refused to lease her their properties to run her business. Nor do I accept the local authorities rejected her application for a business permit because it was assessed as a source of trouble. Given I have not accepted these ongoing threats of harm from her claimed ex-partner, I do not accept the applicant reported it to the police and that they requested money or bribes from her so they would help her. I am not satisfied the applicant faces a real chance of any harm on account of this claim on her return to Vietnam now or in the reasonably foreseeable future.
15. The applicant in her SHEV application claimed that because of her experiences she had developed mental health problems and had been treated by doctors in the detention centre and that she was currently being treated by [a named doctor] in Perth. The applicant was teary at times during her SHEV interview. The applicant said at her SHEV interview, that she sold all her furniture, went home to her parents, talked to them, said she had all these problems, could not live and was thinking of suicide. Her shop was near to the beach in Vung Tau, she bought some sleeping pills and wanted to commit suicide. Her parents didn't say anything, and she told them to find a way for her to escape. Her sister took her on a pilgrimage to see someone; the person she went to confide in had died and she prayed for his soul. She prayed for a path to follow and then she went home. People said there was one way to go and her parents took her to a place to get on a boat and she came to Australia, she did not know what it was like here but now she loved it.
16. At the end of her SHEV interview the applicant stated she would like to say something. She then spoke of an incident when a drunk man entered her [business] took the chopsticks from their holders, broke them and attacked her. The men could run away but she tried to escape with the child of one of her staff; the man chased her and stabbed her with the chopsticks. Her brother and a relative went to the police station, the police came. She was bleeding and the police told her go home and they took the man to the police station. She didn't know why the police in Vietnam kept asking for money.
17. In the applicant's post SHEV interview her representative submits the applicant will be selectively targeted as a business owner unable or unwilling to pay 'protection money'. They reiterate the 2010 incident in [City 1] when the applicant could not pay government officials who requested 'unofficial tax', and these requests were made every few months. A few days later a drunk man damaged the applicant's property, imprisoned the applicant within her store and physically wounded her. The applicant sought police help to no avail and told her to go home. She was subsequently sent a 'reminder' to pay the outstanding unofficial tax. They submit upon her return to Vietnam the applicant will continue to suffer mistreatment because government officials and police corruption is prevalent, and they continue to target non-party members for 'protection money'.
18. Having regard to her written claims concerning events in [City 1] and having listened to both the applicant's arrival and SHEV interview's, it is not apparent the applicant did say she was asked by the police or corrupt government officials for protection money when in [City 1]. While the applicant claimed her boyfriend was a [Occupation 1]/communist party member, that he sought

money from, it was on a personal basis and for his gambling addiction, she did not claim it was a form of protection money. While the applicant did raise the incident of being attacked by a drunk man in her store and being wounded, she did not state when or at which of her [businesses] it specifically occurred at; nor did she claim to have been targeted for 'protection money' as a non-communist party member. Having regard to country information, I do however accept that in doing business in Vietnam the applicant may have had to make certain payments to government officials.

19. While the applicant has not claimed an ongoing fear harm on account of this isolated incident of being attacked with chopsticks, I accept it as plausible she experienced such an attack by a drunken man. I also consider that this could have impacted on her mental health at the time, although there is very limited evidence of any ongoing issues. The applicant has not provided any supporting medical evidence outlining any mental health problems or any ongoing medical needs and I note the applicant has been able to hold down full time employment since March 2015 in a [factory] and more recently conducting a [business] with her husband. She has married, had a child and is involved in the Vietnamese community and church. While this attack may have occurred sometime in the past, I consider this was a one-off unfortunate incident. I also note in this scenario the police did respond to her brother's request for help. There is a deficit of information as to what consequences her attacker faced, and I am not satisfied the police failed to take action as claimed. On the information before me, I am not satisfied the applicant faces a real chance of any harm on her return to Vietnam now or in the reasonably foreseeable future on this basis.
20. While I have not accepted the applicant's claim the authorities requested money from her when she sought their assistance when threatened by her ex-partner, I accept the applicant in undertaking her [business] may have paid occasional bribes to the authorities in order to conduct her business. While not specifically articulated in her written claims, at her SHEV interview when asked if she had ever been officially arrested by the police in Vietnam, the applicant stated 'no' they didn't arrest her but they found ways to get money from her, property and furniture, when she opened her [business]. While discussing her problems with [Mr A] in Vung Tau and that she went to the police for assistance, the applicant stated when she opened the [business], the police would come every month or second month and settle money for tax; they never asked for an invoice or anything.
21. The applicant also spoke about the arrest of her younger brother. She stated she didn't know for what reason, but her younger brother went to have coffee at a shop; there was fighting outside, and he went to have a look. Her brother went home and then a few days later some paperwork was sent to her brother inviting him to come in even though he didn't do anything. After he went to the place, the police arrested him, and he was put in prison for a few months. Asked when this was, the applicant said she only knew it was last year. The interviewing officer noted this concerned her brother and asked what it had to do with her. The applicant stated she escaped communist Vietnam and if anything happens it might impact on them. Her sister went to visit her brother in jail. The guard asked for 20 million (VND) for her brother to be released. Her sister recorded the guard's request but when she got home, her child accidentally deleted the recording on her phone. Her sister did not have the money but a few days later her older brother went there, they asked the same thing. Her brother had the money, handed some over a few days later and four months later her brother was sentenced to two years suspended imprisonment. Asked what for, the applicant said 'they' made it up; deliberately causing injuries to others.
22. The applicant's post interview submission provided no further details regarding this incident of arrest concerning her younger brother. The applicant was asked at the beginning of her SHEV

interview if there was anything further she wished to add or include in her claims and she made no mention of her brother's arrest. It is possible the applicant's younger brother may have been arrested, released from prison following the payment of a bribe and then sentenced to a two years suspended sentence, however, on the information before me I am not satisfied it has anything to do with the applicant or her escape from communist Vietnam or that it would have the implications she claims. I am not satisfied the applicant faces a real chance of any harm on this basis on her return to Vietnam now or in the reasonably foreseeable future.

23. According to DFAT Transparency International's 2018 Corruption Perceptions Index ranked Vietnam 117th out of 180 countries, higher than its neighbours Cambodia (at 161st) and Laos (at 132nd). Vietnam has a comprehensive anti-corruption legal framework, including through the *Law on Anti-Corruption* (2005) and several provisions under the Penal Code. Several government agencies have authority to investigate and prosecute corruption offences, but enforcement remains problematic and indictments of high-level corruption are often perceived to be politically motivated. Corruption is perceived to be widespread in the ranks of the Vietnamese police, public service sector and land administration affecting construction and development.²
24. A number of high-profile corruption trials have been held since 2017, including those of several high-ranking officials involved in state-owned enterprises. Some economic crimes in the Penal Code, including embezzlement and taking bribes (Articles 353 and 354), can result in the Death Penalty being applied. The current administration has given particular focus to countering corruption, including through initiating more investigations into the conduct of high-profile officials, restructuring government ministries, and reviewing governance and oversight mechanisms for state-owned enterprises. The anti-corruption campaign has resulted in the removal of several high-level office holders. While some citizens have welcomed the government's current anti-corruption campaign as a necessary reform, government critics generally consider it to be a political strategy, noting it has mostly targeted those close to former Prime Minister Nguyen Tan Dung. Some commentators have noted that, despite the government's focus on corruption by senior officials, day-to-day corruption faced by Vietnamese people in accessing public services is still common.³
25. International observers report that corruption is highly prevalent within the ranks of the police. Sources have reported recent cases of organised crime groups bribing local police to not respond in specific situations, and instances in which police have not responded when citizens have called for help. Sources have also reported that local police sometimes use contract 'thugs' and 'citizen brigades' to harass and beat political activists and religious adherents perceived as undesirable or a threat to national security.⁴
26. I accept the applicant has had to pay bribes in the past conducting her [businesses] and at times faced day to day corruption accessing public services. The country information indicates that this type of behaviour is a problem faced by all Vietnamese. Though not without controversy the Vietnamese authorities are taking steps to root out corruption. I accept the applicant may be subject to the payment of bribes accessing public services on her return to Vietnam; however, I am not satisfied this constitutes serious harm. I accept the payment of a bribe is both an inconvenience and annoying. The applicant was able to conduct two businesses over a four-year period prior to her departure from Vietnam and I am not satisfied such payments would threaten

² Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121.

³ Ibid.

⁴ Ibid.

her capacity to subsist. I am not satisfied the applicant faces a real chance of serious harm on this basis on her return to Vietnam now or in the reasonably foreseeable future.

27. I accept the applicant is a Catholic and that she is raising her son as a Catholic. The applicant has provided a letter of support dated 10 October 2018 from the Rev. Fr [B] that confirms the family's involvement in the Vietnamese Catholic Community in WA. I accept the family attends church in Australia on a regular basis. In her SHEV application and statement the applicant did not claim to have experienced any harm in the past on account of her Catholic faith but I note in her arrival interview she referred to her siblings, although being government workers, were denied benefits because as Catholics they were not allowed to join the ruling government party.
28. According to DFAT, Vietnam describes itself as a multi-religious, multi-belief country although it is officially an atheist state. Article 24 of the Constitution states, however, that all people have the right to freedom of belief and religion, including the right to follow any religion or to follow no religion: that all religions are equal before the law; and that no one has the right to infringe on the freedom of belief and religion or to take advantage of belief.⁵
29. According to statistics released by the Government Committee for Religious Affairs, 26.4 percent of the population was categorised as religious believers: 14.9 percent Buddhist; 7.35 percent Roman Catholic; 1.47 percent Hoa Hao Buddhist; 1.6 per cent Cao Daist; and 1.09 per cent Protestant. Smaller religious groups combined constituted less than 0.16 percent of the population. Government recognised religions/faiths in Vietnam numbered 43 religious organisations from 16 religious traditions, representing more than 25 million followers and this includes Catholics.⁶
30. While Catholics reside in most districts, provinces and cities, the highest concentration is in central Vietnam (Nghe An, Ha Tinh and Quang Binh Provinces). In-country sources report that Catholics are generally able to practise freely at registered churches, particularly in areas with larger Catholic populations. Authorities do not, however, permit the Catholic Church in Vietnam to have official publications, radio stations or TV channels, which observers report is a means of limiting proselytisation.⁷
31. DFAT has previously noted that in August 2015, the government approved the establishment of the Vietnamese Catholic Institute, the first faith-based educational institution in Vietnam able to grant Bachelor and Masters degrees. The Institute officially opened in September 2016 initially offering a Masters theological course to 23 selected priests from dioceses within the country. Furthermore, Catholic bibles and other religious texts are readily available in cities and towns.⁸ The UN Special Rapporteur observed in 2015 relationships between Vietnam and the Vatican have improved markedly in recent years.⁹
32. Unlike other religions, there are no independent Catholic organisations claiming to represent Vietnamese Catholics. There has, however, been a rise in the number of independent 'house churches' in locations where Catholic parishes have faced difficulties in registering with provincial authorities, due in part to inconsistent enforcement of national laws. These parishes are generally in remote areas and/or areas with majority ethnic minority populations, with the most problematic regions reportedly in the Central Highlands, the Northwest Highlands, and Hoa

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597.

⁹ 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt – Addendum: Mission to Viet Nam (21 to 31 July 2014)', UN Human Rights Council, 30 January 2015, CISEC96CF13238.

Binh Province. Human rights observers report that these house churches face constant surveillance by authorities.¹⁰

33. The Catholic Church has played a prominent role in organising and engaging political demonstrations on a number of issues, including in relation to historical land grievances. Catholic priests in Nghe An and Ha Tinh Provinces were active in organising demonstrations in response to pollution and high volumes of fish deaths, and assisted parishioners to file lawsuits against the government for financial compensation. Catholic priests were also among the most vocal critics of draft laws on cybersecurity and special economic zones in June 2018.¹¹
34. DFAT assesses that Catholics who belong to registered churches and are not politically active face a low risk of official harassment. Catholic adherents who are perceived to challenge the authority or interests of the CPV and its policies, particularly through political activism, face a moderate risk of harassment from authorities or their proxies, which may include arrest or violence. Catholics belonging to house churches are likely to come under surveillance by authorities.¹²
35. Other reports in the review material generally correspond with DFAT. In its 2020 Annual Report the US Commission on international Religious Freedom noted the Vietnamese government continued to enforce the Law on Belief and Religion, which requires religious organisations to register with the state, and to harass unregistered religious groups. Multiple religious organisations applying for registration reported local officials regularly exceeded their authority demanding the congregant names and applications were often pending for months or years. Ethnic minorities especially in the Central Highlands are targeted by the authorities; house churches are regularly raided or closed down. Religious followers in urban, economically developed areas usually are able to exercise their religion or belief freely, openly, and without fear.¹³
36. The 2019 US Department of State Report on International Religious Freedoms for Vietnam similarly notes the government harassment of religious groups and leaders without official recognition, notably those in the Central and Northwest Highlands. Tensions and disputes between Catholics and the authorities in the Vinh and Ha Tinh dioceses in the central provinces of Nghe An and Ha Tinh continued to be reported. Religious leaders continued to say existing laws and regulations on education, health, publishing, and construction were restrictive toward religious groups and needed to be revised to allow religious groups greater freedom to conduct such activities. During the year, the Catholic Church reassigned a number of priests who were vocal in their opposition to the government or engaged in human rights activities to less restive areas activities.¹⁴
37. The applicant has not claimed to have experienced any incidents of harm on account of her Catholic faith prior to her departure from Vietnam nor has she claimed to fear harm on account of her faith on her return to Vietnam. She is not an outspoken priest or part of the church hierarchy. She has not claimed to be part of an unregistered church nor has she claimed that she intends to become involved in an independent, unofficial, unrecognised or unregistered church or house church. She is ethnic Kinh, Vietnam's ethnic majority which makes up 86 per cent of

¹⁰ DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121;

¹¹ Ibid.

¹² Ibid.

¹³ 'USCIRF 2020 Annual Report', United States Commission on International Religious Freedom (USCIRF), 28 April 2020, 20200429103634

¹⁴ '2019 Report on International Religious Freedom - Vietnam', United States Department of State, 10 June 2020, 20200612161552.

the population¹⁵; she is not an ethnic minority from the Central or Northwest Highlands. She is not a government worker and she has not indicated any wish to join the ruling communist party. As discussed below, I am not satisfied the applicant is a political activist, and I am not satisfied she will be targeted as a religious adherent perceived as undesirable or a threat to national security.

38. The applicant also claimed to fear harm on account of her husband's past activities against the Vietnamese government and police. Information about the applicant's husband and his claims were before the delegate and forms part of the review material. In summary, her now husband claimed that after returning from working in [Country 1] to Vietnam in June 2012, he attended a Sunday mass at a private residence which was attacked by 40 undercover policemen on [date] July 2012. On the morning of [date] July 2012, thousands of Catholics gathered at [a] church in the city [to] pray for the Catholic followers suffering repression. Following the mass, in the presence of the media (journalists and reporters) her husband demanded the Chairman of Nghe An province and district officials apologise to the [Church] followers. As a result, the husband was issued with four police summonses to attend a meeting with the police department; when he did not attend the police came looking for him and threatened his parents.
39. The husband provided a copy of these summonses. They are dated within several days of each other, and apart from dates and times, they are expressed in near identical terms. While I note they are presented to corroborate his claims, the reasons given in each summons is to attend the police station 'to work on matters' related to him. They do not indicate his outspokenness to the media or demands for an apology or that the police interest in him relates to matters which occurred on [date] July 2012. The summonses do not refer to the applicant husband's failure to attend the police station. I also note that DFAT observes document fraud is common in Vietnam.¹⁶ I have also listened to the husband's two interviews. The husband did not provide any further substantive details over and above that already included in his written claims. The delegate also observed he made no mention of these incidents in his arrival interview.
40. I am not persuaded by the husband's claims that on his return to Vietnam after an almost seven-year absence working in [Country 1] he would spontaneously stand up and speak out given he has no record of prior political activism and that amongst thousands of attendees he would be the only one to do so. I am not satisfied the events occurred as claimed and that her husband was of adverse interest to the Vietnamese authorities, at the time he departed Vietnam. I am not satisfied the applicant faces a real chance of any harm on account of her husband's claimed profile at the time he departed Vietnam.
41. The applicant claimed on the return to Vietnam the police will interrogate her and find out about her involvement with the Vietnamese community in Australia, namely organisations such as [names deleted]. The police will also find out about her husband and his suspected associations with the Viet Tan. The applicant provided letters and photographs to support these claims.
42. I note in an annexure to question 89 'Why did you leave that country?' (Vietnam) of her SHEV application form the applicant refers to protesting about being disappointed with China and the harassment of fishermen. It is unclear whether this is a reference to her participation in protests in Australia against China as the applicant has not otherwise claimed to have been involved in protests in Vietnam nor did she state so at her SHEV interview nor in her arrival interview. I am

¹⁵ DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121.

¹⁶ Ibid.

not satisfied the applicant protested against China and the harassment of fishermen whilst in Vietnam and that this was one reason why she left Vietnam.

43. There is a letter from the President of [an organisation] dated 14 October 2018. It states the applicant and her husband participate in military related days such as the Anniversary of the Vietnam Armed Forces Day or attend the Anzac and Remembrance Day in Perth. They took part in protests against the Chinese communists who invaded the South East sea of Vietnam. The Vietnamese Communist authorities will monitor them, and they will be in danger if they return to Vietnam.
44. There are four letters of appreciation dated 15 October 2018, two for the applicant, two for her husband, said to be from the President of Viet Tan's representative of the Perth Chapter. The first letter thanks her for her [work]. The second for an event organised on [date] April 2017 to support the Democratic Movements and Democratic activists in Vietnam. Her husband's two letters read similarly. Apart from a blue symbol, none of these letters have a letterhead to speak of. While none of the letters display a contact address, or any details of the organisation or phone number for the writer or organisation; given the photographs depict the applicant and her husband at Vietnam Reform Party events I accept they corroborate the applicant's attendance at these two events.
45. At the SHEV interview when questioned about her activities in Australia, the applicant stated she did voluntary work in the church, she often went to the new year Fete and she participated in government demonstrations. Asked specifically about her involvement with anything political or criticism of the (Vietnamese) government while in Australia, the applicant stated they took part in demonstrations against the laws introduced by the communists about safety on the net, restrictions on Facebook and also conscientious objection to the environment with the dead fish and sea life. Asked about her actual involvement, the applicant stated she went to Canberra, arranged tables and chairs when they were having a general meeting or gathering. Referring to the photos, the interviewing officer asked if she was talking about political involvement as shown in the photos. In response the applicant said she worked for the community selling Vietnamese Pho.
46. Asked about other organisations she was involved in, the applicant said she supported the prisoners of conscience like the Viet Tan against the policies introduced by the Vietnamese government. She followed the Viet Tan and supported them materially. Asked about doing anything online, the applicant said she shared things on [social media]; one or two years earlier she shared something, and some people swore back at her, she didn't know who it was, and she had erased it. Asked whether she had any evidence, the applicant said she had deleted it because of all the swearing.
47. The representative submitted photographs following the applicant's interview and a second statement. In her statement the applicant submits when her husband advocates for the Viet Tan organisation, she joins him and has participated in activities of the group. She has also demonstrated in many demonstrations demanding the abolishment of the harsh laws imposed on the Vietnamese people such as the law of security of websites. There are 15 photos in total and a number of these were discussed at her SHEV interview. Two photos are of the applicant and her husband at the 'Black April' commemoration. Three are of the applicant and her husband at a Vietnam Reform Party (Viet Tan) stall standing next to a South Vietnamese army veteran; two are of them at a Viet Tan event. Two are of the applicant in front of food (one of Pho) at outside events and four photos are of the applicant and her husband wearing placards protesting about China at two separate events. The placards in the photos read 'Vietnam is not for sale to

China', 'No economic zones for China' and 'Viet people reject China communist for Vietnam's existence & prosperity'.

48. The delegate wrote to the applicant's representative on 22 December 2020 inviting her to provide further additional information that she would like to submit in support of her claims. As noted by the delegate in her decision no additional information was received of the applicant's participation in political activities since 2018. The IAA has not received any further information from the applicant.
49. At his first SHEV interview on 4 October 2018 the husband spoke of supporting Block 88 and the Viet Tan. Asked about his involvement, he said they did things to make sure there is a voice and people are released and they sent propaganda banners to the Vietnamese government on Facebook and YouTube. Asked whether he had any evidence of his online activity, the husband said it was usually the president who did this. The delegate interviewed the applicant's husband on 17 December 2020. Asked whether he had been politically active in Australia, the husband stated he was not 'really' politically active, but if there is fund raising for the Catholics he helped and put some money in. He didn't have a lot of time to be active. He stated he was a member of the Viet Tan and had been a member for maybe two years or more, he couldn't remember the exact time or dates because he worked so much. The husband stated when he had time, he attended Viet Tan events and helped them protest and if he didn't have time, he donated to the organisation to help people stuck in Vietnam with the same problems.
50. Asked about the process of becoming a member of the Viet Tan, the husband stated there was not really a formal process to apply to be a member, one just had to have the right mindset to look towards freedom. Asked about the aim of the Viet Tan party, the husband said as a member he could speak for himself and from what he observed is that they helped fund raise and helped people stuck in jail who had no voice; those who were arrested on ridiculous charges and were not able to have their say and hopefully they could be released. The husband stated he had not been to Viet Tan meetings in Australia for a few years because he had been so busy but if they wanted help, out of his heart he will fundraise and provide financial support. He confirmed earlier photos he had provided were of him standing in front of the Vietnam Reform Party stand with a south Vietnamese army veteran; the delegate noted it did not really show he was a member of the Viet Tan.
51. I accept that applicant and her husband have been involved in the Vietnamese community in Western Australia and that they have on, a few occasions between 2017 and 2018, attended a couple of Viet Tan or Vietnamese Revolutionary Party events including fundraisers. I am of the view that their involvement is superficial, and they are more motivated by a connection to the Vietnamese community and diaspora in Australia. There is no tangible evidence of any activity since 2018. I am more persuaded they are vested in their [business] rather than political activism. The applicant claimed to the delegate to have participated in protests in Canberra against the Vietnamese government, but I am not satisfied this is the case. The pictures of the applicant's holding placards are all anti-China and pro-Vietnam, and I am not satisfied the Vietnamese government would find these offensive or adverse. The applicant says she has removed any anti-Vietnamese government posts on her social media profile but again I am not satisfied she posted these. On her husband's own evidence, I am also not satisfied he is a member of the Viet Tan or motivated by political activism. I accept the applicant and her husband may sympathise with those suppressed by the Vietnamese authorities but other than a superficial involvement with these organisations I am not satisfied they have developed profiles as political activists or would genuinely seek to protest, or have an interest in protesting, or being involved politically on their return to Vietnam

52. The Constitution enshrines rights with regard to freedom of speech, assembly, association and demonstration. These rights are restricted, however, by a number of 'national security' provisions within the Penal Code, namely: Article 109 ('overthrowing the State'); Article 117 ('conducting propaganda against the State'); and Article 331 ('abusing rights to democracy and freedom to infringe upon the interests of the State'). These provisions take precedence over constitutionally enshrined rights in practice and are commonly applied to activists. The penalties mandated by the provisions remain unchanged, ranging from prison sentences of between six months and 20 years, to life imprisonment or capital punishment.¹⁷
53. Official approval is required for all public gatherings, and authorities routinely deny permission for meetings or marches considered politically sensitive. Police and other security authorities routinely use excessive force to disperse unauthorised demonstrations. Despite legal restrictions and often-severe responses from authorities, citizens do continue to protest, generally in relation to single issue, livelihood-related issues, or occasionally in relation to anti-Chinese sentiment. Hundreds of residents from the central provinces protested regularly in the months following the 2016 Formosa disaster, with some protesters reportedly beaten and arrested by police.¹⁸
54. The Vietnam Reform Revolutionary party (known as Viet Tan) is a US based opposition group (also with an active branch in Australia) which advocates for Democracy in Vietnam. It is considered a terrorist organisation by the Vietnamese government. DFAT observes some political activists with affiliation with the Viet Tan have been sentenced in Vietnam. In November 2019 a 70-year-old Vietnamese-Australia dual citizen and two accused were sentenced to 12 years imprisonment after being convicted of 'engaging in terrorist activities to oppose the government'. He was a Viet Tan member.¹⁹ Other reports describe the man as a human rights activist who entered Vietnam on a false ID who was well known in the Vietnamese community in Sydney with a long history of campaigning for human rights in Canberra.²⁰
55. DFAT assesses that activists who are known to authorities as active organisers of protests, or who openly criticise the state, face a high risk of official sanction. This may include surveillance, harassment, preventative detention, physical assault, travel bans, arrest, and prosecution. This risk is higher for those engaged in areas judged politically sensitive, or who have well-established links with outlawed political organisations. Such activists may not be able to access legal representation and are unlikely to receive a fair trial. DFAT assesses that low-level protesters against the government, and their supporters, face a moderate risk of harassment from authorities, which may include arrest and being subjected to violence.²¹
56. I accept the applicant attended some protests in 2017 and 2018 but I am not satisfied these protests were directed at the Vietnamese authorities but rather towards China. I am not satisfied the applicant has a social media profile of a political activist or that her profile includes anything against the Vietnamese authorities. I accept the applicant has been associated with the Viet Tan and other organisations through her participation in Vietnamese community events but her participation in political activities is very low level and only as a supporter. I am not satisfied that she is a member of the Viet Tan and I am not satisfied her husband is. The applicant is not a political dissident, an organiser or leader of political protests nor is her husband. I am not

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Effectively a death sentence: Australian retiree imprisoned in Vietnam loses final appeal', Special Broadcasting Service (SBS), 03 March 2020, 20200303091219; 'Australia seeks consular access for detained activist in Vietnam', SBS World News Australia, 25 January 2019, 20190129115543

²¹ DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121.

satisfied they have a reputation within their community in Australia as being high level, prominent or vocal political activists. Given their limited political activity, I am not satisfied the applicant will be active politically on her return to Vietnam or that she will partake in protests against the authorities or engage in other politically motivated activities. This is not because of any fear of persecution but rather she is not so inclined. I am not satisfied the applicant faces a real chance of any harm on her return to Vietnam because of her limited involvement with organisations [or] other community events political or otherwise. I am also not satisfied that she faces a real chance of any harm based on her relationship to her husband and his limited activity now or in the reasonably foreseeable future.

57. While, I accept the applicant has been involved in some political activities in Australia, I am not satisfied on her return to Vietnam she will seek to actively engage in political activities involving the Catholic church including land protests. Based on the information before me including the country information, the applicant and applicant son's involvement with the Catholic community and open practise of their Catholic faith as regular members of the Catholic church, a recognised religion in Vietnam, I am not satisfied the applicants would be forced to stop practising their Catholic faith or that they face a real chance of any harm on the basis of their Catholic faith on their return to Vietnam now or in the reasonably foreseeable future.
58. While the applicant did not claim to fear harm on account of the Department of Immigration's data breach, the matter was considered by the delegate. On 31 January 2014 confidential details for a number of people in immigration detention became briefly accessible in a routine report released on the Department's website and this included details about their identities but not their claims for protection. There is no evidence before me to suggest the Vietnamese authorities had access to this information. Although no information was included in the data breach indicating those listed had sought asylum, I am willing to accept that if the information is accessed it may be inferred that they had sought asylum. I am not satisfied however, that the Vietnamese authorities have knowledge of the applicant's specific claims for protection.
59. The applicant claimed the authorities would not protect her because she is a returned escapee and there have been numerous reports of failed refugees being arrested upon return and sentenced to imprisonment. In her post interview submission, her representative submitted the applicant faced persecution because she illegally fled to a western country. The applicant has consistently claimed to have departed Vietnam illegally by boat and I accept this to be the case. I accept the applicants have applied for asylum in Australia a western country.
60. Article 23 of the Vietnamese Constitution provides for citizens to 'freely travel abroad and return home from abroad in accordance with the provisions of the law'. In practice, the government imposes limits on movements of some individuals, particularly foreign travel by high profile political activists or critical journalists. The applicant does not fit this profile. Nor is she a family member of someone who does. Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon return. This is between AUD187 and AUD310 for crossing a national border without undergoing official exit procedures; evading, organising or helping others to leave illegally.²² The applicant has been working in Australia; she stated at her SHEV interview she had AUD\$10,000 in savings. Whilst I note this was over two years ago, her husband stated in his interview of December 2020 he had savings and they have not suggested their circumstances are such that she would be unable to pay. I am not satisfied the applicant would be unable to pay any fine if so required.

²² Ibid.

61. Articles 120 and 121 of the Penal Code state that 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is a criminal offence. Organisers of such movements face imprisonment of between five and 15 years. Individuals face between three to 12 years, or 12 to 20 years in serious cases. DFAT is unaware of any cases where these provisions have been used against failed asylum seekers returned from Australia. Returns to Vietnam are usually done on the understanding that individuals in question will not face charges as a result of making an application for protection.²³
62. DFAT understands that would be migrants who have employed the services of people smugglers typically only face an administrative fine. The authorities occasionally question returnees from Australian upon their arrival in Vietnam. The interview process generally takes between one or two hours and focuses on obtaining information about the facilitation of any illegal movement on their part. DFAT is not aware of any cases in which returnees from Australia have been held overnight.²⁴
63. DFAT assesses that the government typically views a person who paid money to organisers of people smuggling operations as victims of criminal activity rather than as criminals themselves. Such individuals are unlikely to be subjected to penalties allowed in the law for illegally departing Vietnam. DFAT assesses that long-term detention, investigations, and arrest is generally conducted only in relation to those suspected of involvement in organising people-smuggling operations.²⁵ The applicant has not claimed to have been involved in people smuggling.
64. Included in the post-interview submission were three news articles, one from 2016 and two from 2017, about Vietnamese asylum seekers being detained and beaten on their return to Vietnam.²⁶ These articles relate to the same group of people charged with organising others to flee illegally including buying the boat. The applicant has not claimed to have been involved in these activities. I do not accept the applicant would be perceived in the same way as those individuals referred to in these articles. While I accept there is information before me that some individuals have been imprisoned on their return to Vietnam from Australia, I am not satisfied this was on the basis of their simply being failed asylum seekers or someone who departed illegally with a profile like the applicant.
65. I accept the applicant will be questioned on her return to Vietnam. She has Vietnamese identity documents which she can present and her son's Australian birth certificate identifying her as his biological mother. The information does not indicate that those questioned for a couple of hours at most are subject to any harm or mistreatment. Nor does the information before me suggest she and her son would be separated as a family group as part of this process.
66. I accept the applicant may be subject to a fine of up to AUD\$310. The applicant has been working in Australia and I am not satisfied on the information before me she will be unable to pay a fine issued because of their illegal departure. I am not satisfied that being questioned and paying a fine, amounts to serious harm in this case. Furthermore, the country information does not support that this is systematic or discriminatory conduct.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ 'Vietnamese asylum seeker returned by Australia says 'a bullet would be better'', ABC News (Australia), 21 February 2017, CXC9040662329; 'Turned back by Australia, Vietnamese recognised as refugees in Indonesia', Shira Sebban, Sydney Morning Herald, The, 11 June 2017, 20191004135950; Vietnamese asylum seekers forcibly returned by Australia face jail.

67. I find the applicants do not have a well-founded fear of persecution on any of these bases.

Refugee: conclusion

68. 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

69. 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

70. 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.

71. 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.

72. I have accepted the applicant may be subject to day to day corruption including the payment of bribes in accessing public services on her return to Vietnam. I am not satisfied this constitutes significant harm, even when considered together with the processes and penalties that are likely to be faced by the applicant as someone who departed the country illegally.

73. I have accepted the applicant may be subject to administrative processes including being interviewed for one or two hours, and she may receive a fine as a result of departing Vietnam illegally. I am not satisfied this constitutes significant harm as defined, for these applicants. I am not satisfied there is a real risk they will be subject to the death penalty or will be arbitrarily deprived of their life or will face torture. Furthermore, the evidence does not support that there is any intention to inflict severe pain or suffering, pain or suffering that could reasonably be regarded as cruel or inhuman in nature or any intention to cause extreme humiliation. I am not satisfied the applicants face a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment in this context.

74. I have concluded that the applicants do not otherwise face a real chance of any harm for the reasons claimed. Given 'real chance' and 'real risk' involve the same standard, I am not satisfied they face a real risk of harm on these bases.

Complementary protection: conclusion

75. 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

76. 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 dependent children.
77. As neither of the applicants meets the definition of refugee or the complementary protection criterion and there is no evidence the applicant's husband is a person who holds a protection visa, 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.