



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA23/10603

Date and time of decision: 1 November 2023 16:50:00

S McNeill, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be national of Vietnam. He arrived in Australia with his sister [in] April 2013 and the pair lodged a combined application for a Safe Haven Enterprise visa (SHEV) on 23 August 2016.
2. In a decision dated 13 January 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate did not accept the applicant faced a real chance of persecution or a real chance of significant harm for the reasons claimed.
3. The delegate also concluded the applicant, and his sister were not members of the same family unit and made a separate decision in relation to his sister. Both the applicant and his sister gave consent during their SHEV interviews for information to be shared between their applications including that provided at their respective interviews. I have considered the sister's claims in a separate decision (IAA23/10604).
4. The IAA affirmed the delegate's decision on 21 March 2017. The applicant and his sister both sought judicial review and on 8 September 2023, the Federal Court of Australia quashed the original IAA decision and remitted the matter to the IAA to be determined according to law.

Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). This includes the material that was before the IAA in its first review, the 'original portfolio', and also a number of documents that were not previously referred to the IAA. These have been identified in the IAA referral checklist as Detention Notices and Consular Access Forms for both the applicant and his sister, a Biodata Form for the applicant and a Detainee Biographic Details Form for his sister. I consider these forms are administrative in nature and while they contain some biographical details regarding the applicant, they do not contain information that would materially assist in determining his claims for protection. I do not consider them relevant in the assessment of the applicant's claims.
6. I have obtained the most recent Australian Department of Foreign Affairs and Trade (DFAT) country information report for Vietnam of 11 January 2022 prepared for protection status determination purposes only.¹ The report draws on DFAT's on-the-ground knowledge and discussions with a range of sources in Vietnam and elsewhere. It takes into account information from government (including the Vietnamese Government) and non-government sources, including (but not limited to) those produced by the US Department of State, the UK Home Office and relevant UN agencies, and reputable news organisations.
7. Given it is almost six years since the delegate's decision, a significant period of time, and that the country information the delegate relied on mostly dates back to 2013, 2014 and 2015, I am satisfied there are exceptional circumstances to justify consideration of this new information.

¹ Department of Foreign Affairs and Trade (DFAT), 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

Applicant's claims for protection

8. The applicant's claims can be summarised as follows:
- He was born in [Year] in [Village], [District], Kien Giang province in Vietnam.
 - His family has an ongoing land dispute with the Vietnamese authorities, and their house has been dismantled a number of times; the government wants their land.
 - He fears harm from the Vietnamese authorities because of this ongoing land dispute.
 - He also fears harm from the Vietnamese authorities because his details were made publicly available on the Department's Data Breach in 2014 and as a failed asylum seeker who departed Vietnam illegally.

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. The applicant has consistently claimed to have been born in Vietnam, since his arrival in Australia and throughout the protection visa application process. He has provided copies of his Vietnamese identity documents, his National ID card and birth certificate. The applicant has participated in a number of interviews with the Department and these interviews have been conducted using Vietnamese interpreters. On the information before me, I am satisfied the applicant is a Vietnamese national and that Vietnam is the receiving country for the purpose of this review.
12. Based on the consistent oral and documentary evidence before me, I accept the applicant was born in [Year] in [Village], [District], Kien Giang province of Vietnam and that he is a

Buddhist. His parents and younger sister continue to live in Vietnam. He finished his schooling at the end of year [Number]; then undertook a number of labouring jobs including in the [Work] sectors and received some training in [Job skill]. He departed Vietnam illegally by boat from Kien Giang province with his sister, his uncle who arranged the boat, and some cousins in April 2013.

13. The applicant's core claim is his family's ongoing land dispute with the local Vietnamese authorities. The applicant participated in an arrival interview on 22 April 2013 just over a week after his arrival in Australia. The reasons given at this interview for why he left Vietnam were mostly economic. The applicant stated the earning in Vietnam was very low, he could not earn enough money for a living. Even though he worked hard, he got a very small payment. Asked whether he came to Australia to work, the applicant said 'yes'. Asked whether there were any other reasons why he decided to leave, the applicant said 'no'. Asked why his sister wanted to leave, the applicant said they both worked very hard and did not make much money. He expected to work in Australia including working for his uncles who both had farms.
14. The applicant's sister participated in her arrival interview two months later, this conducted in two parts, part one on 26 June 2013 and part two on 5 July 2013. The sister provided her reasons for departing Vietnam on 26 June 2013. Similar to her brother, the reasons given for leaving Vietnam were because they were very poor, and her parents couldn't afford to buy them food. Asked whether there was any other reason for leaving Vietnam, she stated they had no one to help them financially or economically, their house was demolished by the authorities, so they were living in a tent. Asked why the authorities demolished their house, the sister said she didn't know the reasons. After her father had their house built on at least two occasions, they were demolished on two occasions by the local authorities. Asked whether the police, security or intelligence organisations impacted on her day-to-day life, the sister said 'yes', they demolished their home. I note the applicant responded 'no' to this question in his arrival interview.
15. In his SHEV application form lodged on 23 August 2023, the applicant in response to the question why he left Vietnam, it is written 'harassment by police', 'no work' and 'Police break in house regularly and demand money and demand working for criminal gangs for crime purpose.' In response to what will happen on return, it is written 'police brutality', 'forced prostitution', 'jail' and 'torture'. In response to whether he experienced harm in his country, it is written 'regular beatings by police', 'intimidation by force', 'threats to parents/family/self'.
16. At his SHEV interview on 15 December 2023 the applicant presented as his primary claim the land dispute with the authorities. Questioned about his SHEV application and the reasons he left Vietnam, the applicant introduced the claim that the government wanted his family to move house and use the land for something else. The police showed the paperwork; when people were around, they dare not do anything but at night they came and told them to remove the house. The applicant could not say what they wanted to use the land for as he was [Age] at the time and [Age] when he left Vietnam.
17. Their house was now like a hut, they built a big house, and they dismantled it. They built it again and they dismantled it and now it was a much smaller place but still on the same land. Asked when it was last demolished, the applicant said before he left to come over here, it had been some time so he couldn't remember. Asked about his parents having any problems with the house at the moment, the applicant said his mother did. The police came and asked her to dismantle the house, she argued, and they hit her on the head; last week she had to go to

Saigon (Ho Chi Minh City). They hit her on the head, they asked her to come to the office, she was so scared; his father told her to go to Saigon and not to come back in case they hit her again.

18. The applicant then provided papers relating to the dismantling of the house. The delegate said she would take a copy of the documents. The applicant did not have a translation of the documents. He didn't know where a translator could be found. The interpreter translated one of the documents. The letter is addressed to [Mrs. A] from the area assessment committee of the city of Rach Gia. It advises it has received a letter of appeal from [Mrs. A] dated [May] and [June] 2010 concerning an appeal to [Ward] the people's committee send the police and come and dismantle the house and three times they are dismantling her hut and the decision concerning appeal [Number] dated [June] 2010 of the people's committee of the city concerning the administrative offence relating to construction... The appeal concerning the land dispute of [Mrs. A], the office of the environment and resource is still considering in order to resolve. They are waiting for the resolution of the people's authority. If any cadre does the wrong thing, then they become the object ... the subject to the decision and advice of the authority which has the responsibility to resolve. The interpreter explained the committee of Rach Gia is informing [Mrs. A], to let her know.
19. The delegate asked the interpreter to repeat the bit about the penalty. The interpreter said it was not clear, she did not know if it was a cadre committing an administrative offence concerning construction work regarding [Mrs. A]. She does not know if it is the people at fault or her, it was not very clear, and there would presumably be more documents explaining the outcome. I note the letter the interpreter translated has a discernible date at the top of 20.8.2010 (written as *ngay 2 thang 8 nam 2010*). The interpreter observed this was from August 2011, but it may be that the stamp certifying the document as an original that is dated 12 August 2011.
20. The interpreter commented there must be more documents which clarified whether it was a cadre violating the administrative policy or process or [Mrs. A], it was not clear and subsequent paperwork was needed to show what the people in authority had decided. The interpreter observed this was five years ago. The applicant stated he did not have much education in Vietnam, he did not quite understand these things as he did not have the knowledge. He was afraid if he brought too many documents, it would not be understood. I do not find this explanation convincing but rather an attempt to withhold information or potentially the outcome of this dispute.
21. I note in the documents provided by the applicant's sister in 2013, as discussed below, and the ones described as the register of the family living on her grandfather's land there are pages for individual family members and one of them has the name of '[Mrs A]' with [Year] next to it.
22. Asked by the delegate the outcome of the appeal, the applicant said the final decision is they want their family to move elsewhere, they didn't know. These were the processes. If his family moved, they did not have anywhere to live. The government had a plan for the area; they offered some money for his family to leave, there were many in his family and the amount offered was so small. Asked whether any other families were affected by this, the applicant said there were a number of people who were poor like them; four or five houses nearby but he could not remember. They had refused to leave and were beaten.
23. The applicant confirmed he was in contact with his family in Vietnam. Asked about what they said about the current situation, the applicant said they were sad and angry because they

fought the police a lot, about moving house. Asked whether his family had a date by which they needed to move, the applicant said they had decided not to leave; if they did not give them the money then why should they leave.

24. The applicant said he studied until year [Number] and they expelled him and wouldn't let him continue. They did this because he followed his father, his family and argued against the police; he was a student of low morals, and they didn't pay the money, so they expelled him. The school fees were high. Asked if he had ever been arrested, the applicant said many times. Asked why, the applicant said because 'they' used a knife and hammer to dismantle the house, so he jumped in, and they said he was against people trying to carry out these duties. This happened before he came over here. Asked whether this was in 2010 or 2011, the applicant said probably then.
25. The applicant said he was arrested many times, so he couldn't remember clearly. Asked when else, the applicant said a few days before he left for Saigon, he stopped them from dismantling the house. They told him if he did that again he would put them in jail; he was sad and upset so he left. Asked if he was arrested before 2010, 2011, the applicant said probably in 2012. Asked again, the applicant said 'yes', many times, he couldn't remember but it was for the same issue. Every three to four months, they sent the police to dismantle the house. He came out and swore at them. They put him in the car, handcuffed him and kept him for the day. As noted, the applicant failed to mention his claimed arrests in his arrival interview.
26. Asked when the government first wanted to take the house, the applicant said in 2010 but he couldn't remember the month. He was [Age] when he saw the dismantling, only small at the time. The delegate observed that [Age] was not that small. The applicant said they might have erected it for one day, the police came and dismantled it. He was surprised and didn't know why they came one or two days after to dismantle it.
27. The applicant said he thought they dismantled the house seven or eight times. The delegate observed his sister had said in her arrival interview that they demolished the house on two occasions. The applicant responded she probably said twice because that was when she was there, his sister worked away like he did too. They dismantled it many times. Asked if he was working away, how was he arrested for disrupting them dismantling it. The applicant said he went away because of construction, he worked for one or two months then had a break and came home. He was not arrested for any other problem. Asked whether the police ever charged him for an offence so that he had a criminal record, the applicant said 'no'; he was scared so he went away, they just sort of scared him and arrested him.
28. Asked whether he thought he was being personally targeted at all, the applicant said probably the whole idea was to disrupt the family; he was doing his year [Number] studies and they disrupted his studies. If they arrested him many times, the principal might not think very much of him. Asked why he left Vietnam, the applicant said he was haunted by that and fearful; each time he returned home to his family he had to fight the police, the arrest and his uncle was leaving Vietnam so they could take him.
29. The delegate referred the applicant to his SHEV application. The applicant said a western man helped him complete it; they used an interpreter, and he also helped him fill out the form. Asked whether he had been physically harmed by the police at all, the applicant said 'yes'; they dragged him into a room, but he wouldn't put up with it, he ran away so they beat him. Asked how many times this happened, the applicant said each time they slapped him in the face to frighten him. When they dragged him to the car, they slapped him. Asked whether

they did anything other than slap him, the applicant said they threatened and slapped him; they threatened to send people to school, and the school would expel him.

30. The applicant said he did not have any problems with gangs. The delegate then read out his written SHEV application claims, harassment by police, no work, police breaking in house regularly, demanding money and working for criminal gangs for a crime purpose. After having it read twice to him, the applicant said he thought the interpreter must have made a mistake and did not understand. Asked if he was saying this is not correct, the applicant said they more or less entered the house and dismantled it, they were allowed to put up a temporary hut not a house. The applicant confirmed the police did not make him work for criminal gangs.
31. The applicant said if he returned to Vietnam, he would probably be arrested and imprisoned. He came overseas and that is like being a traitor. He had heard about the Data Breach, and he was worried and fearful. The authorities would come and look for him because his family disagreed with the government, they had a big argument with them, and this was a disadvantage to him and also because he had escaped here. Asked whether because of the issues with the house and his arrest he would be viewed in a particular way by the government, the applicant said they would be viewed as anti-government and classified in the lowest category; they would watch everything they did and make it difficult. Towards the end of his interview, asked whether he had ever been involved in any political organisation or groups, the applicant said 'no'.
32. The delegate again referred the applicant to his SHEV application and his responses when asked what he thought would happen to him on return, the police brutality, forced prostitution, jail and torture. The applicant said he was likely to be jailed and tortured. In relation to the forced prostitution, the applicant said probably the interpreter didn't interpret correctly. He was also interviewed with his sister and that might be applicable to her because of her sex. He didn't know the English that was written down. He confirmed he would not be forced into prostitution. Asked whether he would be forced into a crime gang by the police, the applicant said he would have to do whatever they told him to do. Given the applicant's responses, I am not satisfied the police broke into the applicant's house regularly demanding money or that he was made to work for criminal gangs for any criminal purpose prior to his departure from Vietnam. I also do not accept the applicant fears being forced into prostitution on his return to Vietnam.
33. The delegate referred the applicant to his arrival interview, that he said he could not earn enough for a living in Vietnam and though he worked hard, he got a very small payment. The applicant said this is correct. The delegate continued that he had responded 'yes' to did he come to Australia to work and when asked if there were any other reasons why he had decided to leave, he had said 'no'. The applicant said at the time he had only got to the island (Christmas) one or two weeks before and he was panicking, unsettled and afraid of death, he didn't know what to answer.
34. The applicant stated his sister had received an invitation his father had sent to her phone after his mother was beaten, escaped and ran away. Her father had sent it, but he did not know how to access it. Asked if his father attended, the applicant said he was afraid if he went there, he might be beaten. Asked if his father went, the applicant said he did not know because in the 'paper' they said they are allowed 20 days to a month to respond, otherwise they will come to the house and arrest. Asked what happened then, the applicant said in his opinion if they were more or less saying if they dismantle the house, they will let it go but if he didn't then he might face a beating.

35. Referring to the document dated 7 May 2013, the delegate asked why they wanted to see his father. The applicant said they wanted to ask him why he had left to go to Australia and whether he had bought a boat for him to escape. The delegate observed that his uncle had said that his father was repeatedly summonsed to the local police in relation to his uncle's escape from Vietnam and it sounded more like they were inquiring about his uncle and not him. The applicant stated his uncle was his father's older brother and now his father was the only sibling there and they tended to send someone to ask.
36. The delegate then asked the applicant whether he had any documents in support of his application. The applicant said he had brought some, but he didn't understand them much, the related to the housing issue. They were mostly legal. The interpreter then sought to translate a document that referred to an incident in [Ward] in 2008. This has the date of *ngay 30 thang 7 nam 2008* at the top (30.7.2008) and there is a date visible of 12/6/2008 in the body of the document. Translated by the interpreter, she referred to the applicant being pressured into declaring that he kicked someone so that they miscarried. The interpreter made no reference a land dispute.
37. The delegate then stated it was up to the applicant to present his claims for protection and if there were any documents he would like to submit in support of his application, then he needed to provide a NAATI qualified translation of them. The delegate then explained how to access a NAATI translator, advised the applicant he had 7 days to respond, the documents could be emailed through and then he could seek an extension of time. While the applicant was unrepresented, I am satisfied the delegate adequately explained the steps needed for the applicant to provide the documents translated.
38. The delegate then interviewed the applicant's sister with the same interpreter. The sister commenced her interview by stating she had just spoken to her mother who was in Saigon because people might beat her. This was because her parents would not let them dismantle the house. They were looking for her mother because she protested, and they wouldn't let her dismantle the house. Asked whether they succeeded in dismantling the house, the applicant said 'no' her father stopped it.
39. Asked when the government first started trying to take their land back, the sister said in [Year], she was small. Questioned about her work history, the sister said she remembered the police put her and her family in the car when she was small, and they shut her up with her family. This was probably in [Year] when they moved to the new place, but she couldn't remember clearly. Asked whether her family had a lease on the land they were living on, the sister said it was their family's land.
40. Asked whether she even been arrested in Vietnam, the sister said 'yes.' Asked how many times, the sister said once she was in the back of the car, she remembered a few times. They more or less bullied them and shoved them but didn't take them away. Asked why she was arrested, the sister said because she was with her family. Her family were being arrested because they owned the land, built the house but they wouldn't let them.
41. Asked whether they were ever harmed when arrested, the sister said they just imprisoned them but did not feed them or give them water. They were held for one day sometimes, but she couldn't remember clearly. Asked whether she was ever physically harmed at all, the sister said 'no', they tended to push and shove her. She left Vietnam because life was difficult, they wouldn't let them erect the house and beat her brother and mother, they pushed and shoved her. The delegate noted her brother had said four or five families had the

same problem in her village. The sister said she didn't know, she was small. She didn't know what the plan was, but they wanted their land.

42. The delegate confirmed this had been an issue with the government for nine years now, the sister said 'yes' since 2007 or 2008 until now. Asked if her family tried moving elsewhere, the sister said 'no' because the land was theirs, her parents did not want to move because it was their land and their grandparents used to live there. The delegate observed she had said they didn't move there until 2007 and the sister said before that the government would not let them live there, but this land belonged to her father's parents who left it to him.
43. Questioned about her SHEV application claims, and that the police and gangs joined to intimidate her into prostitution, the sister said 'no', police and also 'black society' beat up her father and stabbed him with a knife, they wanted to dismantle but they wouldn't let them. A group of people came, they beat her mother who she was holding on to. They beat her brother. Someone ran out and stabbed her father. He went to hospital, and he recovered but there was a big scar. Asked whether she was beaten or harmed at all in that incident, the sister stated when she was small, they beat her, and she had bruises but mostly men grabbed her by the hair and beat her.
44. Towards the end of her interview, the sister confirmed her family had never committed an offence against the law. The government considered them as traitors because they did not cooperate with the government who wanted to take their land, but they would not let them. The delegate noted her brother (the applicant) had brought some documents with him to the interview, and did she want to provide any of those documents in support of the application, the sister said she had one her father had sent over yesterday. Yesterday the police had arrested her father and beat him. She had taken a photo of it, and it was the invitation for her to come. They beat her father yesterday and his face was all swollen. This was an invite for both her parents to come at 9:05 on 15 December to the police station at [Ward]. Her mother escaped. He told his wife (her mother) not to attend because he was worried, they might imprison her.
45. Asked if he was going to attend, the sister said he had gone yesterday, he attended, was beaten, and returned and they had sent another invitation. The delegate then assisted the sister to email her the document and noted she was waiting for her brother to provide the documents. Again, the delegate explained they would need to be provided with a NAATI translation by next Thursday and they could get an extension. She checked whether the sister understood.
46. Asked if she knew whether the authorities had made enquiries about her, her uncle, her cousins, and brother since she left Vietnam, the sister said 'yes'. Asked whether they were in the letters her brother had brought in, the sister said 'yes', the invitation letters. Asked whether the letters stated the reasons they wanted to speak to her father, the sister said she didn't know, she only knew they sent an invitation letter; it was more or less investigating to see where they went just after they left, they asked where they went and why they left.
47. The delegate confirmed she would wait before the documents and any other information before making her decision. It is clear from the delegate's decision that no translations were received. In the review material there are a number of untranslated documents. On 8 October 2013, the sister provided the Department with the additional information statement and documents in Vietnamese. The additional information states the Vietnamese government used to abuse her family because her grandfather had land, but the government wanted to use the land for themselves. They built a house, the local police destroyed it and

arrested some of her family for one day then released them in the town of [Ward]. On 7 September 2011, her family wanted to rebuild their house, but the local government disapproved the application. With nowhere else to live they built the house anyway and the local police came and destroyed it. The third time they rebuilt the house, the local government sent gangsters to destroy the building and used a knife to her father's left hand and abused other family members. The family members were injured and had to go to hospital.

48. Pages 1 to 3 are described as summons to her father to go to the police station. There are dates discernible. All three documents are similar with official looking stamps and the '*Giay Moi*' title. Page 1 has the date of 7.5.2013 (written as *ngay 7 thang 5 nam 2013* as the majority of dates identified) and then 8.5.2013 in the body of the document. Page 2 has what appears to be a time, 9:00 and the date of 31.5. 2013. Page 3 has 13.9.2013 at the top and 16.5.2013 in the body of the document.
49. The delegate referred to having a translation before her of one for the 7 May 2013 document. On 18 August 2014 the Department received a response from the sister regarding the Department's letter of June 2014 of her personal information being made available on the Data Breach (discussed below). In her letter the sister writes that on 7 May 2013 at Rach Gia City, Kien Giang Province, her father was invited to the police station and told he had to force her to return to Vietnam, otherwise her family would have a lot of problems, even being put in jail. [In] May 2013, [Mr B] (investigator from police) [section] invited her father again and he threatened her as before. Information before me indicates, the delegate meant this as the translation.
50. Pages 4 and 5 of the documents are described as being her father's report saying that the local police knew they'd escaped illegally and that the police would jail them for five to seven years if they returned. This document has the appearance of a formal statement and is it signed by the applicant and sister's father and in the body of the document their names and year of birth are evident. It is dated 18.9.2013. It is not clear who the report is for, whether to support the applicant and her sister's claims or for the police.
51. Pages 6 to 9 are described as the grandfather's land title where they couldn't build a house. It has the form of a small booklet. Pages 10 to 17 are the register for the family living on the grandfather's land, and page 16 is referred to as the sisters. There are individual pages with a person's name and date of birth on them. Each page has an official looking stamp.
52. There are other untranslated documents on file the applicant and his sister provided following their SHEV interview. The first is another '*Giay Moi*' or summons they claimed to have received from their father; his name is apparent and the date at the top is 14.12.2016 and within the body of the document is 9:00, 15.12.2016.
53. There are also two other documents, the first with the date of 30.7.2008 (of which there are two copies) regarding the [Ward] incident of 2008 and the applicant being accused of causing a miscarriage, and the second one of 20.8.2010 with a date stamp of 12 August 2011, both of which the interpreter translated as discussed above. As already noted only the document from 2010 relates to there being an actual land dispute and as observed by the interpreter it does not suggest an outcome but rather an investigation.
54. None of the documents provided have been translated by a NAATI accredited translator. I note in the Department's acknowledgement letter of the applicant's visa application of 16 September 2016, and his request to attend an interview letter of 23 November 2016, the

applicant was advised to provide translations of documents in English either by a NAATI accredited translator or that if translations by a non-accredited translator outside Australia was used, they should be endorsed by the translator. The applicant was also provided a document titled 'Important information about your protection visa interview' both in English and Vietnamese which included a link to the NAATI website. At the time of the applicant's SHEV interview, he had been in Australia over four years and while his English is not his first language, I am satisfied he would have known where to seek help in order to provide translations. There is an email on the review material from the applicant dated 18 August 2016 seeking clarification of matters relating to this SHEV application. Although it is possible someone assisted him with this email given its high level of English, it demonstrates the applicant's ability to navigate the process.

55. The IAA wrote to the applicant on 12 October 2023 by way of email and invited the applicant to provide translations of these documents outlined above. The IAA also attempted to call the applicant on three occasions on 12, 13 and 15 October 2023 and left voice messages each time to contact the IAA. The applicant did not contact the IAA and no translations have been provided. The applicant's sister was also emailed and invited to provide translations. Attempts were also made to contact her by telephone. I note the issue of translations was the subject of their judicial review and the applicant would be aware of this.
56. I have some concerns about the applicant's claims regarding the family dispute with the local authorities over the land. Firstly, the applicant's failure to mention the land dispute in his arrival interview and his negative response when asked whether he had ever been arrested or whether the police impacted on his day-to-day life. I am conscious that an arrival interview is not the opportunity for an applicant to present their claims in full or have those claims investigated, but the applicant was provided with the opportunity to present other reasons why he came to Australia additional to his economic reasons. I accept the nine-day boat journey would have been challenging, but the applicant was told at the beginning of the interview, he was expected to give true and correct answers to questions asked and that he should understand that if information he gave at any future interview was different to what you told now, this could raise doubts about the reliability of what he had said. The applicant responded 'yes' when asked if he understood what had been said and if he understood the interpreter.
57. I note also in his arrival interview, the applicant stated he was not aware of the preparation or planning of the trip. His father suddenly called him home and told him he should go with his uncle. His uncle explained the boat was going overseas but if he did not want to travel to Australia he could go back home. While the applicant's sister raised the issue of the house being dismantled twice, this was not her primary reason for departing Vietnam and her arrival interview was conducted over two months after she had been in Australia.
58. Other concerns I have are the inconsistencies between the applicant and his sister's evidence. The applicant said that the land dispute began in 2010 while his sister said it was in 2007 or 2008. While the applicant sought to rely on his youth for not remembering correctly, I agree with the delegate that [Age] is not that young and this is especially so given the significance of a house being dismantled and it being his primary claim. Furthermore, the discrepancies between the number of times, the house has been dismantled. The applicant said he thought seven or eight times and every three to four months they sent people to dismantle the house. Whereas his sister, in her arrival interview said the home had been demolished on at least two occasions, in her additional information provided in 2014 the house was dismantled three times, although she was not asked at her SHEV interview for a

number. I also consider it significant his sister did not know about other neighbours being impacted.

59. I also have concerns that only the day before their SHEV interview the authorities would summons or invite their parents for questioning, beat their father and that their mother would need to flee to Saigon. I do not find this evidence convincing. I accept there is a summons with the date of 14 December 2016, and it appears to request someone to attend on 15 December 2016, but this would be the day of their actual interview. I consider it too coincidental that their parents would be come to the authorities' attention at the time of their SHEV interview. I am also mindful of country information which indicates document fraud is prevalent in Vietnam.²
60. The issue of the land dispute has purportedly been going on since 2007/2008 or 2010 but at the time of their SHEV interview, the applicant's parents remained living on the property in December 2016. I am not persuaded the Vietnamese authorities have an ongoing interest in the land. As noted by the delegate the state can appropriate land for socio-economic development. Under a law passed by the National Assembly in November 2014, land can only be taken if deemed necessary for social-economic development in the public or national interest and is approved by the Prime Minister or the National Assembly, as well as the Provincial People's Council. However, 'socio-economic' development is loosely defined, and there are many outstanding legal disputes between landowners and local authorities. Disputes over land rights are a significant driver of social protest in Vietnam. Foreign investors also may be exposed to land disputes through M&A activities when they buy into a local company. All land in Vietnam is collectively owned and managed by the state, and as such neither foreigners nor Vietnamese nationals can own land. The majority of land in Vietnam (94.5 percent) has been issued a land use rights certificate. Vietnam is building a national land registration database, and some localities have already digitized their land records.³
61. DFAT also reports that protests about land and its compulsory acquisition occur occasionally and that all land in Vietnam is formally owned by the state, which issues usage rights to individuals or organisations. The state retains the right to reacquire the land and landowners allege low levels of compensation, which sometimes leads to protests.⁴
62. Furthermore, while the applicant and his sister have been able to provide their untranslated documents sent from their father in Vietnam, no other evidence has been provided such as in the form of photos of their dismantled house or their father's swollen face or scars he purportedly obtained when stabbed by gangsters. I have considered whether the applicant's evidence was dissimilar to his sisters because either of them worked away from home, and I am not satisfied it is the case. I note also only his sister submitted the claim of her father's stabbing which is of some significance given according to her oral evidence, her brother (the applicant) was actually there.
63. Taking all my concerns into consideration, while I accept it as plausible there may have been some form of land dispute with the authorities in the past in 2010, I am not satisfied the matter has played out as claimed. I am not satisfied at the time the applicant departed Vietnam; it was because of any claimed ongoing land dispute with the Vietnamese authorities. I also do not accept the applicant and his family members have been mistreated

² Ibid.

³ US Department of State, 'Vietnam 2016 Investment Climate Statements of the Bureau of Economics and Business Affairs US Department of State', 6 July 2016, CX6A26A6E9812.

⁴ DFAT, 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

physically and harmed by the authorities as claimed. I do not accept they have ever been arrested on account to this dispute. I do not accept they were attacked by gangsters and her father stabbed or that other family members were injured and hospitalised as claimed by his sister. I do not accept in December 2016 the authorities beat his father as claimed or that his mother fled to Saigon to avoid the authorities. I consider the primary reason the applicant departed Vietnam was for better work opportunities. I am not satisfied the applicant faces a real chance of any harm on account of this claimed land dispute on his return to Vietnam now or in the reasonably foreseeable future.

64. I have accepted the applicant left school in year [Number]. I note in his SHEV application form 'no schooling' is written in the question regarding education history. In his arrival interview it is recorded that he completed year [Number] in 2009. The applicant would have been approximately [Year] years of age at the time. I note the applicant stated the land dispute began in 2010 and therefore based on his own evidence, the applicant would have left school prior to the commencement of the dispute. The applicant's more spontaneous and repeated response in his interview as to why he left school was that they were poor.
65. Information before the delegate indicates the law provided for universal education for children regardless of ethnicity or religion. Education is compulsory, tuition-free, and universal through age 14, although many families were required to pay a variety of school fees. Under a government subsidy program, ethnic-minority students were exempt from paying school fees. Nevertheless, authorities did not always enforce the requirement or enforce it equally for boys and girls, especially in rural areas, where government and family budgets for education were limited, and children's contributions as agricultural laborers were valuable. Child labour is common in Vietnam, and many drop out of school.⁵
66. DFAT similarly confirms education is free and compulsory up until 14 but some students in rural areas may work and not have the opportunity to attend regularly.⁶ On the information before me, I am more persuaded the applicant finished his education at the end of year [Number] because he needed to work and for economic reasons. I am not satisfied he was expelled because of the land dispute, and that the school principal considered him to have low morals. I accept financial reasons or costs may prevent him from resuming his education on his return to Vietnam if he wished to do so. I am not satisfied this constitutes serious harm.
67. According to the delegate's decision, the applicant was in immigration detention on 31 January 2014 and may have been affected by the 'Data Breach'. Departmental advice indicates that a Microsoft document dated 31 January 2014, was published on the Department's website on 10 February 2014 for eight days. This allowed access to source data containing personal information (including names, dates of birth and nationalities) of approximately 10, 000 detainees. There were 123 "hits" on the document from 104 unique IP addresses and access was passed to journalists at the Guardian.⁷ I note the applicant's claims for protection were not disclosed in the data breach; however, I accept the Vietnamese authorities may know the applicant was in detention and has sought asylum in Australia.
68. The applicant claimed his father was summoned by the authorities in May 2013 to question him about his illegal departure. As noted above his father was summonsed about his

⁵ United Kingdom Home Office, 'Operational Guidance Note: Vietnam', United Kingdom Home Office, 1 June 2013, CIS28916; US Department of State, 'Vietnam - Country Report on Human Rights Practices 2015', 13 April 2016, OGD95BE926333.

⁶ DFAT, 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

⁷ 'Management initiated review. Privacy breach - Data management', KPMG, 5 April 2014, 20230426135529

departure and whether he purchased a boat. The applicant and his sister were both consistent in their arrival interviews that they departed Vietnam illegally on a boat arranged by their uncle with their cousins. He did not pay his uncle any money for the journey nor did his family according to his arrival interview. While the summons in relation to their illegal departure have not been translated, I accept it as plausible the authorities may have questioned his father soon after their departure from Vietnam given there were a small group of people from the same family involved. I note the delegate's comments that their uncle stated their father was called in relation to him. I note also the authorities released their father after his being questioned but again it can be assumed the Vietnamese authorities are aware the applicant departed illegally from Vietnam.

69. I accept the applicant will be returning to Vietnam as a failed asylum seeker who departed his country illegally. I accept the applicant's uncle was responsible for arranging the boat and their trip; however, the applicant himself and his sister were not involved in this process. According to DFAT, article 23 of the Constitution allows citizens to 'freely travel abroad and return home from abroad in accordance with the provisions of the law'. Articles 120 and 121 of the Penal Code prohibit 'organising, coercing [or] instigating illegal emigration for the purpose of opposing the People's Government' and describes penalties of between three- and 20-years' prison for both organiser and individual émigrés. DFAT is not aware of any cases where these provisions have been used against failed asylum seekers returned from Australia.⁸
70. Reports in the review material indicate that 46 Vietnamese asylum seekers were aboard a small vessel intercepted off Australia west coast in 2015 and were returned to Vietnam as a result of negotiations between the two countries. On their return all adults were detained for questioning for at least a week.⁹ In May 2016 a court in Vietnam jailed four of the group for terms ranging from two to two and a half years each for "organising other to flee abroad illegally" after Australia sent them back. Their 42 Vietnamese companions were relatives and acquaintances.¹⁰ I note these events occurred over seven years ago and while he travelled on a boat his uncle organised, the applicant has not claimed to have been involved in its organisation or people smuggling.
71. According to DFAT, In-country sources report that all individuals involved in people smuggling operations, whether as organisers or travellers, are typically held by authorities for questioning to determine their involvement in operations. Sources have described cases where people have been detained for multiple days or recalled for further questioning. DFAT understands that would-be migrants who have employed the services of people smugglers at worst only face an administrative fine, including in cases of multiple illegal departures.¹¹
72. DFAT understands that authorities occasionally question returnees from Australia upon their arrival in Vietnam. The interview process generally takes between one to 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 for this purpose.¹²

⁸ DFAT, 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

⁹ 'Fears returned Vietnamese asylum seekers are being grilled in police detention', Sydney Morning Herald, The, 23 April 2015, CXBD6A0DE17949.

¹⁰ 'Vietnam jails four asylum seekers returned by Australia', Reuters, 27 May 2016, CX6A26A6E4618.

¹¹ DFAT, 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

¹² Ibid.

73. Returnees, including failed asylum seekers typically face a range of difficulties upon return. These include unemployment or underemployment, and challenges accessing social services, particularly in cases where household registration has ceased. DFAT assesses that most people who have been subject to people smuggling are seen by the Government as victims, not criminals. Being a failed asylum seeker is not generally stigmatised. Migration, particularly internal migration, has been a feature of Vietnamese lives for decades, is very common and is even encouraged by the Government.¹³
74. Many returnees have high levels of debt from funding their travel out of Vietnam. Sources in Vietnam have reported cases of moneylenders taking borrowers' houses or land as repayment, or borrowers having to flee loan sharks when they are unable to repay their loans.¹⁴ I note the applicant did not pay for his journey nor did his sister. I am not satisfied the applicant has any debt in relation to his journey to Australia.
75. According to DFAT, Vietnam has been described as a 'development success story' and its GDP one of the fastest growing in the world; official unemployment is low at 2.4 per cent although the rate of formal unemployment is high. The majority of the poor are from ethnic minority groups. According to World Bank data, between 2002 and 2018 more than 45 million people were lifted out of poverty. In that period, the poverty rate fell from over 70 per cent to below 6 per cent. The economy continues to grow and has strong growth potential, with 2.9 per cent growth in 2020 despite the COVID-19 pandemic. This is reflected in a growing middle class and increasing urbanisation.¹⁵
76. While I accept the applicant's initial reasons given for leaving Vietnam was because they were poor, the applicant has previous work experience in Vietnam in the [Work] industries, as [an Occupation] and was taught how to [do a Job task] at a [Workplace]. The applicant also has some work experience in Australia. For support the applicant has his parents in Vietnam, who he has maintained regular contact with. I am satisfied the applicant will be able to find suitable employment on his return to Vietnam and that he will be able to reside with his parents.
77. There is an untranslated copy of the applicant's household registration. Rather dated information before the delegate from the Immigration and Refugee Board of Canada indicated that persons absent from their permanent place of residents for more than six months without registering their temporary absence and without plausible reasons had their names cross off their registration book; however, they could reapply when they returned home.¹⁶ DFAT understands that physical hộ khẩu (household registration) books are no longer issued and have been replaced by information held in a national database that is linked to a person's Citizenship identification card.¹⁷ As observed above, returnees face challenges access social services where their registration has ceased.
78. Taking into consideration the applicant's profile, that he departed Vietnam illegally and has claimed asylum in Australia but has not been involved in people smuggling, I am not satisfied there is a real chance he will be of any particular interest to the Vietnamese authorities on his

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ 'VNM103087.E: Vietnam: Circumstances under which an individual's name may be removed from a household registration', Canadian IRB: Immigration and Refugee Board of Canada, Immigration and Refugee Board of Canada, 24 February 2009, VNM103087.E; 'Vietnam Process for being reinstated onto a household registration, VNM103088.E', United Nations (Unspecified), 26 February 2009, CX324690.

¹⁷ DFAT, 'DFAT Country Information Report Vietnam', 11 January 2022, 20220111094403.

return given I have rejected his claim of an ongoing land dispute between his family and the authorities. I accept he may be questioned for one or two hours and that he may face an administrative fine, but I am not satisfied he will be detained or imprisoned for any period of time, considered a traitor, tortured or be subjected to police brutality, coerced by gangs or be forced to do whatever he was told on his return to Vietnam because of his illegal departure and that he has claimed asylum in Australia or for any other reason.

79. I accept he may face some challenges re-integrating including finding suitable employment and that he may be unable to access social services until he re-registers his residence in Vietnam, but I am not satisfied on the evidence before me that this amounts to serious harm or persecution. I have not found the applicant to be of interest to the Vietnamese authorities at the time he departed Vietnam including as a result of any claimed land dispute.

80. I have considered the applicant's profile, his personal circumstances and relevant country information. I am not satisfied that the applicant would face a real chance of serious harm amounting to persecution on his return to Vietnam, now or in the reasonably foreseeable future.

Refugee: conclusion

81. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

Complementary protection assessment

82. 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

83. 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.

84. 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.

85. I have accepted the applicant may be subject to some administrative processes including being interviewed for one or two hours on her return and paying an administrative fine because of his illegal departure from Vietnam, and that he may face some challenges integrating including finding initial suitable employment and re-registering. I am not satisfied

this constitutes significant harm. I am not satisfied there is a real risk he will be subject to the death penalty or will be arbitrarily deprived of his 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 applicant faces a real risk of cruel or inhuman treatment or punishment or degrading treatment or punishment in this context.

86. I have accepted the applicant left school year [Number] because his family were poor and that financial reasons may prevent him from resuming his studies on return to Vietnam if he so wished to continue. I am not satisfied this constitutes significant harm. I am not satisfied there is a real risk he will be arbitrarily deprived of his life or subject to the death penalty or tortured. I am not satisfied that the treatment he may face amounts to cruel or inhuman treatment or degrading treatment or punishment
87. I have concluded the applicant does not face a real chance of harm as a failed asylum seeker. I have rejected the applicant's claim of an ongoing land dispute between the local authorities and his family. 'Real chance' and 'real risk' have been found to equate to the same threshold. For the same reasons given above, I find the applicant does not face a real risk of significant harm for any of the reasons claimed.

Complementary protection: conclusion

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

Member of same family unit

1. Under s.36(2)(b)(i) or s.36(2)(c)(i) 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 mentioned in s.36(2)(a) or (aa) of the Act who 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) of the Act.
2. The applicant lodged a combined application with his sister (IAA23/10604). The delegate concluded they were not members of the same family unit.
3. As the applicant is above the age of 18, he must meet the criteria for a dependent mentioned in r.1.05A(2) of the Regulations to be considered a member of the same family unit as his sister. On the information before me, the applicant does not reside at the same address as his sister. There is no information to suggest he is wholly or substantially reliant on his sister or another person as the family head for financial, psychological, or physical support. I am not satisfied the applicant is a member of the same family unit as his sister.

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

...

36 Protection visas – criteria provided for by this Act

...

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

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

...

Protection obligations

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

Determining nationality

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