



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA17/02056

Date and time of decision: 9 May 2017 10:03:00

Inge Sheck, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He left Vietnam [in] May 2013 and arrived in Australia [in] June 2013. [In] October 2016 he lodged an application for a protection visa (PV).
2. [In]February 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant practised the Catholic faith and attended a service at [Church 1] [in] May 2013, but was not of the view that the applicant was involved in the church and Catholic community at a level that would attract adverse interest from the authorities. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm for this or any other reason.

Information before the IAA

3. I have had regard to the material referred by the Secretary under s.473CB of the *Migration Act 1958* (the Act). [In] May 2017 the IAA received a submission from the applicant together with ten additional documents. These were sent to the IAA again [in] May 2017.
4. Section 473DD of the Act provides that the IAA must not consider any new information from an applicant unless satisfied there are exceptional circumstances which justify considering the new information and the new information was not and could not have been provided to the Minister, or is credible personal information which was not previously known and had it been known may have affected the consideration of the applicant's claims.
5. The basis of the applicant's submission is that he would now be at risk of harm should he return to Vietnam because he has been engaged in political activism, including posting items online that are critical of the Vietnamese government. The applicant claims to have been undertaking such activities since he arrived in Australia in 2013. This information was not before the delegate at the time of the primary decision and is new information. No mention was made of such activities at or prior to the PV interview [in] January 2017, nor was the delegate provided with any information pertaining to this, prior to making his decision [in] February 2017. The applicant contends that additional documents 1 to 4 comprise his older on-line posts. Examination of these documents indicates that they are Facebook posts made by a "[person A]" [in] August 2013, [date] May 2014, [date] May 2016 and [date] December 2016 respectively. There is nothing before me to confirm that [person A] is a name used by the applicant. In addition to this, the text of all documents is in Vietnamese, so I cannot ascertain any of the content. The applicant claims he could not have provided the information previously as he didn't know it was relevant at the time. At his PV interview he did however refer to a number of postings on friends' Facebook pages, relating to protests that they attended in Vietnam and pointing out banners bearing protest slogans. He made no mention at that time of any on-line activity of his own so was not asked about such activity. I am not satisfied that this information is credible personal information which was not previously known and may have affected the consideration of the applicant's claims, or that it could not have been provided before the delegate's decision was made.
6. The applicant further submits that as a result of his more recent on-line activities his father has been interrogated by the police and this is supported by further attached documents. Documents 7, 8 and 9 are further Facebook postings by [person A] [in] March 2017, [date]

March 2017 and undated. Documents 5 and 10 are telephone text conversations and document 6 is a letter dated [in]March 2017, which purports to be a summons for the applicant's father to attend the police station. It would appear that these documents post-date the delegate's decision, are new information and could not have been given to the delegate before the decision was made. Again, however, these documents are all in Vietnamese therefore their content is not known to me.

7. I note that the applicant was sent a notice by the IAA on 23 February 2017, acknowledging the referral of his matter. This notice included attachments in both English and Vietnamese, setting out relevant parts of the IAA's Practice Directions. These included the requirements that any new information must be given within 21 days of referral and that all documents that are not in English should be translated into English. The applicant's submission and supporting documents in Vietnamese were received 70 days after the matter was referred to the IAA and there is no explanation as to why the requirements of the Practice Directions were not met. Further to this, the applicant was given several opportunities by the delegate to provide details of any claims, both before and after the "natural justice" break in the PV interview. There was no suggestion that he had made any political statements including postings under his own name or a pseudonym, although he referred to the on-line postings of friends. [In] January 2017 he provided the delegate with additional documents including a photo of his friends with a protest banner from their Facebook pages, but none of the documents subsequently provided to the IAA. As the name [person A] bears no relation to that of the applicant, I do not accept that the local police would be questioning the applicant's father about any posts made under that name. I am not satisfied that exceptional circumstances exist that warrant consideration of this information and have not had regard to it.

Applicant's claims for protection

8. The applicant's claims are contained in the information referred to the IAA. [In] July 2013 he attended an interview with an officer of the Department of Immigration and Border Protection (the Department). At that interview he provided his name and date of birth [date of birth] which were confirmed by copies of a birth certificate and household booklet. He stated that he was of Kinh ethnicity and Catholic religion. The delegate noted that when giving details of his schooling and work history the applicant was "frantically counting on his fingers" and was of the view that his age may not be as stated. In relation to his reasons for leaving Vietnam and coming to Australia the applicant said that he had come to Australia to study and to support his parents financially.
9. [In] July 2013 the applicant spoke with a Departmental officer at [location] and advised that he had been using his [sibling's] identity documents. He had been told by the people on the boat to do this and had feared for his family if the Vietnamese authorities found out. He provided a name and date of birth [date of birth] which he stated were correct. In relation to his reason for leaving Vietnam, the applicant stated that he was involved in an altercation with two policemen [in] May 2013 at a church in [certain] parish. That night the police came searching for him so he fled with his father, [relative] and [sibling] to Vinh city, where he took a bus south.
10. [In] October 2016 the applicant lodged a PV application, together with a written statement of claims and several supporting documents. His central claim for protection was that his "fear of harm at the hands of the Police on account of my religion. I have personally had summonses issued by the Police because I attended a church service at my local parish". His background and claims stated in these documents can be summarised as follows:

- He was born in Nghi Loc district, Nghe An province and resided in the family home until his departure from Vietnam. His parents and [number] [sibling]s (born [years]) still reside there. He completed [qualification] of his schooling in [year]. He worked for his [relative] operating a [occupation] for a year or so and then as a [different occupation] until his departure. He presently works as a [occupation] in Australia;
- He is a practising Catholic. When in Vietnam he attended church every Sunday as well as occasionally on other days. He attended both the [name] and [Church 1]. [In] May 2013 he and his [sibling] were attending a service at the [Church 1], to pray for Catholics who had been arrested. The applicant had made a banner which read "[slogan deleted]". As they arrived at the church they were stopped by two men who asked for their identity documents. The applicant did not know who the men were so ignored them and went into church. After the service the two men identified themselves as policemen and arrested and assaulted many of the parishioners. The parishioners responded by beating the policemen and dragging them into the church. While this was occurring the applicant and his [sibling] went home;
- The following day a police officer came to their home and gave the applicant's [sibling] a summons requiring the applicant to attend the local government office the next day to discuss the altercation at the church. The applicant was scared that if he attended he would be beaten and incarcerated, so he left home that night and travelled to Ho Chi Minh City. Four more summonses were issued in his name between this date and [in] June 2013. His [sibling] did not receive any summonses;

11. The applicant expanded on his claims for protection at a PV interview [in] January 2017. He claimed:

- The hamlet where he lived was small, around 200 families lived there. The closest big town was Vinh city, some 30 kilometres away. He went to church two or three times every week. The family all attended together on a Sunday; the applicant went alone or with his [sibling] during the week. He went to two churches and also attended a youth group every Thursday night;
- [In] May 2013 he attended the [Church 1] with his [sibling]. He had a banner that he had made, reading "[slogan deleted]". They were stopped outside the church by two men who demanded to see their documents. They hit him and tried to grab his banner. They said they did not want him to attend the mass. After that there was some friction but they (the applicant and his [sibling]) managed to get into the church. There were around [number] people attending the service. The men came into the church but did not participate in the service, they continued walking around the church;
- After the mass the men again approached the applicant and said they had told him not to attend the mass. They tried to tear up his banner. They fought with the applicant. Some local people approached and identified the men as local police officers. Then the local people beat the officers up. The applicant and his [sibling] joined in. One of the men confirmed that they were police officers, whereupon the parishioners beat them some more and took them into the church. The applicant and his [sibling] drove home;
- In the evening of the same day a large number of police went to the [Church 1]. Some of the applicant's friends phoned him and said that the police were arresting everyone who had been involved in the altercation earlier in the day. The applicant was scared that he would be arrested so that night his [sibling] took him to the bus station and he left for Ho Chi Minh City. He later heard that [number] of his friends had been arrested and beaten. They were made to give the names of the people who had beaten

the police officers. One of the men did divulge the names and was released. The other would not talk and is still in prison;

- When he arrived in Ho Chi Minh City he called the person who would take him to Australia. His father had been given the contact details of a man in the smugglers' network. He stayed in Ho Chi Minh City for a few days and then left the country illegally by boat. His father told him that when he got to Australia to tell the authorities a different name. "It is important not to tell the truth or you will be put in gaol". After the applicant left his home the police came and beat his father. They told him to bring the applicant home, if he did not do so his (the applicant's) offences would become more serious.

Factual findings

12. As can be seen from the summary of evidence above, the applicant has provided varying evidence regarding his background and claims for protection. The applicant claimed in his statement of July 2013 that he had lied about his personal details because he was anxious and feared for the safety of his family, should the Vietnamese authorities discover that he was in Australia. In his statement of October 2016 he claimed it was his own safety at risk, should the Vietnamese authorities become aware that he sought asylum in Australia
13. The applicant has provided to the Department supporting documents to confirm the name and date of birth which he now claims to be correct, as well as his ethnicity and religion. On the basis of such information, I am satisfied that the applicant is from the Nghe An province of Vietnam, is of the Kinh ethnicity and is a practising Catholic.
14. The applicant's central claim for protection is that he fears harm from the police due to his religion and his involvement in an altercation at the [Church 1] [in] May 2013. Reports of the events at the [Church 1] were widely reported in the media. The referred information contains the following relevant material:

[Information deleted]..¹

[Information deleted].²

15. I am mindful of the fact that it has now been several years since the incident in question, however given the stated importance of the events [in] May 2013 to the applicant, I conclude that his memory of such events would remain strong. There are however a number of significant inconsistencies in his own evidence as set out above, these including the message on his banner, whether he fled from his home on the day of the service in question or the following day, and whether he was involved in any way in the assault on the police officers. The applicant was unable to explain to the delegate why, out of a crowd of [number] or so, the two police officers should have focussed their attention on him, or describe how they managed to arrest and assault a number of parishioners after the service. In his PV interview the applicant was clear that he had attended the service in the afternoon [in] May and was then called by friends in the evening of that day, when more police had gone to the church to make arrests. From the articles as quoted above, it appears that the actual disturbance in question and consequent arrests occurred on the evening [in] May 2013.

¹ [Information deleted]

² [Information deleted]

16. The applicant further claims that over the two week period [date] May 2013 to [date] June 2013 he was issued with [number] summonses to appear at the [Police Station 1]. This claim first appears in the applicant's written statement of October 2016. Together with this statement the applicant has provided the [number] and [number] summons in question. In considering the validity of these documents, I note that they are in two parts. The summons itself occupies the top half of the page. The lower half of the document is addressed to "[name], Police Officer" and requires the officer to take the summons to the applicant, ask him to sign it and return the summons to the [Police Station 1]. There is a place for the signature of the intended recipient. I conclude from this that the document was required to be returned to the police station by the officer once it had been served and signed by the intended recipient. It is not clear why these documents would have been left with the applicant's family. Further to this, country information indicates that document fraud is common in Vietnam.³ I am not satisfied that these documents are authentic or that the applicant was issued with any summonses requiring him to attend the [Police Station 1] or any other local government offices.
17. Taking into account the inconsistencies in the applicant's evidence and my concerns regarding his credibility, I am not satisfied that he was present at the event at [Church 1] [in] May 2013 in which police officers were assaulted and held captive.
18. The applicant claims that he will be targeted by the authorities, should he be returned to Vietnam, for having departed the country illegally. I accept the applicant departed Vietnam illegally. The delegate noted that in February 2014, a report released on the Department of Immigration's website unintentionally enabled access to certain personal information about people who were in Immigration Detention [in] January 2014. That data breach was removed from the website. As the applicant was in detention [in] January 2014, the applicant's personal information (name, date of birth, nationality, gender, detention details and details of any other family members in detention) may have been accessed from the Department's website during the period of the data breach. I accept that the applicant's details would have been available on the website at that time.

Refugee assessment

19. 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

20. 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

³ Department of Foreign Affairs and Trade (DFAT), "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; 5.37

- 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.

21. There are approximately 6.5 million Catholics in Vietnam (of a general population of 93.4 million people)⁴. The Catholic Church is a registered church in Vietnam, and the country information indicates a number of new congregations were approved in 2013 in response to growing demand for the church in certain communities. DFAT assesses that Catholics who attend registered churches or churches that are not politically active or opposed to the state face a low risk of harm, as are those that worship quietly in a manner that conforms to government policies and sensitivities⁵. Those who attend unregistered churches that are considered by the Vietnamese authorities to be opposed to the government are likely to be monitored, harassed, detained, arrested or otherwise prosecuted by the authorities⁶. Apart from his claims relating to the incident at [Church 1] which I have not accepted, the applicant did not claim to have experienced any difficulties in the past despite regularly attending church from a young age. He has not stated that any members of his family have experienced any harm or discrimination due to their Catholic faith and I find that they also have not.

22. The applicant did not make any suggestion that he has modified his religious practice in the past to avoid harm, or would need to do so in the future. While there is evidence of activists associated with Churches being targeted for arrest and crimes against the state by the Vietnamese authorities,⁷ I find the applicant is not an activist, nor would he be perceived to be one, nor would he engage in religious activism, on return to Vietnam. I have rejected the applicant's claims that he attended a service [in] May 2013 in support of [number] people charged with subversive activities, and that he was involved in the assault on police officers which occurred after that service. Having regard to the country information before me and the applicant's circumstances, I find there is not a real chance of him being harmed on the basis of his Catholic faith in the future.

23. The applicant has also claimed that he will be targeted by the authorities, should he return to Vietnam, due to having sought asylum in Australia. While I accept that the applicant's information would have been available during the period of the Department's data breach in February 2014, I find that the possibility of the Vietnamese authorities accessing or obtaining the information to be highly remote. In any event, even if accessed, this may reveal the applicant was seeking asylum in Australia, which would be evident on his return to Vietnam because of the method of his departure and return. Information in the referred materials does not indicate that any details of the applicant's claims for protection were included in the disclosed data.

24. The Constitution of Vietnam provides for freedom of movement, however there are penalties for Vietnamese nationals that depart the country unlawfully, including without travel documents or false passports. Fines for departing without a travel document range between

⁴ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; 2.4

⁵ Ibid; 3.24

⁶ Ibid; 3.21

⁷ Ibid; p.9

VND 2 Million and VND 10 Million (AUD \$120 to \$600)⁸. I have accepted the applicant departed Vietnam without a passport in violation of Vietnamese law and I find he may be liable for a fine on that basis. DFAT advice is that there is no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government than any other returnees to the country, although those that have departed unlawfully may be briefly detained and fined for that departure.⁹ In relation however to people who have paid money to people smugglers, as the applicant has, they are viewed by the Government as victims of criminal activity rather than as criminals facing the penalties allowed in the law for departing Vietnam illegally¹⁰. I am not satisfied that the applicant faces a real chance of harm on the basis that he departed Vietnam illegally, that he has spent time in Australia or that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

25. 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

26. A criterion for a protection visa is that the applicant is a non citizen in Australia (other than a person who is a refugee) in respect of whom the Minister (or Reviewer) is satisfied Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Real risk of significant harm

27. Under s.36(2A), a person will suffer 'significant harm' if:

- the person will be arbitrarily deprived of his or her life
- the death penalty will be carried out on the person
- the person will be subjected to torture
- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

28. I have concluded above that the applicant does not face a real chance of harm on the basis that he is a Roman Catholic, that he was involved in any way with the incident at [Church 1] [in] May 2013, as a result of the Department's data-breach, or as an asylum seeker returning from Australia. As 'real risk' and 'real chance' involve the application of the same standard¹¹, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on this ground.

29. As noted above, based on the information from DFAT, I accept there is real chance, and therefore real risk, that the applicant may be briefly detained and interviewed on arrival and

⁸ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; 5.22

⁹ Ibid; 5.21

¹⁰ Ibid; 5.23

¹¹ *MIAC v SZQRB* (2013) 210 FCR 505

fined for his unlawful departure from Vietnam in 2013. However, on the basis of that information, I am not satisfied being briefly detained and interviewed, or fined, constitutes significant harm. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, on the evidence, it does not amount to pain or suffering, severe pain or suffering or extreme humiliation. I have also found there is nothing in the applicant's profile which would lead him to face any extended detention or other harm that would amount to significant harm during this process. I am not satisfied he faces a real risk of significant harm on return to Vietnam either on the basis of being a failed asylum seeker or for his illegal departure for the purpose of the Act.

Complementary protection: conclusion

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

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.