



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA17/03956

Date and time of decision: 15 January 2018 10:42:00

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

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He departed Vietnam [in] April 2013 and arrived in Australia [later in] April 2013. [In] November 2016 he lodged an application for a protection visa (PV).
2. [In] November 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant was a practising Roman Catholic and had left Vietnam illegally. The delegate did not accept there was a real chance or real risk the applicant would be harmed on his return to Vietnam for reasons of his religion or his imputed political opinion, or for any other reason.

Information before the IAA

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

Applicant's claims for protection

4. After his arrival in Australia the applicant was interviewed by officers of the Department on [two occasions in] May 2013, the latter for the purpose of assessing his age. Together with his PV application the applicant lodged a written statement of claims. [In] October 2017 he attended an interview ("the PV interview") with the delegate. His then representative was also present. The applicant claims:
 - He is a Catholic and has been arrested, detained, beaten and persecuted by the Vietnamese authorities on numerous occasions for practising his religion. There is no freedom of religion in Vietnam;
 - If he returned to Vietnam he feared being imprisoned due to his illegal departure. If he was imprisoned he may be killed while in custody.

Factual findings

5. The applicant has consistently claimed to have been born in [District 1 in Province 1] on [birth date]. He has stated since his arrival in Australia that his mother died when he was very young and he has no siblings. He is of Catholic faith and Kinh ethnicity. He attended school from 2001 to 2004 only. He and his father moved from [Province 1] to [Province 2] in 2006. Shortly after this the applicant's father moved away, leaving the applicant to live with friends of his, who the applicant refers to as his foster family. The applicant resided with his foster family until 2010, when he moved to the neighbouring [Province 3]. The applicant has also stated at his arrival interviews and in his PV application that he worked as [occupation] since [a young age]. In the arrival interview of [May] 2013 he stated that he worked with an itinerant [group], travelling around and working on a casual basis at a number of [workplaces]. [Particulars of occupation]. He undertook this work until his departure from Vietnam. I am satisfied that the applicant's background, education and work history is as stated.
6. At his arrival interview, the applicant was asked why he left Vietnam. He responded that he was hired to work on a [boat]. He had no intention of coming to Australia and did not know why the boat came here. He had not paid anyone to be brought to Australia. When asked whether he intended to stay in Australia he said he did not know. When asked if he wanted to

go back to Vietnam he responded that he did not know anyone there. He had not seen or heard from his father since 2006. In the PV interview the delegate put to the applicant that in an email dated [February] 2015 it is recorded that he told his case manager that he feared being imprisoned if he returned to Vietnam because he departed the country illegally. This email is not part of the review material however I am satisfied that the delegate accurately recounted its contents.

7. The applicant then claimed at questions 89 to 96 of his PV application that he left Vietnam because he feared for his own safety at the hands of the communist government: he and his family had been persecuted and targeted by the authorities because of their religious activities. The applicant stated that he knew from his father's stories that his family gave land to the church in order to build [a church]. Due to this they were persecuted by the local authorities and moved to another village [in] 2000 (at which time the applicant was [age]). They continued to be persecuted and tortured by the authorities and the applicant's mother died as a result of this treatment. Since that time the applicant and his father had to move from place to place, moving to [Province 2] province in the South of Vietnam in 2006. At question 6 of his PV application the applicant provided his father's name, date of birth and current address in [Village 1], [District 1]. The applicant lodged a supplementary statement together with his PV application. In this he states that his mother died when he was born due to complications of childbirth. In 2000 his father wanted to donate some of his land to the church in order to build a [particular facility] but this proposal was not approved by the local authorities. He stated that his father told him that they had to move down south to [Province 2] after this trouble with the authorities.
8. At the PV interview the delegate asked the applicant what had happened in 2000 and he responded he did not know as he had been too young. He further advised that he had however made a friend while in immigration detention in Australia and the friend had gone back to Vietnam. The applicant's friend located a man named [Mr A], who the applicant's father had worked for before they left for [Province 2] in 2006, and [Mr A] had given the friend all of the details of the applicant's family's life, including the name of his mother. The friend then telephoned the applicant and passed on the information to him. The applicant also stated "he got information about land confiscation." The man had managed to locate the applicant's father, but he was unable to contact the applicant because he did not have a phone. Actually the applicant was contacted by his father on one occasion in 2016. The delegate put to the applicant that he had given varying accounts of his mother's death. The applicant responded that he had just recounted what his friend had told him.
9. While stating in the PV application and supplementary statement that he had heard these stories from his father, the applicant now claims that he heard them from a friend who travelled to Vietnam and in turn heard them from a man who his father used to work for. I do not find this explanation credible. The numerous inconsistencies in the applicant's evidence reflect poorly on his credibility. The applicant also noted that the friend had obtained details of land confiscation, however this does not appear to be of any relevance to his stated story of his father donating land to the church. Disputes over government acquisition of church land are however frequently quoted as the basis for protests and harassment¹ and I conclude that the applicant has conflated the two issues. The applicant had made no mention whatsoever of any of these issues in his 2013 interviews. I do not accept the recent claims made by the applicant regarding his early life, as set out above. While I accept that his mother has passed away I do not accept that this was due to persecution or torture by the authorities. I do not

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 2.30, 3.28

accept that the applicant's father donated land to the local church or that the applicant and his father were forced to leave the [District 1] area to escape persecution.

10. At his arrival interview of [May] 2013 the applicant stated that he had never been arrested or detained and that the police did not impact on his day to day life. He now claims that he was beaten and persecuted by the police in [Province 3] from 2007 [until] his departure to [Province 3] in 2010. During this period "local authorities summoned me up all the time, for torturing, terrorizing and beating me and confiscated the money I saved". He stated that the first incident occurred when he attempted to attend [religious] services in 2007. In his PV application he states that he was arrested, tortured and beaten. In the supplementary statement he claims that he was arrested by local police during a raid on the event. He was detained at the police station and beaten, then released the next day after his foster father made a payment to the police. In the PV interview the applicant stated that the police blocked the gates to [the] church, which he regularly attended, and would not allow anyone into the church but he managed to find a way in. Then the police came and arrested everybody who was in the church. They beat everyone. They [beat] him, then threw him in the truck. Everyone was beaten again when they got to the police station, but not as severely as before. They were all given a warning that they were not to attend church any more; the next morning they were all released. The applicant has made similar claims of arrests and beating due to attending church services held [in] 2009, [2012] and [2013].
11. The applicant also claims that he was a member of a Catholic Youth Group [and] I am prepared to accept that he was. The delegate asked him what he did as part of this and replied that the members helped with the ceremonies at the church and visited elderly isolated people. In his PV application the applicant claims that he was called up by the police, beaten and tortured due to being a member of this group. In his supplementary statement he claims that while participating in a prayer meeting in early [2008] the meeting was raided by police; he was arrested and held for a day.
12. Again, there are inconsistencies with the applicant's evidence given at various times as well as internal inconsistencies, for instance in the 2007 claimed event, that the police would not allow anyone in the church but they arrested everyone that was in there. Further to this, the applicant's claims that entire congregations – including children - were rounded up by the police, detained and beaten is simply not supported by the country information. DFAT notes in its 2015 report that Catholics in Vietnam who worship quietly and in a manner that conforms to government policies and sensitivities are able to do so with a low risk of official interference.² More recently, the situation for Catholics has continued to improve³ and DFAT has observed that Catholics are able to practise freely at registered churches.⁴ Following the PV interview, the applicant's then representative made extensive submissions, quoting from a number of reports from Human Rights Watch, Radio Free Asia, Amnesty International and others. A central theme of these reports, however, is the ongoing harassment and violence *against activists and protesters*. The applicant does not claim to have been taking part in any protest activity or any activities that could be considered to be opposing the state. He claims that he and the other members of the congregation were attacked and persecuted for simply taking part in Christian [ceremonies]. I do not accept that this occurred. I also do not accept that he was arrested, detained, tortured or beaten at [a certain age] for participating in a Catholic Youth Group. I conclude that all of these claims are fabrications made to further his claims for protection.

² DFAT, "DFAT Vietnam Country Information Report", 31 August 2015, CISEC96CF13212; 3.24

³ DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 3.9

⁴ Ibid; 3.10

13. The applicant then states that he left [Province 2] in 2010 and moved to the neighbouring province of [Province 3]. He has claimed that “I was already in their special target because I did get involved in religious activities”. Country information notes that people who engage in religious activity which is perceived to actively oppose government policy or pose a threat to the state face a high risk of being subject to close monitoring and government action to curtail their activities.⁵ I do not accept that a [age] year old boy who had at no point been involved in any protest or anti-government activities would have been subject to any monitoring by the authorities. The applicant states that in [Province 3] he attended [two] churches. “Both of these churches were run from different houses in the local area because the local authorities did not permit church activities at all in the area without a permit”. Again, the applicant claims that he and a number of worshippers were taken by the police and detained due to attending services, in particular [in] 2012 and [2013]. He further claims that he was beaten so severely that he required hospital treatment, however when asked about this at the PV interview he reported that his wounds were [treated] at a clinic then he went home.
14. In relation to religious activities in the [a] parish of [Province 3], a media article in the review material notes that the parish was established [a long period of time ago] but as of early 2015 construction of a "real church" had never been approved despite the fact that the number of Catholics in the region has [swollen]. For some years services had been held in a makeshift [construction]. Following an order to demolish the structure in [2015] “[a protest occurred]”.⁶ Although the article supports the applicant’s claim that [this] church was not a registered church, it would appear that the presence of police at the church was not a usual event. Further to this, there is no report that any protesters were arrested or otherwise harmed during the course of their [protest] or as a consequence of that protest. Taking into account the local situation (albeit two years later) as well as the applicant’s lack of credibility, I do not accept that he was arrested, detained or harmed in any way by the police [in] 2012 or [2013]. The applicant further claims that he was summoned by the police to appear following his attendance at [a religious ceremony in 2013] and this prompted his flight to Australia, also that his close friend, who escaped from custody with him after the [2013 religious ceremony], was recently killed by the police while in custody. As I have not accepted that the applicant was the subject of any adverse attention [in] 2013, I do not accept these claims.
15. The applicant states that he has never held a passport and departed Vietnam illegally. I accept that this is the case. At his arrival interview he claimed that he had not intended to leave Vietnam but had been hired to work on a fishing boat and was brought to Australia without his knowledge. In his supplementary statement he claims that he made some arrangements while in [Province 3] to leave Vietnam by taking a fishing boat from [City 1] and then taking a larger boat that was travelling to Australia. I consider that the latter statement is more likely to be correct. I conclude that the applicant paid a people smuggler for his passage to Australia.

Refugee assessment

16. 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.

⁵ DFAT, “DFAT Vietnam Country Information Report August 2015”, 31 August 2015, CISEC96CF13212; 3.20

⁶ [Source deleted].

Well-founded fear of persecution

17. 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.

18. Vietnam is the applicant's receiving country. I accept that the applicant is Catholic. Some 7% of the Vietnamese population who declare their religion or belief are Catholic.⁷ The Catholic Church is a registered church in Vietnam, and is one of 14 distinct religions that hold full government recognition and registration.⁸ DFAT assesses that religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the CPV and its policies.⁹ I have not accepted the applicant's claims that his parents were persecuted due to donating land to the church or that he was on several occasions arrested, detained, beaten and tortured by the police, had his money confiscated, forbidden to pray or attend church or engage with the Catholic youth group. I do not accept that the applicant has modified his religious practice in the past to avoid harm, or would need to do so in the future, and on the evidence am satisfied he has been able to practise his faith unhindered.

19. The applicant claims that he will be imputed with the political opinion of being against the Vietnamese government because he departed the country. The applicant has not claimed to have been involved in any activities with the church, that may be regarded as political activity. I have accepted that he was a member of a Catholic youth group from age [age] and participated in prayer groups and helping the local community. While there is evidence of activists associated with various religions being targeted for arrest or harassment by the Vietnamese authorities,¹⁰ I find the applicant is not a religious activist, nor would he be perceived to be one, nor would he engage in religious activism, on return to Vietnam. I have also considered whether the applicant would be considered a political activist on return. There is no evidence before me to indicate the applicant will participate or have any interest in participating in any conduct in which he would be perceived to be a political activist on return. I am not satisfied that the applicant faces a real chance of any harm on the basis that he would be considered to be a religious or a political activist, or that he faces a real chance of harm on account of his religion.

20. The applicant has also claimed that he will be targeted by the authorities, should he return to Vietnam, due to having departed illegally and having sought asylum in Australia. I accept that

⁷ DFAT, "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED50AD4597; 2.7

⁸ Ibid; 3.9

⁹ Ibid; 3.10

¹⁰ Ibid; 3.13

if the applicant returns to Vietnam the authorities will know or will assume that he has applied for asylum in Australia due to the manner of his return. Country information provides that in December 2016, a new Memorandum of Understanding (MOU) was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security, which provides a formal framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea'.¹¹ Because the applicant may be returned to Vietnam involuntarily, the Vietnamese authorities will inevitably be made aware of his personal details and will assume that he is a failed asylum-seeker.

21. 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 VND 2 Million and VND 10 Million (AUD \$120 to \$600)¹², however DFAT understands that people who have paid money to organisers of people smuggling operations, as the applicant has, are not subject to such fines.¹³ I accept the applicant departed Vietnam without a passport in violation of Vietnamese law. Country information on the issue confirms previous advice that, at a meeting on 22 September 2014, the Deputy Head of Nghe An Provincial Department of General Policing stated individuals who travel to Australia illegally by boat are technically both offenders and victims but the Police Department's policy is to facilitate return through diplomatic channels and treat returnees as victims rather than criminals.¹⁴ While some returnees may be briefly detained and interviewed, DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people smuggling operations.¹⁵ There is no information indicating different treatment being applied by the Vietnamese Government to persons known or believed to have sought asylum in other countries. The referred information does not indicate that differential treatment is being applied by the Vietnamese Government to failed asylum seekers known to be Catholics compared to non-Catholics. I am not satisfied that the applicant will face a real chance of serious harm on the basis that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

22. 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

23. 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

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

¹¹ DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 5.15

¹² Ibid; 5.16

¹³ Ibid; 5.21

¹⁴ Department of Foreign Affairs and Trade, "Vietnam - treatment of returnees", 18 March 2015, CXBD6A0DE3202

¹⁵ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; 5.23

- 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.

25. 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 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 possibly 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 that is cruel or inhuman in nature, 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 on return to Vietnam. I am not satisfied he faces a real risk of significant harm on return to Vietnam on these bases.

26. I have otherwise concluded above that the applicant does not face a real chance of harm on the basis that he is a Catholic or that he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard¹⁶, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

Complementary protection: conclusion

27. 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.

¹⁶ *MIAC v SZQRB* (2013) 210 FCR 505

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.