



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/04357

Date and time of decision: 29 March 2018 19:19:00

Alison Nesbitt, 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 claims to be from Vietnam. In November 2016 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 6 February 2018, a delegate of the Minister for Home Affairs refused the application.

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). The IAA did not receive a submission from the applicant.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He was born Can Loc district in Ha Tinh Province. He completed 12 years of schooling.
 - He is Catholic and was a member of a Catholic group.
 - He moved to Ho Chi Minh City in approximately [year] and worked there [until] early 2013.
 - He returned to his home village in early 2013 following the Vietnamese lunar New Year. He worked briefly for [Relative 1]'s [business].
 - In around April 2013, he became involved in a fight with boys from his sister's school who had been harassing his sister. In the evening following the fight, he received a request to attend the local authority building or police station.
 - That night, or the next day, he attended the local authority building or police station. He was beaten and locked in a storeroom for a week. He was told that one of the boys with whom he fought was the son of one of the local police officers.
 - He was released without charge when his parents paid a fine. When he returned home he came to learn that his sister was still being teased and as a result had stopped attending school.
 - He went to the school with his sister and became involved in another fight with the same boys. One of the boys, the son of a local police officer, sustained a broken leg in the fight.
 - He hid and travelled to [Country 1] the next day. He used his own passport to obtain a [visa] for [Country 1]. He worked in [Country 1] for around one month before flying to [Country 2], from where he travelled to Australia by boat.
 - His parents told him that after his departure they had received a written request for the applicant to attend the local authority building or police station, or were visited by the local police, who were looking for him.
 - He fears that if he returns to Vietnam, the boys he fought with at his sister's school harm him in revenge.

- He fears that the Vietnamese police will arrest, torture or otherwise harm him if he returns to Vietnam because he fought with the son of a police officer.
- He cannot relocate to another area in Vietnam because the police are still looking for him. They will arrest him immediately if he returns to his village.

Refugee assessment

5. 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

6. 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.
7. The applicant presented his original Vietnamese national identity card and a copy of his household registration card. He relied on a Vietnamese language interpreter during the entry and SHEV interviews. I accept that he is a citizen of Vietnam who was born in Can Loc District in Ha Tinh Province. I accept that he has no right to enter and reside in any other country, and find that Vietnam is his receiving country for the purpose of this assessment. I accept that the applicant completed 12 years of school and that in approximately [year] he moved to Ho Chi Minh City where he worked as [an occupation].
8. The applicant claimed in his SHEV application that he is Catholic and was a member of a Catholic church group in Vietnam. I accept this to be true. When asked during the entry interview whether he or any members of his family were involved in any activities or protests against the government, the applicant referred to a church protest in his village related to the local authorities’ refusal to allow the church to construct a playground in front of the church. He appeared to suggest that he was involved in this protest, along with most other Christian people. The applicant did not refer to this incident in his subsequent SHEV application or SHEV interview. On the limited evidence before me, I am willing to accept that this protest occurred and that the applicant participated, as a member of the local Christian community. The applicant did not claim that he was of any adverse interest to the Vietnamese authorities

because of his involvement in this protest or for any other reason related to his Catholic faith, including his membership of a Catholic church group. The fact that the applicant did not refer to the protest other than in the entry interview indicates that he has no ongoing fear of any consequences of his involvement in this protest. I find that he was of no adverse interest to Vietnamese authorities for any reason related to his Catholic faith at the time he left Vietnam.

9. The applicant has not claimed that he experienced any past mistreatment related to his Catholic faith. Neither has he expressed any fear of future harm in Vietnam on this basis. DFAT observes that Catholics are able to practise freely at registered churches in Vietnam. Religious observance and practice is said only to become an issue when it is perceived to challenge the authority or interests of the Communist Party of Vietnam and its policies.¹ The applicant has not claimed that he attended an unregistered church in Vietnam. I have found that he was not of any adverse interest to Vietnamese authorities because of his participation in a protest related to his local church's desire to construct playground in front of the church. On the evidence before me, I am not satisfied that there is a real chance of any harm to the applicant in Vietnam, now or in the foreseeable future, for any reason related to his Catholic faith.
10. The applicant claimed that after finishing high school he moved to Ho Chi Minh City, where he worked as [an occupation] for a number of years until early 2013. He claimed that he returned home to work in [Relative 1]'s [business] briefly following the Vietnamese lunar New Year in early 2013, before travelling to [Country 1] in approximately April 2013. The applicant claimed in his SHEV application that during this period he was involved in two fights at his sister's high school. He claimed that on the first occasion he went to the school to talk to boys who had been harassing his sister. A fight with a number of these boys ensued. That evening, he was asked to go to the police station. When he arrived at the station, the police punched and kicked him, then locked him in a storeroom for a week. He was released after paying a fine. When he was released, a police officer told him that one of the children with whom he had fought was the son of a police officer at that station. The applicant said that although the record of the entry interview conducted shortly after his arrival in Australia indicated that he said during that interview that he had been charged with assault, he could not remember if this was the case, as it was a long time ago. He said that following his release, he discovered that his sister was no longer attending school. She told him that she didn't attend any more because she had been kicked by one of the boys at school. The next day, he took his sister to school where he met the same group of boys. He was angry because he had been locked up by the police. He had another fight with the boys and one boy's leg was broken in the fight. He hid, and the next day travelled to [Country 1].
11. During the SHEV interview conducted in September 2017, he said that the fights with the boys occurred in approximately April 2013. He said he went to the school with the intention of asking these boys why they caused problems for his sister and prevented her from studying, but they wanted to fight so he had to fight them. He said there was a group of four or five boys. He said that other people came and separated them, stopping the fight. After the fight, he went back home to work. The applicant claimed that he was working for [Relative 1]'s [business] at this point in time. He said that on the evening after the fight at the school, he received a written invitation or request to attend the office of the local police. He said that the next morning he took the written invitation and attended the local police office. He said that when he arrived he was punched and beaten with police batons. He does not know where the written invitation is now.

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

12. A number of inconsistencies are evident in the applicant's account of these events. For example, in the entry interview the applicant referred to a single fight during which he hit the leg of the son of a village authority officer. He did not indicate that this boy's leg was broken. As discussed, in the applicant's SHEV interview and SHEV application he referred to two fights with students. He said that during the second fight he broke the leg of the son of a police officer. In the SHEV interview, the applicant indicated that he received a written invitation to attend the local police station in the evening of the day of the first fight. He said that he attended the station the next morning. However the applicant's evidence in his SHEV application suggests that he was asked to attend the local police station on the evening of the fight and did so that night, rather than the next day.
13. During the entry interview, the applicant did not refer to being hit or kicked or otherwise physically harmed, other than his claimed imprisonment at the local police office. As noted, he indicated in the entry interview that he was charged with an offence but indicated in his SHEV application that he did not remember whether this was correct. On the other hand, he did not refer during the entry interview to any demand for, or payment of, a fine. I note that his evidence regarding the duration of his detention has been quite vague and has varied from a period of four or five days described during the entry interview to a period of approximately one week mentioned in his SHEV application.
14. I find it somewhat difficult to accept that the applicant would have been detained for a period of between four days and one week by local police following a fight that was initiated by the four or five other boys, particularly given that the applicant did not claim in his SHEV application or SHEV interview that any of the participants sustained any serious injuries in this first fight. I agree with the delegate that it is also difficult to accept that if the applicant was in fact beaten and then detained for a period of a week following the first fight as claimed, he would have risked further treatment of this nature on his release by returning to the school and again confronting the boys who had been harassing or harming his sister, even accepting that he felt a level of anger due to his imprisonment and their claimed continued mistreatment of his sister.
15. The applicant claimed in his SHEV application that his parents told him that after his departure from Vietnam, the police visited his family home looking for him. During the SHEV interview, the applicant claimed that following his departure from Vietnam his parents received a written request for the applicant to attend the local police station for an interview. He did not refer to the authorities visiting his family home. He said that he did not know where the written invitation is, as he was not home at the time it was received. When asked whether he could ask his parents about it, he said that it had been many years since the incident and the paper would not be there anymore. The applicant has not provided any documentary evidence in relation to these events, including copies of any written invitations for him to attend the police station, or any demands or receipts for payment of any fines.
16. The applicant stated in his SHEV application that the answers he provided during the entry interview were not read back to him at the end of the interview and the record of the entry interview may therefore contain errors. He did not identify any errors said to be included in the record of the entry interview, although as discussed, he stated that although the record of the entry interview indicated that he had stated that he had been charged with assault following the fight at his sister's school, he could not now remember whether this was true. The recording of part one of the arrival interview, the section of the interview in which this matter and the applicant's description of his reasons for leaving Vietnam, were discussed, is not before me. In the absence of any evidence to indicate that the record of the entry interview is

inaccurate, as the applicant suggests, I am not satisfied that the record of the entry interview contained any errors or is inaccurate in any way.

17. During the SHEV interview, the delegate put to the applicant some inconsistencies between his responses to questions asked during the entry interview and his subsequent evidence. The applicant said that at the time of the entry interview he had only just arrived, so did not go into the details. I note that part one of the entry interview, during which the applicant was asked about his reasons for leaving Vietnam, was conducted on 13 June 2013. The applicant's evidence is that he arrived in Australia at the end of May 2013. The record of the entry interview indicates that following the applicant's initial response to a request to describe his reasons for leaving Vietnam, the interviewing officer asked the applicant approximately nine further questions designed to elicit further information about the applicant's reasons for leaving Vietnam. These included asking the applicant about what happened to him after the claimed fight at school.
18. Given that the first part of the entry interview took place approximately two weeks after the applicant's arrival in Australia, I am not satisfied that his capacity to participate in the entry interview, including his ability to describe his reasons for leaving Vietnam, was hindered by any effects of his journey to Australia. I do not consider that the differences in the applicant's evidence in the entry interview and his subsequent evidence can be attributed to the later elaboration of essentially the same claims made during the entry interview. For example, as discussed, the applicant referred during the interview to a single fight at his sister's school. As noted, he was asked to describe what happened to him after this incident and did not refer to any subsequent fight. I do not accept that the applicant's later description of two separate fights at the school can reasonably be described as no more than the provision of further detail related to essentially the same events. Neither do I accept that the applicant's reference during the entry interview to being charged with assault, and his omission of any reference to being fined, and his subsequent claim that he was fined but could not recall whether he was charged can be accounted for in this way.
19. The delegate accepted that the applicant was involved in an altercation at his sister's school but considered the applicant had embellished his claims to strengthen his claims for protection. She did not consider it plausible that the police would have visited his parents' home looking for him after his departure from Vietnam. Having considered the evidence before me, I have reached a similar conclusion. I am willing to accept that the applicant was involved in an altercation with a number of boys at his sister's school in 2013. I am also willing to accept that one of the boys involved in this incident was the child of a local police officer. However, in view of the issues relating to the applicant's evidence discussed, I am not satisfied that the applicant was detained or assaulted by police officers because of this incident, or for any other reason. I do not accept that he broke the leg of any other boy in this incident or that two such incidents occurred. I am not satisfied that the applicant was of any adverse interest to Vietnamese authorities because of his involvement in this incident, or for any other reason, at the time he left Vietnam. I do not accept that following the applicant's departure from Vietnam, the Vietnamese police contacted the applicant's family by letter or in person to request that the applicant attend the local police station, or in order to establish his whereabouts.
20. There is no credible evidence before me to suggest that the applicant would be of any future adverse interest to Vietnamese authorities in his area, or elsewhere in Vietnam, because of his involvement in an altercation at his sister's school which involved the son of a local police officer. I am not satisfied that there is any chance of harm to the applicant in Vietnam on this basis, now or in the foreseeable future.

21. The applicant claimed to fear that the boys involved in the fight or fights at his sister's school may harm him on his return to Vietnam because of a desire to exact revenge for his involvement. I have found that a single fight occurred approximately five years ago. I have not accepted that any person was seriously injured in this incident. In view of this finding, and the applicant's evidence that he intended only to talk to the boys concerned about their harassment of his sister, and fought them only when obliged to do so, and his evidence that he was a single person fighting number of boys, is difficult to understand why the boys involved in this fight might feel a wish to exact revenge from the applicant.
22. Other than his claims that the Vietnamese police were looking for him after his departure from Vietnam, which I have not accepted, the applicant has not claimed that any of the boys involved in the fight, or members of their family, contacted his family looking for him following his departure from Vietnam. On the evidence before me I am not satisfied that there is a real chance of harm to the applicant, now or in the foreseeable future, resulting from the incident at his sister's school.
23. Although not raised by the applicant, the delegate considered the possibility that the applicant might experience harm on the basis that his household registration might have been cancelled due to his absence from his home village. Her consideration of this issue arose from her finding that the claimed visit of the police to the applicant's parents' home after his departure from Vietnam was more likely to have been related to issues associated with the applicant's household registration than to the reasons claimed by the applicant. As discussed, I do not accept that the police visited the applicant's family home after his departure from Vietnam, or at any other time, for this or any other reason. The applicant did not claim that his household registration had been cancelled, or express any fears relating to his household registration. I am not satisfied on the evidence before me that there is a real chance of harm to the applicant, now or in the foreseeable future, on this basis.
24. The delegate also considered the chance of harm to the applicant as a person returning to Vietnam having applied for protection in Australia, and on the basis that he was affected by the Department's 2014 inadvertent disclosure of the personal details of persons in immigration detention, or 'data breach', matters which were not raised by the applicant. On the basis of the delegate's decision, I accept that the applicant's personal details were inadvertently made available on line for a short period in 2014 as a result of the data breach. Although I consider the possibility to be remote, I accept that it is possible that the applicant's details were accessed by Vietnamese authorities and that they may, as a result, be aware that the applicant applied for asylum in Australia. I note that in December 2016, a Memorandum of Understanding providing a formal framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea' was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security.² I accept that Vietnamese authorities may, for a number of reasons, become aware that the applicant sought asylum in Australia.
25. There is no indication that any information about the applicant's substantive claims was made available on line as a result of the data breach. I note that I have not accepted that there is a real chance of harm to the applicant from Vietnamese authorities as a result of his involvement in a fight involving a police officer's son, or for any reason related to his Catholic faith. There is no credible evidence before me to suggest that the applicant would be of any future adverse interest to Vietnamese authorities for any other reason. DFAT advises that it has no information to suggest that people known or believed to have sought asylum in other

² Ibid.

countries are mistreated by the Vietnamese Government on this basis on their return. DFAT is aware of recent returnees receiving assistance from Vietnamese provincial authorities and IOM to reintegrate to their communities.³

26. Article 91 of the Vietnamese *Penal Code 1999* states that 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence. DFAT reports that it is unaware of any cases where this provision has been used against failed asylum seekers and advises that returns to Vietnam are usually undertaken on the understanding that returnees will not face charges as a result of their having made asylum applications.⁴ I am not satisfied on the evidence before me that the applicant faces a real chance of any harm as an unsuccessful asylum seeker on his return to Vietnam.
27. DFAT advises that Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon return. The applicant claims, and I accept, that he left Vietnam lawfully, using his own Vietnamese passport. I do not accept that the applicant will be found to have left Vietnam unlawfully, or that he will be fined for this reason, on his return to Vietnam. I note in any event that DFAT indicates that its understanding is that people who have paid money to organisers of people smuggling operations are not subject to fines for unlawful departure from Vietnam.⁵
28. According to DFAT, individuals who have paid money to organisers of people smuggling operations are viewed by the Vietnamese Government as victims of criminal activity (people smuggling), rather than as criminals facing the penalties for illegally departing Vietnam. While some returnees can 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. In general, persons detained upon return to Vietnam are those suspected of organising/assisting with people smuggling activities.⁶ The applicant does not claim to have been involved in people smuggling, nor am I satisfied that he will be perceived to be involved in people smuggling.
29. DFAT advises that there are credible reports of some returnees being held for a brief period upon return for the purpose of interview by officials from the Ministry of Public Security to confirm their identity where no documentation exists.⁷ The applicant has presented his original Vietnamese identity card and I am not satisfied that he will be held on his return to Vietnam in order to confirm his identity.
30. I accept that on his return to Vietnam, the applicant may be detained and interviewed by Vietnamese authorities. I am not satisfied that any brief period of detention for an interview of the type discussed would amount to serious harm. Having regard to the evidence before me, and to the applicant's individual circumstances and profile, I am not satisfied that there is a real chance of any other type of harm to him in Vietnam, now or in the foreseeable future.

Refugee: conclusion

31. 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).

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Complementary protection assessment

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

Real risk of significant harm

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

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

34. I have accepted that the applicant may be briefly detained and questioned by Vietnamese authorities on his return to Vietnam. I am not satisfied that any harm experienced as a result of any such treatment would constitute significant harm for the purposes of s.36(2A). I am not satisfied that there are substantial grounds for believing that there is a real risk that the applicant will suffer significant harm as a result of this treatment, should it occur, on his return to Vietnam.

35. I have concluded that there is not a real chance of any other harm to the applicant in Vietnam, having regard to his profile and background, including his Catholic faith and the incident at his sister's school, and to the other information before me. As 'real risk' and 'real chance' involve the application of the same standard,⁸ I am also satisfied that the applicant would not face a real risk of significant harm in Vietnam for these reasons.

Complementary protection: conclusion

36. 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.

³⁰ *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

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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.