



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/04447

Date and time of decision: 30 May 2018 09:54:00

L Hill, 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 applied for a Temporary Protection Visa (protection visa) on 13 February 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 21 February 2018.

Information before the IAA

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

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - The applicant is a citizen of Vietnam born in [Hà Tĩnh] Province in Vietnam.
 - The applicant is a practising Catholic. As a Catholic he was persecuted and prevented by the authorities from practising his religion. He was also unable to obtain employment or undertake further education.
 - In 2005, applicant participated in a protest against the government's confiscation of land belonging to the church for a carpark. He was later summonsed to attend the police station where he was verbally abused by the police officers before being released.
 - In 2010, a government [company], approached the government and asked for permission to build a [development] on land owned by a number of families including the applicant's family. The company paid compensation for the land however the applicant's family believed that they had not been sufficiently compensated.
 - In 2012, the applicant, along with his uncle and other families who had their land resumed, protested against the [development]. He was summonsed to attend the police station and when he attended he was told by the police officers to go elsewhere until matters settled down. The applicant feared he would be arrested and jailed and went into hiding before making arrangements to flee Vietnam.
 - Since the applicant's arrival in Australia the police sent a summons to his wife requesting him to attend the police station.
 - The applicant fears harm on return to Vietnam because of his religion, the perception he is anti-government because of his participation in protests against government actions in 2005 and 2012, the release of his personal information by the Department on the website in 2014 and his illegal departure and return as an asylum seeker.

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. I accept the applicant’s identity as claimed. I accept the applicant is a Catholic male from Hà Tĩnh Province in Vietnam, and a Vietnamese national. Vietnam is the receiving country for the purpose of this assessment.
8. In his protection visa statement, the applicant claimed that as a Catholic he was persecuted and prevented by the authorities from practising his religion. The authorities would prevent Catholic people from attending religion ceremonies and confiscate land and property owned by the church. On one occasion the authorities wanted to confiscate land owned by the church for a carpark. He protested against the confiscation and as a result he was summonsed to attend the police station where he was verbally abused by the police officers.
9. At the protection visa interview the applicant was asked how he had practised his Catholic faith in Vietnam. He stated he attended church each evening for a prayer service and attended mass three times each week. He was asked if his family including his wife, children, parents and siblings continue to practise their Catholic faith in his village, he stated “yes”. He was asked when he had participated in the protest against the confiscation of the land owned by the church, he stated “2005”. He was asked how many people had participated in the protest, he stated “all my village more than [number] people”. He was asked what activities he had undertaken at the protest. He stated as a group they prayed.
10. The applicant claimed that because of his Catholic religion and his involvement in the protest he is considered a second class citizen and anti-government because his religious views are different to the Vietnamese communist government.

11. I accept that in 2005, the applicant participated in one protest against the Vietnamese authorities' confiscation of the Catholic church's land in his village. I accept that as a result of his participation in this protest the applicant was summonsed to attend the police station where he verbally abused by the police officers. The applicant's evidence regarding this event has been generally consistent throughout his interactions with the Department and is plausible when considered against the information before the delegate which reports that individuals and groups who protest against land confiscation by the government have had their protests shut down and have been subjected to intimidation and harassment by the local authorities.
12. The applicant's evidence is that after he was verbally abused by the police officers he was released. The applicant has not claimed that that a consequence of this event he was arrested or charged or detained for any period of time. At least seven years passed between the applicant's involvement in this event and his departure from Vietnam and during this period the applicant's evidence is that he applied for and was issued with Vietnamese passport. I do not accept that the applicant's participation in the protest in 2005 resulted him being of any further interest to the Vietnamese authorities.
13. I accept the applicant is Catholic and that he has regularly attended mass and religious ceremonies since his birth in Vietnam. I accept the applicant would continue to practise his faith on return to Vietnam. Although he participated in one demonstration against the confiscation of church land, I am not satisfied that he was perceived as an activist by the Vietnamese authorities.
14. In 2016, the US Department of State reported that the Vietnamese Constitution provides for freedom of belief and religion; however it also stated that the government maintains significant control over religious practice and permits restrictions on religious freedom in interests of national security and social unity. In 2017, DFAT reported that some 7% of the Vietnamese population who declare their religion or belief are Catholic. The Catholic Church is a registered church in Vietnam, and is one of 14 distinct religions that hold full government recognition and registration. The situation for Catholics has continued to improve in recent years. DFAT observed that Catholics are able to practise freely at registered churches and assessed that religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the Communist Party of Vietnam (CPV) and its policies.
15. Based on the country information before me, I am not satisfied the applicant's past and present activities as a practising Catholic would result in the Vietnamese authorities identifying the applicant as a religious or political activist, or someone of interest. I accept the applicant would continue to be regular member of the Catholic church and participate in services and religious celebrations on return to Vietnam. I am satisfied the applicant's level of participation, as a regular member of the Catholic church would not be perceived to be acts of a religious activist by the state, or otherwise viewed adversely. I am also satisfied the manner in which the applicant practises his Catholic faith does not involve him curtailing his religious practise or modifying his behaviour to avoid harm.
16. I have considered the applicants claims that as a Catholic he could not obtained employment or undertaken further education. The US Department of State indicated that while unofficial policies of the CPV and the government have hampered advancement of religious adherents within those organisations, membership of a religious group generally did not seriously disadvantage individuals in nongovernmental civil, economic, and secular life. In 2015, DFAT reported that it was not aware of credible claims of societal abuse of systematic discrimination based on religious practices. However in DFAT's most recent report no reference was made to

any disadvantage being encountered in the areas of employment or education merely due to a person's religion.

17. I accept that as a Catholic the applicant may have in the past experienced some difficulties when seeking to obtain employment or further education. However, the country information no longer indicates that a person would be disadvantaged in obtaining employment or further education on religious grounds. At least five years has passed since the applicant departed Vietnam and I do not accept that there is a real chance the applicant will be prevented from obtaining employment or further education opportunities, or limited in these opportunities because of his Catholic religion.
18. I am not satisfied the applicant faces a real chance of harm as a practising Catholic on his return to Vietnam now or in the reasonably foreseeable future.
19. I accept that in 2010, a government [company], approached the Vietnamese government and asked for permission to build a [development] on land owned by a number of families including the applicant's family. I accept that the Vietnamese government paid the families involved including the applicant's family monetary compensation for the compulsory land acquisition. I accept the applicant's family was not happy with the amount they were paid and believe they should have been paid more.
20. The applicant's evidence regarding these aspects of his claims has been generally consistent throughout his interactions with the Department and plausible when considered against the information before the delegate indicating that land use is a contentious issue in Vietnam. DFAT reports that all land is formally owned by the state, which issues land use rights to citizens but retains significant power over land use, including through compulsory acquisition powers. The use of land is often subject to dispute due to poorly defined property rights and the potential for corruption. These disputes can lead to protests and, occasionally violence. For example, in April 2015 there was a dispute between local residents and construction workers over the compensation to be paid to the residents for the use of the land at a construction site in Hà Tĩnh Province. Violence occurred between hundreds of civilians and police, and dozens of people were hospitalised with injuries.
21. The applicant's claims are also corroborated by the document, "Integrated List of Land Retrieved". It states that [in] January 2009 a decision was made for land to be "retrieved" from the "People's Committee" of "Can Loc District". It refers to the applicant's father as a "land user" and that land which he had been "using" since 1993 was being "retrieved" by the Vietnamese government, although the document remains silent on the reason why the land was being retrieved. I also consider the reference to the "land use" and not "land ownership" is consistent with the information above that land is formally owned by the state, and land use rights granted to citizens.
22. The applicant claimed that when the company started to build the [development] on the compulsory acquired land, his family along with a group of other families protested against the development. In response the company started to bribe some of the families to stop protesting. During the protest the applicant's uncle was arrested and jailed. His uncle died from his injuries three months after he was released from jail. The company continued to construct the [development] and eventually the police called the applicant and told him to attend the police station. At the police station the applicant was told to go elsewhere until matters settle down.

23. Unlike his claims regarding the land acquisition, the applicant's evidence regarding the protest activities against the construction of the [development] have evolved over time.
24. [In] November 2013, approximately six months after the applicant's arrival in Australia, the applicant participated in an entry interview. The applicant was asked why he had left Vietnam. The applicant stated that his family's land had been confiscated by the authorities and sold to a person in Saigon who wanted to make it into an eco-tourism area. He made no mention that he or any of family members had protested against the confiscation or development of the land. The applicant's claims that he and his uncle were involved in a protest and that they were of interest to the Vietnamese authorities are significant claims and I consider that had these details had any credible basis the applicant would have mentioned them at the entry interview when he was asked why he had left Vietnam.
25. The applicant's evidence regarding what had happened after the protest has also been inconsistent and unconvincing. At the protection visa interview, he stated that he had been at the protest when the police had tried to arrest him and that he had been rescued from arrest when other people came over to help him. It was put to the applicant that his evidence regarding his interactions with the police had been inconsistent and that in his protection visa statement he had stated he had been called by the police and told to attend the police station. He stated that maybe the interpreter had misinterpreted what he had said. I do not accept this explanation. The protection visa statement was prepared with the assistance of a volunteer solicitor and interpreter and that the interpreter read the statement back to the applicant. I am satisfied the applicant was capably assisted to prepare his protection visa statement and its contents reflects the statements provided by the applicant at that time.
26. Having regard to the evidence as a whole, including the discrepancies and evolution of the applicant's evidence, I am not satisfied the applicant has been a truthful witness regarding this aspect of his claims. I do not accept the applicant or any of family members protested against the development of their family's land which had been compulsory acquired by the government. Nor do I accept that his uncle was arrested and jailed and the applicant was being sought by the Vietnamese authorities including the police. I am satisfied the applicant has contrived these aspects of his claims to enhance his claims for protection.
27. The applicant has made no mention of any other claims of harm or interest in him by the Vietnamese authorities at the time when he departed Vietnam. I am satisfied that at the time of the applicant's departure from Vietnam in 2013 he was not of any interest to the Vietnamese authorities.
28. The applicant claimed that since his arrival in Australia the police sent a summons to his wife requesting him to attend the police station.
29. This claim was not part of the protection visa statement. The applicant made this claim at his protection visa interview when asked what he thought would happen to him on his return to Vietnam. The applicant's evidence lacked any specific details and was absent of any timeframes such as when his wife had received the summons or when he had been told this information. No documentary evidence was provided. I have found the applicant was not of interest to the Vietnamese authorities at the time of his departure, and given this, the omission of this claim from his protection visa statement, and the lack of evidence. I do not accept that the police have sought his whereabouts since his arrival in Australia. I accept the police sent his wife a summons requesting his attendance at the police station. I am satisfied these claims have been contrived to enhance his claims for protection.

30. The applicant claimed he would be harmed on return because of the release of his personal information by the Department on the website in 2014 and because of his illegal departure.
31. I accept the applicant left Vietnam unlawfully, has applied for asylum and would be returning to Vietnam after his asylum application has failed. Having regard to information provided by the Department, I accept that on 31 January 2014 some of the applicant's personal information was inadvertently published on the Department's website for a short period of time. This information included: the applicant's name; date of birth; nationality; gender, the reason for and location of his detention; and whether he had any family members in detention.
32. DFAT indicates that the Constitution of Vietnam provides for freedom of movement albeit there are penalties for Vietnamese nationals that depart the country unlawfully, including without travel documents or false passports. I accept the applicant did not depart on a travel document and left Vietnam by boat. To depart in the way the applicant has would constitute a breach of Vietnamese law. DFAT advice is that if a person departs Vietnam unlawfully without a travel document, they may be subject to a fine upon return under Article 21 (regarding 'Violations of the regulations on exit, entry and transit') of the Decree on Sanctions against Administrative Violations in the Sector of Security and Social Order. Fines for departing without a travel document range between VND 2 Million and VND 10 Million (AUD \$120 to \$600).
33. I accept the applicant departed Vietnam in violation of Vietnamese law and 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 for having done so, although those that have departed unlawfully may be briefly detained and fined for that departure.
34. DFAT indicates some returnees may be briefly detained and interviewed, but that long term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people smuggling operations and reporting and monitoring is confined to returned political activists and not those that have only sought asylum in another country. The reports suggests that people who have used people smugglers are seen as victims of crime, in contrast to the people smugglers, facilitators or people that aid in that crime.
35. The applicant has not claimed to have been involved in people smuggling, nor is there anything in the applicant's history or background that would suggest he would be seen as a people smuggler or otherwise involved in the venture on his return to Vietnam. The applicant has not claimed and I am satisfied on the information before me that he would not be suspected of any such involvement on return.
36. I accept that because of the inadvertent release of the applicants' details on the Department of Immigration's website in January 2014 the applicant's details may have been obtained by the Vietnamese authorities and that it may be inferred that he sought protection in Australia. In 2017, DFAT reported that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the Penal Code 1999. However, DFAT also stated it had no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government for having done so. In light of the information before me, I am not satisfied he would face a real chance of serious harm because he sought asylum, or sought asylum unsuccessfully. There is nothing before me that would indicate that he would be imputed with an adverse opinion or profile by the Vietnamese authorities as a result of the release of his details on the Department's website or that this would put him at risk of harm on return. I am satisfied that as a returning asylum seeker who

departed Vietnam unlawfully the applicant does not face a real chance of serious harm on these bases on return to Vietnam now or in the reasonably foreseeable future.

37. I accept that the applicant may be fined under Vietnamese law because he left the country unlawfully and he may be briefly detained and questioned by Immigration officials and police on return. Having regard to the information before me, I am satisfied that the provisions and penalties under Vietnamese law are laws of general application that apply to all Vietnamese equally. The information before me does not indicate the law is discriminatory on its terms, nor is there any country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced.
38. I am satisfied that any process or penalty the applicant may face on return to Vietnam because of his unlawful departure or as a returning asylum seeker would not amount to persecution for the purposes of s.5J(1) and (4) of the Act.
39. I am not satisfied that the applicant faces a real chance of persecution on return as someone who departed Vietnam unlawfully and sought asylum in Australia and the disclosure of his details on the Department's website.

Refugee: conclusion

40. 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

41. 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

42. 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.
43. I accept that as the applicant left Vietnam unlawfully he may be briefly detained and questioned on arrival at the airport and may be fined for breaching Vietnamese law. However, I am not satisfied that being briefly detained, questioned, and fined, constitutes significant harm. It does not amount to the death penalty, an arbitrary deprivation of life or torture. Further, on the information before me I am not satisfied it amounts to pain or suffering that may be described as cruel or inhuman in nature, severe pain or suffering or extreme humiliation.

The country information does not indicate that there is an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I have also found there is nothing in the applicant's profile which would result in him experiencing any long-term detention, investigation, arrest, reporting and monitoring or other harm that may amount to significant harm. I am not satisfied the applicant faces a real risk of significant harm on return to Vietnam on the basis of their unlawful departure.

44. I have also found the applicant does not face a real chance of harm on the basis of his Catholic religion, his past participation in one protest in Vietnam in 2005, the acquisition of his family's land, the Department of Immigration's data breach, or his status as returning asylum seeker now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

Complementary protection: conclusion

45. 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.