



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA18/05067

Date and time of decision: 15 August 2018 14:37:00

J Maclean, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He arrived in Australia as an unauthorised maritime arrival, and applied for a Temporary Protection Visa (TPV) in May 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 29 May 2018 on the basis that the applicant is not a person in respect of whom Australia has protection obligations.

### 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). No further information has been obtained or received.

### Applicant's claims for protection

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3. The applicant's claims can be summarised as follows:
  - He was born in the Yen Thanh District of the Nghe An Province of Vietnam, and is of Kinh ethnicity and Buddhist faith.
  - He served in the military in Vietnam, and received training with weapons during that time, and worked as [an occupation 1].
  - He left Vietnam because he witnessed corruption in the military, and because his land was taken from him by the government, and he protested against this.
  - He was removed from the Communist Party (CPV) because he protested against them.
  - He needed to find work, but could not because of all the problems he faced with the government.
  - He left Vietnam [travelling] to [Country 1] using a Vietnamese passport. The smuggler took his passport from him when he was on the boat to Australia. He does not have any other identity documents.
  - He is scared he will be arrested or imprisoned because he sought protection in Australia, and because he used a people smuggler to help him leave Vietnam and the government will think he left illegally.
  - He will not be on the Household Registration and the government will not allow him to re-register, and he will only be a temporary resident and will not have any rights citizens have. He does not have any identity documents and the government will not issue them to him because they think he is against them. As a result he will not have access to healthcare and will not be able to find a job, and will not be able to survive in Vietnam.

### Refugee assessment

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4. 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**

5. 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.
6. The applicant has consistently claimed he is a Vietnamese citizen. Although no documents have been provided to support his identity, his identity is not in dispute. I accept he is a citizen of Vietnam, and Vietnam is the receiving county for the purpose of this assessment.
7. I accept the applicant's consistent evidence that he was born in the Yen Thanh District of the Nghe An Province of Vietnam and that he is of Kinh ethnicity, and the Buddhist faith. He claims to have married his wife in 2010 and separated from her in 2014, and that they have one child together. I accept that to be the case.
8. At the Entry interview, on 22 March 2013, the applicant said he finished [level] of school in [year], and worked in his family rice paddy farm until he left Vietnam. He said his father [died] in 2011, and his mother was sick. Some of his friends told him if he went to Australia he could work there and send money back to his family. When asked if there were any other reasons for coming to Australia the applicant said 'no, just family difficulties'.
9. Prior to making his SHEV application in May 2017, the applicant provided three statements, which are summarised below.
10. The applicant's first statement (first statement) is undated, and refers to his [father's death] whilst the applicant was at [school]. He quit studying to help his family. In October 2010 he received papers to attend military service, however he told the district team his father had died and there was nobody to take care of his family, and because of that the local Party branch expelled him from the party, and when he looked for jobs all the offices refused him because he was fatherless and fired from the Party. In August 2012 there was an inter-hamlet road project passing his family's land, and village police took half their land for the construction. They were forced to donate the land and were not allowed to take legal action. Because he did not believe in the leadership anymore he decided to go and find human rights and justice and human freedom.

11. The applicant's second statement (second statement) is also undated, and refers to his father's [death]. The applicant refers to part of his family's land being part of an interprovincial road project, and them being compensated based on the agricultural price, which was very cheap. Because the amount of money was not enough to buy new land they had no house, his mother suffered a mental collapse, and he could not complete his studies and stopped in the middle of [level] to take care of his mother. His cousin loaned him some money to start a business. A friend advised him to go to the South to do business, but nobody accepted him. After that a trafficker took him to [Country 2], and later on to Australia. After arrival in Australia he heard his mother had passed away. If he is returned to Vietnam he has no family. No person or organisation will support or protect him there.
12. The applicant's third statement (third statement) is dated 24 March 2014, and refers to him joining the army in [year] after graduating from [school level]. He was officially admitted to the CPV in 2008, and as a result was given special favours. He became [an occupation 1] for the military leaders, and was acquainted with the military seniors and state leaders, and observed them using people's taxes illegally, such as for gambling and bribes. He was disappointed and felt unsafe to go with those people when he knew what they did, and at the end of 2009 he asked for a discharge from the army. He continued to attend the party group in his village and commune. In 2010 he married, and at that time there was a project to build a road and the building company did not compensate the people properly, which led to conflicts with the local administration. He stood on the side of the people to claim their interests back, and he was expelled from the party, by the party and local administration leaders. He claims he and his family were threatened by senior officials not to reveal their wrongdoings. For his and his family's safety he left Vietnam. If he is returned to Vietnam he will be arrested, tortured, imprisoned and possibly killed, and his family may be implicated.
13. In his first statement the applicant claims that on the day he was interviewed by the department [in Australia] (the Entry interview) was the day he found out his mother was seriously ill, and so he was not confident enough to present his claims. In his SHEV application the applicant claims he did not mention all his claims at the Entry interview because he was confused and afraid the government of Vietnam would find out what he said about them. At the SHEV interview the delegate asked why the applicant did not mention his military service when he first came to Australia. The applicant said at the first interview he was quite nervous and anxious and did not know he had to declare things that could be used in his refugee status later. He said only later when he was in the detention centre and he knew a bit more and provided accurate information. I note the departmental officer who conducted the Entry interview told the applicant at the beginning of the interview that the interview was his opportunity to provide any reasons why he should not be removed from Australia, and a decision may be made on the basis of the information they have. He was also told of the importance of giving true and correct answers to the questions asked, and that if the information he gives at any future interview is different this could raise doubts about the reliability of what he has said. He was also advised that the information given by him during the interview would not be made available to authorities in his country of habitual residence. When asked if the applicant understood what was said by the interviewer the applicant answered 'yes'. I have listened to the Entry interview, which is almost two and a half hours in length, with a rest break after one hour and 48 minutes, and it is not apparent from listening to the interview that the applicant was confused, or that he was inhibited in his responses. He provided cogent responses to the questions asked and numerous details about his travel to Australia, and the arrangements to do so.
14. The applicant consistently referred to his mother passing away after his arrival in Australia, and I accept that evidence. However, I note there are a number of significant inconsistencies

in the applicant's evidence that leads me to believe the claims made after the Entry interview are not credible. Firstly, although the applicant said during the Entry interview the he finished [level] of school, he gave a number of other responses about whether or not he completed school. In his first statement he said he quit school after his father died to help his family, the second statement notes he stopped school in the middle of [school level], and the third statements states he graduated from high school. However, in the SHEV application he suggests he withdrew from school in [lower level] in 2005, and at the SHEV interview he said he dropped out in the middle of [another year], but that he went on to try to do [a higher level]. The applicant was roughly consistent in reporting that his father died in 2011. During the SHEV interview the applicant noted his mother told him he was born in [birth year], but that on personal papers the date was different. Taking into account the applicant's reference in the SHEV application to him completing [school level] in 2005, and the applicant reporting he was born in [year range], although I am prepared to accept the applicant's father died in 2011, at which time the applicant would have been at least [age] years of age, I do not accept the applicant left school as a result of his death, and I consider it is highly likely he completed high school, as reported at the Arrival interview.

15. With regard to the applicant's attendance at military service and his involvement with the CPV, during the Entry interview when asked if he had ever been involved in any military service, or whether he or any members of his family have been associated or involved with any political group or organisation, the applicant said 'no'. However, in his first statement the applicant said he received 'a subscription paper to attend military service' in October 2010, but he told the district team his father had died, and because of that reason the local party branch expelled him. In his third statement and during the SHEV interview the applicant gave the date of joining the military as late [year], with his discharge reported as being at the end of 2009. The third statement notes that the applicant was expelled from the CPV when he tried to protect people's rights when people in his hometown were not adequately compensated for reclaimed land. Although the applicant gave a plausible account of attending one year of military training, including martial arts, weapons training, and daily physical exercise, and working as [an occupation 1], that evidence does not overcome my significant doubt about the applicant's evidence resulting from the inconsistency regarding the date he received the notification to attend for military service given in his first statement, and the absence of any mention of it during his arrival interview when specifically asked. Country information reports that military service of 18-24 months is compulsory for males aged 18-25 years, however in practice DFAT understands that all males must register with the military, but very few are called up to serve for the full military service period. Taking into account the country information and all the information before me, I am prepared to accept the applicant may have registered for military service, however I am not satisfied he attended training or worked with the military at any time in Vietnam. During the SHEV interview the applicant described observing bribes being taken when he worked with the military, however he provided only the most general description of it being a requirement when people meet for business to give an envelope with a lot of money otherwise a decision would not be made, and people of lower ranks giving bribes to superiors to get favours or promotions. Although country information supports that corruption is endemic within the Vietnamese authorities, at all levels, and impacts many ordinary Vietnamese citizens,<sup>1</sup> the applicant's evidence at the SHEV interview was not detailed or convincing, and I do not accept he observed the events described. With regard to his involvement with the CPV, the applicant provided a very basic description of him being recruited to the party, and swearing allegiance and attending a recruiting ceremony. He said after [working] for some time his superior saw

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<sup>1</sup>DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212

he was working well, and was a good person, and so they decided to recruit him. He said normally when you join, then one year later you receive a card or badge that proves you are a party member. Country information reports that persons who want to enter the party must carefully study the Party Charter, and that Marxist-Leninist theory must be studied.<sup>2</sup> The applicant's failure to mention any involvement with the CPV during the Entry interview, along with the inconsistent reporting of the reason for him being expelled from the party, and his vague and unconvincing description of his recruitment to the party, leads me to believe his evidence is not credible on this issue. I do not accept the applicant was a CPV member, or that he was expelled from the party.

16. In relation to the applicant's claim that his family land was taken by the government, the applicant said during the SHEV interview that when his family land was confiscated that he staged a protest against it. He stood up in protest in a party meeting, and as a result he was charged with opposing the party policy and expelled from the party. In the applicant's first statement he states the road project was in August 2012, however in his third statement he refers to being married in 2010, and at that time there was a clearance project to build a road. During the Arrival interview, and in his SHEV application, the applicant refers to working on the family farm from 2009 until 2013, and I accept that was the case. During the SHEV interview the applicant also referred to borrowing money from a relative to set up a business, however the business was not successful, and he returned the money. Taking into account the applicant's evidence overall, along with the applicant's inconsistent reporting of the date of the purported land confiscation, and in particular that he reported he was able to continue working on the family land, I am not satisfied the applicant's family land was confiscated, or that the applicant was involved in any protest activity. Consequently, I do not accept the applicant's claims that he difficulties having documents approved, or in obtaining a job, as a result of that event, or as a result of the purported expulsion from the CPV.
17. I am not satisfied the applicant's reasons for not providing his protection claims at the Entry interview adequately explains his complete lack of mention of any of his claims for protection at that interview. Taking into account the numerous inconsistencies in the applicant's evidence, I consider a more plausible explanation of the lack of articulated claims is because the applicant was telling the truth at the Entry interview, that he came to Australia for economic reasons alone, and he has fabricated the subsequent claims. Consequently, I am not satisfied the applicant was of adverse interest to Vietnamese authorities, for any reason, at the time he departed Vietnam.
18. The delegate asked the applicant whether anything had happened to his family while he has been in Australia. The applicant said his sister told him the local authority came and asked about where he was, and that she said she did not know where he is. No information was provided about the date of the visit, or to suggest his sister was threatened during the visit, or that she suffered any harm as a result of the visit. As I have found that the applicant was not of interest to Vietnamese authorities at the time he departed Vietnam, I am also not satisfied there would be any reason for them to enquire about his whereabouts, and I do not accept the purported visit occurred.
19. In his second statement the applicant said he no longer believes in the leadership in Vietnam, and decided to go and find human rights, justice and human freedom. I am not satisfied the applicant participated in any protest activity in relation to land resumption, however, I am prepared to accept the applicant may hold some views against the current Communist government in Vietnam. There is no information before me to suggest the applicant has been

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<sup>2</sup> "Striving to become a member of the Communist Party of Vietnam, CPV", 12 October 2016, CIS38A80125068

involved in any activities in Australia that could be considered to be against the Vietnamese government, or that he will become involved in political activism on return to Vietnam. I am not satisfied the applicant faces a real chance of being harmed on this basis of any actual or imputed political opinion.

20. With regard to the applicant's claim that he will not be able to re-register on the household registration, and he will not have any rights, including access to healthcare and jobs, and he will not be able to survive in Vietnam, DFAT reports that the Ho Khau, or the household registration system, is used by officials to determine the level of services provided to villages and provinces, linking a person's right to access government healthcare, education and other services to their place of residence. Registration is also essential for obtaining employment with the government or state-owned enterprises. DFAT is aware of recent returnees receiving assistance from Vietnamese provincial authorities and IOM to reintegrate to their communities. The information before me does not indicate that the applicant would not be able to obtain registration on return to Vietnam, and I reject the contention that he would be disadvantaged on that basis. I note the applicant's siblings continue to reside in Vietnam, and that he has previously worked in agriculture, and as [an occupation 1] for a family friend. DFAT reports that agriculture employs around 44 percent of workers in Vietnam.<sup>3</sup> I am not satisfied there is a real chance the applicant will be prevented from obtaining employment or denied other services such as health care. I am not satisfied he faces a real chance of any harm on this basis.
21. The applicant claimed in the third statement that he feels very worried because his personal information was leaked by the department. The delegate noted that the applicant was in immigration detention during the departmental data breach, and that some of his personal details were published on the department's website for a brief period of time, and went on to consider whether the applicant would be at risk of harm on return to Vietnam as a result of the data breach.
22. I accept the applicant was affected by a data breach and some of his personal information was unintentionally made available on the Department of Immigration's public website for a short period of time whilst he was in immigration detention. The information included the applicant's name, date of birth, nationality, gender, details about detention (when detained, why and where), and if there were other family members in detention. No details regarding the applicant's contact details or any information about his protection claims was included in the information released. I consider the possibility the Vietnamese government accessed the information is remote. It is now over four years since the breach occurred, and there is no evidence before me the information has in fact been accessed. Even if I accept the information may have been accessed, it would reveal no more than that the applicant had possibly applied for asylum in Australia, which will be apparent in any case as a result of the manner of his return to Vietnam, and which for the reasons discussed below, I do not accept will give rise to a real chance of any harm. I am not satisfied the applicant faces a real chance of any harm on return to Vietnam, as a result of the data breach, or if he were identified as a failed asylum seeker because of the data breach.
23. I accept the applicant's consistent evidence that he left Vietnam using a Vietnamese passport. At the SHEV interview he said he travelled to [Country 1] [using] a Vietnamese passport, and flew to [Country 2] also using that passport, and that he had a one month tourist visa that was stamped on arrival in [Country 2]. At the Entry and SHEV interviews the applicant said his passport was taken by the smuggler in [Country 2]. I am willing to accept

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<sup>3</sup> DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

the applicant's account of his travel to Australia, and regarding his passport being taken by the people smuggler.

24. Information from DFAT indicates 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 Vietnamese *Penal Code 1999*. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. Returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum. Although there are credible reports of some returnees being held for a brief period upon return for the purpose of interview by Ministry of Public Security officials, to confirm their identity where no documentation exists, DFAT assesses 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 who have only sought asylum in another country.<sup>4</sup> I am satisfied on return to Vietnam the applicant may be interviewed for a brief period to allow his identity to be confirmed. I am not satisfied there is a real chance he will suffer harm as a result of that process, or that the process itself constitutes serious harm.
25. The applicant has not claimed to have been involved in people smuggling, however in his SHEV application he claims that because a people smuggler helped him leave Vietnam the Vietnamese government will think he left illegally. During the SHEV interview he said that because he travelled on a boat organised by some people, presumably referring to people smugglers, he will be considered part of them. He went on to refer to a friend who went to [Country 2] with him but did not get on the boat, being badly beaten and dying in prison on return to Vietnam. I note the applicant made no mention of this friend prior to the SHEV interview. The applicant provided no specific information regarding the particular circumstances of his friend to support that his situation is similar to the applicant's. Taking into account the country information, and having accepted the applicant left Vietnam legally, there is nothing in the information before me to support that, even if Vietnamese authorities became aware he was assisted by a people smuggler to travel to Australia, the applicant would be imputed with being a people smuggler. I am not satisfied the applicant would be suspected of departing illegally on his return to Vietnam, and face a real chance of any harm for that reason.
26. I am not satisfied the applicant faces a real chance of persecution on return to Vietnam, now or in the reasonably foreseeable future.

### **Refugee: conclusion**

27. 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**

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28. 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

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<sup>4</sup> DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

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**

29. 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.
30. I am satisfied the applicant may be briefly interviewed on return to Vietnam, to confirm his identity. I am not satisfied this constitutes significant harm as defined. There is no evidence to suggest the applicant faces a real risk of the death penalty for any reason, or will be arbitrarily deprived of his life or tortured during or as a result of this process, or that there is an intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation, such that it can be said he will face a real risk of cruel or inhumane treatment or punishment or degrading treatment or punishment.
31. I have otherwise found that the applicant does not face a real chance of any harm as a person who sought asylum in Australia, including as a person who had his personal information released in a breach of departmental systems, or because he may have to renew his household registration, or for any of the other reasons claimed. For the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm.

### **Complementary protection: conclusion**

32. 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**

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

## Applicable law

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### ***Migration Act 1958***

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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***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.