



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA16/01206

Date and time of decision: 15 May 2017 17:16:00

Denny Hughes, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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 protection visa [in] October 2015. A delegate of the Minister refused to grant the visa on [in] October 2016.

Information before the IAA

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

Applicant's claims for protection

3. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He was forced to flee his country because the government, with the help of the police and gangsters, persecuted him because of his religion and because he stood against the government for the right to freedom of religion and free speech.
 - He was a member of the parish youth group and distributed leaflets asking people to join a protest for religious freedom. He was taken to the police station and held for [number of] hours on suspicion of distributing leaflets. He was beaten by police officers in the station.
 - The second incident with the police happened when he was part of a protest for religious freedom. He claims police and gangsters employed by the police beat him with batons. While trying to defend himself he pushed a policeman and then ran away. Four or five gangsters then chased him and one of them stabbed him with a knife. He had to stay in hospital for one month and he has a large scar from the attack.
 - When the applicant got home from the hospital, the police came and told him to come to the police station. Because of his previous experiences, his family were frightened about what would happen to him. His father organised for him to go to [Town 1]. He tried to hide there, but the police came [a number of] times looking for him and harassed his family. He did not feel safe in [Town 1] because the government controls people's movements and he could not work or feel safe. He decided to leave Vietnam.
 - After he arrived in Australia, his family received [summons] for him to go to the local police station. As a result of the summons, he believes he cannot return to Vietnam because he would be taken to jail and badly treated.
 - The applicant fears harm from his past experiences, but also as a result of the Department of Immigration disclosing his personal details on the Internet. He has no doubt the Vietnamese government has obtained the data unintentionally released by Immigration. He will be considered a betrayer of his country by the Vietnamese authorities and they will persecute him if he returns to Vietnam.
 - He cannot seek protection from the authorities. He also cannot relocate because he would need permission papers from the government. If he tried to register for such permission he would be caught by the police and harmed.

4. In a submission made to the Department following his protection visa interview, the applicant's representative clarified and expanded on aspects of his claims:

- He fears harm from the Vietnamese authorities because of his religion (Catholicism), his political opinion, and his membership of a particular social group of failed asylum seekers.
- His involvement with the church in Vietnam went beyond that of simply observing his religion. He was involved in community work and advocacy. He was also involved in a local church group. His work included helping the [poor].
- In Vietnam he was involved in a number of protest events. His involvement in political protests continued to grow culminating in a leadership role in large protests for freedom of religion in 2012.
- During the July protest the police chased him. He managed to escape, but the police came looking for him afterwards at his parents' house. He stayed away from his family home and was forced to hide out with friends.
- In the second protest, he was at the front of a large group of thousands of people. The group was not just Catholics, but people from many different religions united by demand for freedom of religion. He was the leader of this protest marching in the front row. He held signs which demanded freedom to practice religion and fair treatment. He handed out leaflets and advocated for people to stand up and demand freedom of religion. He advocated for a change of the Vietnamese government's policy.
- The police pushed him because he was marching in the front row. He pushed them back and they attacked him. This is when the police, army and gangsters hired by the government beat him. A friend of his who was also in the front row, named H, was also beaten. H was subsequently imprisoned for [number of] years. He is therefore in jeopardy of going to jail if he returns to Vietnam.
- If the applicant is forced to return to Vietnam, he will continue his political activism and call for greater protection for human rights, especially freedom of religion. He will continue to practice his religion and advocate for change of government policy.
- His risk of persecution is further heightened by his known status as a failed asylum seeker. His personal information was disclosed by the Department of Immigration in a data breach in 2014.
- Given his profile, and the summons for him to report to the police about his political protests, there is a real risk that he will be arrested and subjected to serious or significant harm.

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. On the basis of the documentary and oral evidence provided by the applicant, I accept he is a Vietnamese national from Nghe An Province. On the basis of the same evidence, I also accept that he is registered as a Catholic, as are other members of his immediate family. The applicant's claims turn principally on his Catholic religion and religious or political activism.
8. After his arrival in Australia, the applicant was interviewed by the Department of Immigration [in] May 2013 in an arrival interview. The applicant was asked a number of questions about his identity, family constitution, education, and employment experience. The applicant indicated he was Catholic and had some limited schooling. He confirmed that between 2010 and March 2013 he was employed in a number of different [jobs].
9. The applicant initially provided a birth year of [year] during his arrival interview. In his subsequent protection visa application¹ and supporting documentation he has corrected that evidence and confirmed that his birth year was in fact [year].
10. When asked why he left Vietnam during the arrival interview, he said it was because in Vietnam the police make it difficult for Catholics to go to church. He explained that there was an incident where the police were involved in a fight with the Catholic people in [Town 2] Parish. Since that time the police have stopped Catholics from going to church to attend Mass.
11. He confirmed he was not involved with that incident, but that he and other young people in his group held a rally to protest against the government. He said the incident at [Town 2] happened in 2012, and they held a protest a few days later.
12. He was asked to describe his involvement in the protest. He said that he and the other young people were on the street to protest against the government and the way they persecute the Catholic people, such as by stopping Catholic people from going to church. He was asked whether there were any other reasons he left Vietnam. He said that he wanted to go to Australia, so that he could practice his belief in his religion, and have a better life.
13. The applicant confirmed that neither he nor any members of his family had been associated or involved with any political group or organisation. He also confirmed that neither he nor any

¹ See questions 15 and 16 of document [number] – [boat ID] – SHEV Application – [number].

members of his family had been involved in any activities or protests against the government. He further confirmed that he was never arrested or detained by the police.

14. When asked whether the police or security intelligence organisations bothered him in his day-to-day life in Vietnam, the applicant indicated that they did. He stated that on the day of the protest, the police bashed them up. When asked to clarify, he said that after the protest the police searched for them in order to arrest and beat them up. However they could not find the applicant. The departmental officer asked the applicant to confirm that he was not bashed. He confirmed he was not. He was asked how he knew the police were looking for him. He said that some of his friends were bashed and arrested and they told him after they were released. He was asked whether he could name any of his friends that were bashed by the police. He said that many of the protestors were bashed. He was asked again whether he knew any of their names, he said there were a lot of them in the protest and he had heard rumours and on one occasion the police had gone to his place. He was asked whether the people that were in the protest were part of his church. He said they were from the same parish; some of them went to the church where he used to go. Later in the arrival interview, he said he did not want to return to Vietnam because if he is returned he will have to face the police. He said they will harm him because of the protest.
15. In the applicant's protection visa application submitted in October 2015, the applicant claimed that he was a member of a church youth group and he distributed leaflets asking people to join a protest for religious freedom. He claimed he was taken to a police station and beaten. He was injured by the police and hired thugs a second time during a protest for religious freedom. The applicant also claimed that while he was trying to defend himself he pushed a policeman. He then tried to run away, but was chased by four to five thugs, one of whom stabbed him with a knife. He was hospitalised for one month. He claimed to have a very large scar. On release from hospital, the applicant claims the police came and asked him to come to the police station. His family were frightened for his wellbeing, so his father arranged for him to go to [Town 1]. He hid there for approximately five months, but the police came to his family home looking for him on [number of] occasions and harassed his family. After he arrived in Australia, his family received a summons for him to go to the police station.
16. The applicant was interviewed [in] July 2016. The applicant gave evidence about his Catholic activities in Vietnam. He said he attended mass, prayed and recited prayers almost every day in the morning, afternoon and before bed. When prompted by the delegate, he appeared to be able to recite the Lord's Prayer in Vietnamese, albeit the interpreter struggled to translate it effectively. The applicant was able to respond to questions about Jesus. He gave evidence about Jesus' family and his death, and the reason for his death. He confirmed he attended church in Australia. On that evidence, I accept he is a genuine and practising Catholic.
17. He confirmed his involvement in the church, and also his participation in a youth group organised by the church to assist [people]. He confirmed he attended a number of protest events, but they were usually small events or meetings. He gave evidence that following government crackdowns on Catholics in 2012, he participated in two major protests.
18. In terms of the first protest, he confirmed it happened after the July 2012 incident in [Town 2], where a priest was harassed by the police and army as he tried to hold mass. After that event, they decided to hold a protest. He claims he was chased by the police, but he fled and he was not caught. He claimed the police went to his house looking for him, but after a while they did not follow up. He confirmed that after this event he met with the members of his youth group and organised to distribute leaflets for people to stand up and demand religious freedom.

19. He also spoke of the second protest, during which he claimed to have been beaten by the police and/or paid gangsters. He explained there were approximately 20,000 people at the protests, and that members of his youth group carried placards and signs with demands on them. They demanded fairness and freedom to practise their religion and basic rights for Catholics. He claims a brawl erupted at the front of the march between the protestors and the police, army, and the hired gangsters. He claimed he was attacked with a stick and beaten, and his hip was broken or fractured. He also confirmed, consistently with his previous statement, that he was stabbed with a sharp knife like object. He was hospitalised for approximately one month.
20. The delegate accepted the applicant attended two protests and that he was injured during the second rally. He also accepted the applicant received [summons] and went into hiding before leaving Vietnam illegally. However, he did not accept the applicant was of serious interest to the authorities. He indicated that given the applicant's profile he was satisfied the police were monitoring the applicant as a form of petty harassment and observation.
21. During the interview, the delegate put to the applicant a number of his concerns. The applicant responded to those concerns during the interview and in a post-interview submission.
22. The delegate discussed the applicant's arrival interview, and referred to a number of discrepancies in his answers between those given during the arrival interview and those subsequently provided to the Department. In this regard, the applicant had significantly changed his evidence about how he arranged to come to Australia, as well as failing to raise claims relating to his involvement in the second protest and the injuries he claims he sustained. The delegate emphasised that the applicant was advised of the importance of providing a truthful account, and the impact it may have on his credibility.
23. The applicant explained that he was very fearful on arrival in the country. He was unwell and he did not understand the relationship between the Australian and Vietnamese authorities. He was afraid that if he was sent back to Vietnam he would be killed or imprisoned, or that evidence about his parents and their involvement in his travels would cause them trouble and he wanted to protect them. The applicant was forthright acknowledging those discrepancies. Significantly, the claims the applicant expanded upon in his application and during the interview did not undermine his earlier claims, but were consistent and plausible when considered against the earlier claims he did raise in his arrival interview. Having regard to his evidence, I am prepared to accept he withheld information in his arrival interview out of concern for himself and his family, and that his later claims were not fabrications.
24. The delegate put to him that it seemed unlikely that he would have been targeted by the authorities given the protests involved in excess of 20,000 people. The applicant stated that he and the members of his youth group were standing in the front row of the protests carrying placards. He claims this is where the fight between the demonstrators and police began. He claims that one of his friends (H) was also beaten and detained and put in prison for two years. I found his response as to how he and the members of his youth group were singled out to be plausible and consistent with his evidence about the prominence of their involvement in the protests that he provided earlier in the interview.
25. Another of the delegate's concerns related to the fact that the police did not arrest the applicant while he was in hospital. If the applicant was as seriously injured as he claims, and he was surrounded by family and members of his parish and youth groups, I find it plausible that the police would not seek him until after he was well enough to leave the hospital. In that context I accept it would be possible for his family and friends to negotiate a deferral of any

arrest or detention. That does suggest to me that he was not considered of a high level of interest to the authorities for his political/religious activism, because the country information before me indicates that high level activists are treated harshly by the Vietnamese authorities. However, the decision of the police not to immediately arrest the applicant does not necessarily undermine his claim that he was prominently involved in the protest(s) or under suspicion for his involvement. I accept that his injuries were serious and police elected to delay investigations into the applicant's role in the protests. I am satisfied that when it became apparent that the applicant was no longer injured and may have fled his home area, the police questioned and harassed his family, and then issued summonses for the applicant's attendance for questioning. Given his failure to attend, I expect those summonses remain in effect or have been reissued.

26. The delegate also raised a concern that he was able to attend a hospital near [Town 1] for follow up treatment without being detained by the authorities. He indicated that he was registered when he attended that hospital, but he noted the warrants/summonses were not issued until after he left the country. He also stated that his relative had taken him to a hospital where he was treated by a family friend and they would not have reported him. I found those explanations plausible and accept that he was able to attend a hospital near [Town 1] for follow up treatment and give no adverse weight to the fact that he was not sought or detained by the police around this time.
27. The applicant has provided documentary evidence in support of his claims, including [summonses] issued in June 2013. While the country information before me indicates that document fraud is common in Vietnam,² I have no reason to discount this evidence. The issuance of the summons has been consistent with the applicant's evidence, and the content, while general, does not obviously undermine his claims. There are also no obvious indicators that the summonses are fraudulent. Weighing everything before me, I accept they are genuine documents and have given them some positive weight in support of his claims.
28. While I accept the above explanations, there are some concerning aspects to the applicant's claims. He provided a false age, and failed to raise the full extent of his claims in a timely manner in his first interview. He also significantly shifted his evidence in relation to how he arranged his travels out of the country. However, his evidence has been plausible and coherent in terms of his claims, as are those claims consistent with the available country information, including about protests in 2012.³ His evidence of his religious and political involvement was freely given and I found it to be credible. Apart from the initial omissions, there have been few inconsistencies in his evidence and he was able to address the delegate's concerns in a coherent way. I note the delegate accepted much of his evidence.
29. In my assessment, while I have concerns about aspects of his evidence, I am prepared to accept the applicant is religiously and politically active in Vietnam, and that he would continue to be on return to the country. I accept he was involved in handing out leaflets, and that he was prominently involved in two protests, including one in which he was seriously injured. I also accept that as a consequence of his activities, he continues to have a profile with the authorities, as evidenced by their ongoing interest in the applicant. I disagree with the delegate's assessment that the police interest in the applicant is petty observation or harassment.

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

³ Vietnamese Redemptorists' News, "Flash reports of Catholic prayer vigils throughout Nghe An", 15 July 2012, CX0D38E8E19981; Independent Catholic News (ICN), "Vietnam - mass protests after government crackdown on Catholic Church", 15 July 2012, CX0D38E8E19928.

30. In my view, he is a religiously and politically active member of the Catholic Church that has been involved in advocacy outside of his church and protests against the government in favour of religious and political freedoms. If he were to return to the country, I am satisfied he would continue to participate in religious advocacy and be politically active and outspoken against the Vietnamese government and authorities. Further, his involvement in a brawl during the second protest, the seriousness of his injuries, and his departure from the country while the police sought him under summons, lead me to conclude that he has an ongoing profile with the authorities.
31. The country information before me highlights the potential and serious risks for those who are religiously or politically active, including within the applicant's home province.⁴ DFAT assesses that as long as religious practice is exercised within state-sanctioned boundaries and does not challenge the interests or authority of the Government of Vietnam, religious adherence in Vietnam is tolerated. In contrast, DFAT also advises that people who engage in religious or political activity which is perceived to actively oppose government policy or pose a threat to the state, face a high risk of being subject to close monitoring and government action to curtail their activities. These groups can include those with an anti-government agenda that organise large numbers of people in public spaces or promote civil activism. Religious and political activists are highly likely to be monitored, harassed, intimidated, arrested, detained (without charge), mistreated, or prosecuted by authorities.⁵ DFAT also states it has credible reports that local police use contract 'thugs' and 'citizen brigades' to harass and beat political activists and others, including religious worshippers, who are perceived as undesirable or a threat to public security.⁶
32. The US Department of State advises that arbitrary arrest and detention, particularly for political activists, remained a serious problem in the country. The authorities continued to suppress political speech through arbitrary arrest and short-term detentions without charge. The law allows the government to arrest and detain persons under vague national security provisions of the penal code, while the government continues to arrest and detain individuals for peacefully expressing political or religious views under other legal provisions of the penal code. In terms of participation in protests, while the constitution affords individuals the right to assemble, local authorities routinely inhibited assembly, and the government continued to restrict and monitor all forms of public protest or gathering.⁷
33. Having regard to the country information before me, if the applicant returned to Vietnam and was again involved in religious and political activism, I am satisfied there is a real chance that he would be monitored, harassed, intimidated, arbitrarily arrested, detained without charge, mistreated or prosecuted by the authorities. Further, if he were to continue to involve himself in protests, as I accept he would, I am satisfied there is a real chance of him being harassed or beaten by the police or hired thugs.
34. A further factor here is his existing profile with the authorities, and the potential for him to be arrested and detained immediately or shortly after his return to the country in connection with the 2012 protests, and his illegal departure from the country and failure to comply with the

⁴ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; UK Home Office, "Country Information and Guidance - Vietnam: Opposition to the Government - December 2014", 1 December 2014, OG180885B52; US Department of State, "Vietnam - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926333; UK Home Office, "Country Information and Guidance - Vietnam: Religious minority groups - December 2014", 1 December 2014, OG180885B53.

⁵ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212.

⁶ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212.

⁷ US Department of State, "Vietnam - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926333.

2013 summonses. DFAT advice indicates that while the vast majority of persons who departed illegally will be briefly detained and fined on return, political activists returning from overseas are likely to attract the attention of authorities on arrival. Activists returned involuntarily are held for a short period subject to an interview by Vietnamese immigration officials and police at the airport. On release, returned activists will be required to report to police for an indeterminate period of time.⁸

35. While I am satisfied the applicant has only a moderate political profile, I have also considered the fact that the applicant is subject to two outstanding summonses as a result of being religiously and politically active. Moreover, it is likely that the Vietnamese authorities would determine he has sought asylum in Australia, whether through information obtained through the departmental data breach in 2014, or due to his method of return (without a travel document) and the amount of time he has spent in Australia. While I accept DFAT's advice that many asylum seekers are returned without incident, I also note information cited by the delegate about credible risks to returnees to the country that sought political asylum, including risks of interrogation and torture.⁹
36. I have concerns that this cumulative profile would put him at risk of harm on return, however the information before me indicates that it is high profile political activists that are principally at risk on return to the country after being overseas. I accept he has a moderate profile, but I am not satisfied it is at such a level, even when considered cumulatively. Instead, I find the risk of him facing serious harm from the Vietnamese authorities on arrival at the airport in Vietnam to be remote.
37. Nevertheless, I do accept that as a person who left the country illegally, he will be detained and questioned by the authorities, and that it is likely they will determine his religion, his past political activities, and/or his failure to comply with the 2013 summonses. In that context, I find there is a real chance he would be required to report to the authorities in his home area as part of reporting obligations imposed by the authorities at the airport, and as a consequence there is a more than remote chance that the applicant would be identified by the police in his home area and subject to harassment, mistreatment or indefinite detention by the local authorities because of the past profile.
38. In any event, I am satisfied the applicant would continue to be involved in advocacy for the Catholic Church, and be religiously and politically active on return to the country, including involvement in protests and being outspoken for religious and political freedoms. I find this would be the case whether the applicant returned to his home area, or sought to establish himself elsewhere in the country. As a result of his religious and political involvement, I am satisfied on return to Vietnam there is a real chance the applicant would face arbitrary arrest, indefinite detention and serious ill-treatment from the authorities on the basis of his political and religious activities, and I find this would constitute serious harm. I am satisfied the essential and significant reasons for the serious harm are the applicant's political opinions and religion. I am further satisfied the conduct involves systematic and discriminatory conduct inflicted by the authorities of the receiving country, Vietnam, against Catholics and those politically opposed to the Vietnamese government.
39. While I am satisfied the chance of harm is most significant in his home area on return to the country, given his past profile and my acceptance that he would continue to be politically and religiously active on return to the country, be that inside or outside of his home area, I am

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

⁹ Campaign to Abolish Torture in Vietnam, "Vietnam: Torture and Abuse of Political and Religious Prisoners", January 2014, CIS2F827D92389 (<https://democraticvoicevn.files.wordpress.com/2014/01/vietnam-torture-and-abuse-01-16-2014.pdf>).

satisfied the real chance of him being harmed by the authorities relates to all areas of the receiving country.

40. In terms of s.5J(2) of the Act, as the harm would be perpetrated by the Vietnamese authorities, I find that he would not be able to obtain their protection, and as such I find that effective protection measures are not available to the applicant anywhere in Vietnam.

41. For the purpose of s.5J(3) of the Act, I have considered whether the applicant could modify his behaviour on return to Vietnam. I am satisfied that the applicant's faith is fundamental to the applicant's identity. Furthermore, given the modification of one's political or religious beliefs or concealing their true religious or political beliefs, is not permissible under s.5J(3) of the Act, I am not satisfied the applicant is able to take reasonable steps to modify his behaviour on return.

42. In view of everything before me, I am satisfied there is a real chance of the applicant being seriously harmed for reasons of his religion and political opinion if he returns to Vietnam. I find the applicant has a well-founded fear of persecution within the meaning of s.5J

Refugee: conclusion

43. The applicant meets the requirements of the definition of refugee in s.5H(1).

Decision

The IAA remits the decision for reconsideration with the direction that:

- the referred applicant is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*

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.