



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA19/07518

Date and time of decision: 12 December 2019 09:16:00

M Anderton, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The applicant is a Vietnamese Catholic who arrived in Australia by boat in May 2013.
2. On 7 September 2017 he applied for a safe haven enterprise visa. His claims were that he will be persecuted by the Vietnamese government and detained as a political prisoner for his anti-government political opinions which he has been able to freely express in Australia. He claimed he had nowhere to live in Vietnam as he did not know where his family lived.
3. On 11 November 2019 the delegate refused to grant the visa because she was not satisfied the applicant was a refugee or that the applicant faced a real risk of significant harm upon return to Vietnam.

Information before the IAA

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

Applicant's claims for protection

6. The applicant's claims can be summarised as follows:
 - He is Kinh and his religion is Catholic
 - According to his arrival interview the applicant departed Vietnam because life in Vietnam was economically difficult and he followed his cousin. He did not know what would happen if he returned to Vietnam, but said he would probably be arrested by police because he left the country.
 - According to his application if he were forced to return to Vietnam he fears persecution by the Vietnamese authorities and detention as a political prisoner for his anti-government political views which he has been able to freely express in Australia. He has spoken out against the communist government. Since coming to Australia he can see how the Vietnamese government restricts freedom of speech and human rights. When he was a child he was severely beaten up and the police and government did nothing to help or to protect him. There is no fairness or freedom.
 - Since coming to Australia he has participated in two demonstrations against the Vietnamese government in Canberra. It was arranged by the Vietnamese community and he travelled by bus to participate. The organisers in Melbourne filmed the demonstrations and there is video footage on the internet of him at the demonstration. He is being interviewed.
 - The Vietnamese government will harass him and he is fearful they will penalise him and imprison him for his political opinions. Once he is considered an enemy of the government no matter where he lives in Vietnam the government will find him.
 - On 31 January 2014 he was in detention and his information was subject to the Department of Immigration data breach. He is scared the Vietnamese government had

access to his records, will know he is an asylum seeker and has made complaints against them. This breach of privacy puts him at greater risk of being known to the Vietnamese government.

- As a child in Vietnam he was exposed to, and the subject of, domestic violence by his father, who beat the family once a week. His worst abuse was when he was [a young child] when he was beaten with a stick. His mother reported a few incidents to police but nothing was done to help them. His mother left when he was [age] years old. He stayed with his father for a year, but continued to be beaten with wires and cables. When his father remarried, he had to get up at 3am to help the second wife with her kiosk. He spoke to his mother and ran away to her.
- His mother had remarried and her new husband did not like him and abused and hit him. He went to live with his aunty when he was [age] years old. The aunt's husband was an alcoholic and also beat him occasionally.
- When he was [age] he left and started a [traineeship] but withdrew after 4 months. He moved back to his aunt's for a year and then lived in the restaurant where he worked as she could not afford to keep him. He had been working for 3 months before he left for Australia at [age] years of age. His aunt arranged the trip with his cousin as she wanted a better life for him.
- If he returns to Vietnam he has nowhere to live and no family as he has lost contact with them. He had no contact with his parents or brother since he left Vietnam. He does not know where they live.

Refugee assessment

7. 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

8. 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.

9. I accept the applicant may have had a difficult life and been exposed and subject to domestic violence as a child at home. However, I do not consider he faces a real chance of any such harm upon return. He has not lived with his father or mother's second husband since he was [age] or [age] years old and claims not to have any contact with them or know where they are. Further, the applicant moved to live with his aunt and it was she who assisted and arranged for his travel to Australia for a better life. While he claimed the aunt's husband was aggressive and hit him sometimes, at the protection interview the applicant stated her husband had passed away either in 2008, 2009 or 2010. Given he has no contact with his prior abusers for over 10 years and one is deceased and he is an adult and does not plan to live with them, I do not accept that the applicant faces a real chance of harm in that regard.
10. The applicant claimed he had nowhere to live if he returned to Vietnam and no family. While I accept he may not have had contact with his parents and brother for many years, he had lived with his aunt since he was [age] years old. Further, he also lived independently when he had a [traineeship] and when he worked at a restaurant prior to his departure from Vietnam. Since his departure he has become an adult, lived independently and worked in a [factory] in Australia. As well as Vietnamese, he speaks, reads and writes English (according to his application). I note much of his protection interview was conducted in English also, which was what he preferred. The applicant had also worked on an uncle's farm in 2012/3 in Vietnam. While he stated he could not return to live with his aunt because she had another life and could not support him, I consider the applicant old enough and resourceful to be able to live independently as he has in the past. Further, I consider he would still have contact her as I note according to his application he has contact with her by phone. Further, I am not satisfied that he could not financially support himself. I do not accept the applicant faces a real chance of any harm upon return due to having no contact with his immediate family or not being able to subsist.
11. In relation to a question on the application about whether he had military service obligations, the application noted that upon return the applicant will have to do his military service. The applicant made no claim in relation to his military service obligation. For completeness and on the evidence, I do not consider the applicant faces any harm in relation to military service or military service obligations upon return.

Political claims

12. The applicant claimed he attended two protests in Australia for human rights and freedom in Vietnam and shared democracy information on [social media] and did fundraising. He feared harm from the authorities for his anti-government political views.
13. The applicant provided little meaningful detail about his political views and activities. In his statement he indicated since coming in to Australia he can see how the Vietnamese government restricts freedom of speech and human rights. However, the only example he gave was that children are protected in Australia, but he was not in Vietnam as he was severely beaten and not protected from it. He did not articulate or otherwise give examples of what he saw as restrictions on freedom of speech or human rights. At the protection interview he repeated that he attended two protests for human rights and freedom in Vietnam. However, he was unsure of when those were, but thought it was in 2015 and 2016, one of them being in Canberra when the Vietnamese prime minister was visiting. He thought the second protest was around the same time, a few months later or a year later. I acknowledge that he may not recall specific dates of protests. However, I consider the applicant had difficulty remembering approximately when he attended or how far apart they

were, which is difficult to reconcile given his main claims revolved around his protest anti-government activity. Further, it is difficult to believe that he had so little detail and could not more specifically remember (other than maybe 2015 or 2016) when they occurred given he attended only two protests.

14. When asked about the protests and his anti-government activity, the applicant said they shouted for freedom. The applicant showed the delegate video footage of his attendance and said he was interviewed. However, on further discussion with him it was evident that the person interviewed was his friend. The applicant stated his friend was asked his name and how recently had he been released from immigration detention. Further, the placards at the rally were about land confiscation and Chinese government taking Vietnamese land.
15. When asked about his fundraising, the applicant claimed he raised money from charities in Vietnam. However, he did not know for which charity and reiterated he helped to fundraise. He provided little meaningful detail about his activities, when they occurred, the nature of his activities and did not know who he was fundraising for.
16. I have considered the phone [social media] screen shots provided after the protection visa interview. While they are in Vietnamese, the applicant has provided some explanations of them. There were two posts in April 2018 and the rest appeared to be recent as they referred to Monday, Sunday (without a date). These includes photos of him singing (which he says was at Catholic fundraiser), in front of Parliament house alone, and standing with others. There were also [name deleted] posts photos speaking about an Australian imprisoned in Vietnam and special report Canberra video on [specified TV network] (the video footage showed to the delegate of protest the applicant attended). I note the [social media] name is not in the applicant's name, but an abbreviation.
17. Given the video and photos of the applicant in Canberra in the [social media] account, I accept the applicant attended two protests in Australia. I accept that he may have attended a Catholic charity fundraiser, where he sang. I note the applicant did not know who he raised funds for. He provided a photo of himself singing. However, I on the evidence I am not satisfied it was anti-government or a political activity.
18. However, I do not accept that he has a genuine interest in protests or anti-government activity. The applicant provided little meaningful detail about his activities and was unsure of when he attended the protests. Further, he had not protested at any other time or been otherwise involved. His account lacked any meaningful details about his convictions or activities in Australia. I do not accept the applicant has a genuine interest in political or anti-government activity.
19. The applicant did not claim he intended to attend protests or similar events in Vietnam. Further, I do not consider he may wish to engage in political activity but not do so out of fear of consequences. As discussed, I consider the applicant does not have a genuine interest.
20. Given these concerns, including the timing of his political activity in Australia and the poor and limited evidence in his application about his political convictions, views and knowledge freedom of speech and human rights, I am not satisfied that he has engaged in the conduct for a purpose other than for the purpose of strengthening his claim to be a refugee. As per s.5J(6) of the Act I am required to disregard this conduct for the purpose of determining whether the applicant has a well-founded fear of persecution.

Data breach and failed asylum seeker

21. I accept the applicant was subject to the immigration data breach in 2014 where his personal details were disclosed for a short period on website and will return after having claimed asylum in Australia. The applicant feared the breach of privacy would put him at greater risk of being known by the Vietnamese government.
22. The referred material information is that there is no indication that the immigration data breach material has been accessed in Vietnam. In any event, his reasons for seeking asylum were not disclosed.
23. I do not accept the data breach puts the applicant at a real risk of harm. Even in the remote chance it was accessed by Vietnamese authorities, the information is only his personal information, not his asylum claims. At most, a person may be deduce from that information that the applicant has sought to stay in Australia, or sought asylum. Further, the authorities will very likely be aware that he had possibly applied for asylum as it will very likely be apparent from the manner of his return from Australia.
24. DFAT information indicates that fleeing abroad or defection to stay overseas with a view to opposing the people's administration is an offence under Article 91 of the Vietnamese Penal Code 199. However, DFAT has informed that they are unaware of any cases where this provision has been used against failed asylum seekers. Current information is that returns to Vietnam are done on the understanding that returnees will not face charges as a result of having made asylum applications.
25. 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, nor does the information suggest people are harmed due to a prolonged presence in Australia. 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.
26. While there is country information that some individuals have been imprisoned on return from Australia, the information suggests this was not because they were failed asylum seekers, but rather because they committed criminal offences such as people smuggling or inciting others to flee the country, were known political or religious dissidents or activists, or members of ethnic minorities. The applicant does not have such a profile. Further, the information me does not indicate that Catholics, such as the applicant, are targeted for differential treatment by authorities when returning to Vietnam.

Illegal departure

27. I accept the applicant departed without a passport. DFAT information is that there are fines between \$120 and \$600 for departing illegally. However DFAT notes notwithstanding these fines, that people who have paid money to organisers of people smuggling operations are not subject to such fines. The applicant said his aunt arranged the trip for him and he knew no details. He followed his cousin. There is no evidence to suggest and I do not accept that the applicant was an organiser and I consider he was mere passenger, whose family paid people smugglers.
28. Accordingly, I am not satisfied that there is a real chance the applicant would be required to pay a fine. Further, and in any event, I do not consider payment of such a fine amounts to serious harm or that the country information above does not support a conclusion that it is

the product of discriminatory conduct. The applicant has been employed in Australia in a [factory] and he has not given evidence that would suggest he would not be able to pay the fine, in the event it were imposed.

29. DFAT is aware of recent returnees receiving assistance from Vietnamese provincial authorities and IOM to reintegrate in the community and some have been held for a brief period for the purpose of an interview to confirm identity where no documentation exists. However, the applicant has his birth certificate. I am not satisfied that there is a real chance that the applicant faces investigation, detention or arrest or that he faces a real chance of any harm upon return for his illegal departure.
30. I do not accept the applicant faces a real chance of any harm due to his illegal departure, as failed asylum seeker or data breach or in confirming identity upon return to Vietnam.
31. The applicant did not make any claims to fear harm on the basis of his religion. On the evidence, I am not satisfied that the applicant faces a real chance of any harm on the basis of his religion upon return to Vietnam. Further, I do not consider he is or will be imputed with an anti-government political opinion as a result of his religion, or as a person who sought asylum in Australia and spent time in Australia or who was subject to the data breach or illegally departed.
32. I have had regard to all of the evidence before me and I have considered the applicant's claims individually and cumulatively, as well as considering the personal circumstances of the applicant. I am not satisfied the applicant has a well-founded fear of persecution for reason or combination of reasons in s.5J(1)(a), now or in the reasonably foreseeable future, if he returns to Vietnam.

Refugee: conclusion

33. 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

34. 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

35. 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.

36. DFAT notes that the Vietnamese Government does not tolerate political expression against the communist party of Vietnam. DFAT is aware of at least 19 reported convictions of political/ human rights activists in 2016. Such activists who openly criticise the government or its policies or the party are at high risk of attracting adverse attention from authorities; however the treatment from authorities depends on the person's level of involvement. DFAT assesses individuals who are known to authorities as active organiser or leaders of political opposition are at high risk of surveillance, detention arrest and prosecution and prominent political and human rights activists are monitored, harassed and prevented from leaving their homes to attend meetings and events. Individuals and groups who protest or openly criticise the communist party are likely to attract adverse attention from authorities. Actively protesting against land confiscation, human rights issues or handling of issues will result in protests being shut down, police intimidation and harassment. DFAT assesses low level protesters and supporters often feel intimidated by police presence and sometimes are detained and released the same day.
37. I have accepted that the applicant attended two protests and a fundraising at Catholic event. I do not accept that singing at a Catholic fundraising event is political or anti-government and on the evidence before me there is nothing to suggest that it was such. Further, I note at the protection interview, the applicant did not know who he fundraised for. I consider these activities were low level. Further, for the reasons given earlier I do not accept that this was the result of any genuine interest.
38. I do not accept the applicant has a genuine interest in protesting or participating in any protests, political or human rights activities or organisations that may attract adverse attention. Further, the applicant had not claimed he wanted or would protest or take part in such activities or organisations upon return to Vietnam. I do not accept the applicant will be engaged in any such activity upon return. Further, I am not satisfied his non participation is out of any fear of harm.
39. While I note the country information indicates that the Government monitors social media and shuts down anti-government posts there is no evidence before me that the applicant has come to the attention of authorities in that regard. Further, I note that the applicant provided evidence of only a few posts on his [social media]. Further, the posts are not in his name. The video footage is dated and has lots of people in it and the applicant is not identified by name. I consider the applicant's activities were low level and were done to enhance his protection claims and I do not consider he would be perceived as an activist. Thirdly, there were few political posts. Fourthly, despite the country information about monitoring social media and deleting anti-government posts or removing accounts of independent bloggers, there is no credible evidence the applicant has come to the attention of authorities, which further reinforces my view that the applicant is not of interest and his activities were limited and not of interest.
40. While he may be interviewed upon return as a failed asylum seeker, the current country information does not indicate that authorities take an interest in of the type of low level activity engaged in by the applicant, or in returnees or failed asylum seekers. Even if interviewed upon arrival, I do not accept that there is a real risk that the applicant's past activities or posts would even come to their attention. Further, I do not accept he faces a real risk of harm upon return as a failed asylum seeker or returnee, subject to the immigration data breach.

41. I do not accept that the applicant has an adverse profile with Vietnamese authorities as an anti-government dissident, blogger, protester, political or human rights activist or that he will be perceived as such in the reasonably foreseeable future.
42. I am not satisfied that as a result of his political activities in Australia that as a necessary and foreseeable consequence of being returned to Vietnam, that there is a real risk that the applicant will suffer significant harm.
43. Further, in relation to his illegal departure, I have not accepted he faces a real chance of any harm upon return or payment of a fine. In any event, I do not consider payment of a fine amounts to significant harm.
44. In relation to the remainder of applicant's claims, which I have accepted, I have found that the applicant does not have a real chance of harm on any of these bases. For the same reason and applying the authority in *MIAC v SZQRB* [2013] FCAFC 33, I am not satisfied the applicant will face a real risk of any harm, including significant harm on any of those bases if removed to Vietnam.

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

In this Act, unless the contrary intention appears:

...

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.