



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA17/03670

Date and time of decision: 31 October 2017 09:31:00
Inge Sheck, Reviewer

Decision

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He departed Vietnam in December 2012 and arrived in Australia in January 2013. [In] May 2017 he lodged an application for a protection visa (PV).
2. [In] September 2017 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted the applicant was a practising Roman Catholic and had left Vietnam illegally. The delegate did not accept there was a real chance or real risk the applicant would be harmed on his return to Vietnam for reasons of his religion or his imputed political opinion, or for any other reason.

Information before the IAA

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

Applicant's claims for protection

4. After his arrival in Australia the applicant was interviewed by officers of the Department on [date] February and [date] February 2013. The applicant was also interviewed for the purposes of age assessment [in] February 2013 and [in] April 2016. Together with his PV application the applicant lodged a statement of claims dated [March] 2017. [In] July 2017 he attended an interview ("the PV interview") with the delegate. His then representative was also present. Written submissions were made on [date] July 2017 and a written response to the delegate's queries on 10 August 2017. The applicant claims:
 - He was a Catholic and had escaped Vietnam because of religious oppression. The Vietnamese government disallows religious freedom and limits employment opportunities for Catholics;
 - His father held a position [in] their local church. He was detained by the Vietnamese authorities and beaten because of this;
 - The Vietnamese government assumes that people who have left the country are politically opposed to them. On return he would be arrested and incarcerated. He would likely be tortured and would die in prison.

Factual findings

5. I accept that the applicant's background is as follows: he was born in [Nghe An] province in Vietnam and resided there since birth. He is of Catholic faith and Kinh ethnicity. Vietnam is his receiving country. He departed Vietnam illegally, by boat from Vung Tau/Ba Ria. He completed Grade [number] at school. His parents are separated and he has a [brother].
6. As noted from the summary above, the applicant has been interviewed on a number of occasions by officers of the Department. On arrival in Australia he claimed that his date of birth was [date], which meant that he was [a young teenager]. During his first two interviews the applicant stated that his mother had left him and his father and taken his [brother] with her

but gave varying evidence about when this had happened and how old his brother was; at the third interview of [date] February 2013 he claimed that his mother died when he was young and that his brother born [year] lived with him and his father. He consistently stated that he attended school to grade [number] but gave varying evidence as to how old he was when this had occurred. He has also claimed that he worked for his father [in a certain occupation] after he ceased his education. The Departmental officer noted in their report of April 2016 that the applicant “provided a wildly inaccurate and confused account of his work and school life”. The applicant was released from immigration detention as a minor under the Guardianship of the Minister and absconded. He secured rental accommodation and employment. He entered into a de facto relationship [in] July 2014 (at which time he would have been [a young teenager], according to his stated date of birth) and fathered a [child] born [date]. I do not accept that the applicant has given his correct date of birth and this, together with the variations in his family history, causes some concern regarding his overall credibility.

7. The applicant claims that he was sent to Australia by his father. In his interview of [date] February 2013 he states that he had left Vietnam because there was no work at home. In his interview of [date] February 2013 he stated that his father told him that he should go to Australia to study. In his written statement of claims the applicant states that his father held a position within the church. He was part of the [church] he was in charge of [role details deleted]. His father would attend meetings that were about the Vietnamese authorities and would attend protests that were organised by the Catholic Church. People came and picked him up and took him away and beat him. He was released two days later and organised for the applicant to leave Vietnam. At his PV interview the applicant stated that his father’s duties in [the] church were to “encourage all the Christians to attend and participate in the church activities”. His father also organised working groups to clean up around the church and grounds. When asked why his father had been detained as claimed, the applicant stated that the authorities wanted him to stop doing his activities but he wouldn’t stop. I note that the applicant has at no point stated in his oral evidence that his father was involved in any religious or political activism or protests; this claim only appears in his written statement [in] March 2017. I am prepared to accept that the applicant’s father was involved in [duties] associated with [his] local church but do not accept that his duties were any more than this or that he was a religious or political activist. I do not consider that the applicant’s father’s [duties] caused him to be any of interest to the Vietnamese authorities. I do not accept that he would have been detained or beaten for continuing to carry out these duties.
8. The applicant has also claimed that he does not know the whereabouts of his father and that he has not been able to contact his father since shortly after he arrived in Australia. [In] August 2017 the applicant’s representative advised the delegate that when the applicant spoke to his father in early 2013 his father told him that after driving the applicant to Vung Tau he did not return home to Nghe An. His father said he would be in touch but did not call back and the contact number that the applicant had for him no longer works. This claim is not consistent with the applicant’s statement of [date] March 2017 that “I am going to contact my father to see if he can obtain my Birth Certificate or any other document that can establish my identity.” The applicant subsequently provided a birth certificate with his PV application [in] May 2017. At the PV interview he stated that he had obtained this from his local church in Vietnam: “you have to hand in your birth certificate at church before you can have religious teaching”. I do not accept this explanation. I do not accept that the applicant did not know the whereabouts of his father and conclude that he remains in the applicant’s family home in Nghe An.
9. The applicant also claims that he was subject to religious oppression because of his Catholic faith. At his arrival interview in February 2013 he stated that when he was [age] he saw men

fighting with the parishioners at the church but he did not know who they were. At the PV interview the applicant stated that he left Vietnam because of religious oppressions, problems and persecutions. For example, at Christmas or Easter lots of Christians would gather together to pray and the authorities would come to beat them or arrest them. The applicant did not claim that he had been beaten or arrested and I find he had not. The applicant also claimed that all of the Christians in the village were prevented from praying by the authorities. This is inconsistent with the applicant's other evidence that he attended church every weekend and that the church was particularly full on weekends. I do not accept that the applicant was in any way prevented from attending church or participating in religious practice.

10. The applicant further claims that it is difficult for Christians to obtain work in Vietnam. "Catholics cannot work in Government organisations. We can't be in the police force. We are not allowed to be in the army. We cannot be teachers in the Communist education system". The delegate put to the applicant that he had worked with his father after finishing school and the applicant responded that was only [details of work]; Catholics could not do other jobs that they wanted to. The applicant has not claimed that he has personally been denied any type of employment due to his religious faith and I find he has not. The referred information indicates that the law prohibits discrimination with respect to employment and occupation based on religion, however, in practice social and attitudinal barriers exist to varying degrees.¹ Further to this, the Communist Party of Vietnam (CPV) maintains a strong atheistic stance against religion,² therefore it is likely that a practising Catholic would have some difficulty securing work in the public sector or the CPV.
11. The applicant also claims that he would be at risk of harm due to having departed the country illegally and sought asylum in Australia. I accept the applicant departed Vietnam illegally by boat.

Refugee assessment

12. 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

13. 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

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED850AD4597; 2.15

² Ibid; 3.8

- 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.

14. The applicant has claimed that he was subject to religious oppression in Vietnam. I accept that the applicant is Catholic. Some 7% of the Vietnamese population who declare their religion or belief are Catholic.³ The Catholic Church is a registered church in Vietnam, and is one of 14 distinct religions that hold full government recognition and registration.⁴ The situation for Catholics has continued to improve in recent years.⁵ DFAT assesses that religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the CPV and its policies.⁶ At the PV interview the delegate put this information to the applicant and he responded that while this may be the case in the cities, it did not reflect the situation in rural areas like his village. While the report of the United States Commission on International Religious Freedom (USCIRF) indicates that severe religious freedom violations continued, especially against ethnic minority communities in rural areas of some provinces,⁷ it does not support the contention that Kinh Catholics are treated differently in rural areas compared to the cities and I find they are not. I accept that the situation as set out in the DFAT report as quoted above also applies in the applicant's home village. I do not accept the applicant's claim that when villagers would gather for Christian festivals such as Easter or Christmas they would be beaten or arrested by the Vietnamese authorities. I have not accepted the applicant's claim that he was prevented from praying or attending church. The applicant did not make any suggestion that he has modified his religious practice in the past to avoid harm or concealed his views, or would need to do so in the future. While I am satisfied that the applicant may be hampered if he seeks to secure employment with the government or the CPV, I am not satisfied that he would otherwise be prevented from securing and advancing in suitable employment in other fields on the basis of his religion. I am not satisfied that his capacity to subsist would be threatened or that he would otherwise suffer serious harm.

15. The applicant's representative claims, in the submissions to the delegate [in] July 2017, that he will be imputed with the political opinion of being against the Vietnamese government due to his religious beliefs and his father's role in the church. The applicant has not claimed to have been involved in any activities with the church, that may be regarded as political activity. I have accepted that his father was involved in [duties] associated with [his] local church but do not accept that he attended protests or took part in activities against the Vietnamese government / authorities. While there is evidence of activists associated with various religions being targeted for arrest or harassment by the Vietnamese authorities,⁸ I find neither the applicant nor his father is a religious activist, nor would the applicant be perceived to be one, nor would he engage in religious activism, on return to Vietnam. I have also considered whether the applicant would be considered a political activist on return. There is no evidence before me to indicate the applicant will participate or have any interest in participating in any conduct in which he would be perceived to be a political activist on return. I am not satisfied

³ DFAT, "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED50AD4597; 2.7

⁴ Ibid; 3.9

⁵ Ibid; 3.9

⁶ Ibid; 3.10

⁷ United States Commission on International Religious Freedom (USCIRF), USCIRF Annual Report 2017; p.114

⁸ Ibid; p.116 to 117

that the applicant faces a real chance of any harm on the basis that he would be considered to be a religious or a political activist, or that he faces a real chance of serious harm on account of his religion.

16. The applicant has also claimed that he will be targeted by the authorities, should he return to Vietnam, due to having departed illegally and having sought asylum in Australia. He claims that Vietnamese government will impute him with an anti-government opinion. I accept that if the applicant returns to Vietnam the authorities will know or will assume that he has applied for asylum in Australia. Country information provides that in December 2016, a new Memorandum of Understanding (MOU) was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security, which provides a formal framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea'.⁹ Because the applicant may be returned to Vietnam involuntarily, the Vietnamese authorities will inevitably be made aware of his personal details and will assume that he is a failed asylum-seeker.
17. The Constitution of Vietnam provides for freedom of movement, however there are penalties for Vietnamese nationals that depart the country unlawfully, including without travel documents or false passports. Fines for departing without a travel document range between VND 2 Million and VND 10 Million (AUD \$120 to \$600)¹⁰, however DFAT understands that people who have paid money to organisers of people smuggling operations are not subject to such fines.¹¹ I accept the applicant departed Vietnam without a passport in violation of Vietnamese law. 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the *Penal Code 1999*, however, DFAT is unaware of any cases where this provision has been used against failed asylum seekers.¹² I note that the applicant's representative has provided media articles relating to the arrest and/or imprisonment of returnees to Vietnam,¹³ however in the ABC News case the gaol returnees "played leading roles in the attempt to reach Australia, including conceiving the idea, buying a boat, collecting money from other passengers and captaining the boat" and were consequently considered by the Vietnamese authorities to be people-smugglers. DFAT understands this to be the case in relation to several individuals who were on board vessels returned to Vietnam in 2016.¹⁴ In relation to people who have paid money to people smugglers, as the applicant has, they are viewed by the Government as victims of criminal activity rather than as criminals facing the penalties allowed in the law for departing Vietnam illegally¹⁵.
18. Returns to Vietnam are usually done on the understanding that the returnee will not face charges as a result of their having made asylum applications.¹⁶ The referred information does not indicate that differential treatment is being applied by the Vietnamese Government to failed asylum seekers known to be Catholics compared to non-Catholics. While some returnees may be briefly detained and interviewed, DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in

⁹ DFAT, "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED50AD4597; 5.15

¹⁰ Ibid; 5.16

¹¹ Ibid; 5.21

¹² Ibid; 5.15

¹³ ABC News Australia, 'Vietnam jails four asylum seekers over voyage to Australia despite 'no retribution' promise', 26 May 2016 and The Guardian, 'Vietnamese asylum seekers turned back after being processed at sea', 22 June 2016

¹⁴ DFAT, "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED50AD4597; 5.17

¹⁵ Ibid; 5.17

¹⁶ Ibid; 5.15

organising people smuggling operations.¹⁷ I do not accept that he will be seen by the Vietnamese government to be politically opposed to them as a consequence of him having departed Vietnam illegally and having sought asylum in Australia. I do not accept that there is a real chance that the applicant will suffer serious harm on return to Vietnam. I conclude that possible imposition of a fine and a brief period of detention does not constitute serious harm. I am not satisfied on the basis of the country information that the applicant faces a real chance of harm on the basis that he departed Vietnam illegally, that he has spent time in Australia or that he unsuccessfully sought asylum in Australia.

Refugee: conclusion

19. 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

20. 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

21. 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.

22. As noted above, based on the information from DFAT, I accept there is real chance, and therefore real risk, that the applicant may be briefly detained and interviewed on arrival for his unlawful departure from Vietnam in 2012 and that the applicant may be subject to discrimination relating to securing or advancing in employment with the government or the CPV, on the basis that he is a Catholic. However, on the basis of that information, I am not satisfied being briefly detained and interviewed or possibly fined, constitutes significant harm. I am also not satisfied that employment discrimination in the public sector constitutes significant harm. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, on the evidence, it does not amount to pain or suffering that is cruel or inhuman in nature, severe pain or suffering or extreme humiliation. I have also found there is nothing in the applicant's profile which would lead him to face any extended detention or other harm that would amount to significant harm on return to Vietnam. I am not satisfied he faces a real risk of significant harm on return to Vietnam on these bases.

¹⁷ DFAT, "DFAT Vietnam Country Information Report August 2017", 21 June 2017, CISED50AD4597; 5.22

23. I have otherwise concluded above that the applicant does not face a real chance of harm on the basis that he is a Catholic, that his father holds [a] role in his local church or that he sought asylum in Australia. As 'real risk' and 'real chance' involve the application of the same standard¹⁸, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) for these reasons, including when considered cumulatively.

Complementary protection: conclusion

24. 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.

¹⁸ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

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.