



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/05525

Date and time of decision: 19 September 2018 09:56:00

J Maclean, 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 referred applicant (the applicant) claims to be a citizen of Vietnam. He arrived in Australia as an unauthorised maritime arrival in October 2012, and applied for a Temporary Protection Visa (TPV) in October 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 10 August 2018 on the basis that the applicant is not a person in respect of whom Australia has protection obligations.

Information before the IAA

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

Applicant's claims for protection

3. The applicant's claims can be summarised as follows:
 - He was born in [Ha Tinh Province] of Vietnam, and is of Kinh ethnicity and Catholic faith. He is from a practising Catholic family.
 - [In] August 2012 he was inside the local church praying with members of the Rosary Group, the local Catholic youth group, when about 50 policemen attended and ordered them to stop their religious activities. As the group's leader he was questioned, beaten and handcuffed, and the group was disbursed. He was taken to the local police station where he was interrogated and beaten, and released the next morning. He was told if he continues to go to church he would be imprisoned.
 - [In] August 2012 about 150 armed members of the local authority attended the church, where parishioners were praying, and ordered the priest to stop Mass. The priest and his father, who was an office bearer of the parish board, were beaten. He was also beaten when he went to assist his father, however he managed to escape.
 - [In] August 2012 he was given an order to report to the local police. When he attended he was beaten, interrogated, and forced to sign papers stating that he, the priest, and other people organised meetings without permission and spread propaganda against the government. After two days and one night he was released.
 - [In] August 2012 about 400 people, including the Police Special Task Force (STF), local security men and delinquents, surrounded the church and used machinery to knock it down. He went to the church with other parishioners to protect the priest and was badly beaten. They started to arrest people so he ran away to his uncle's [home].
 - His father was repeatedly called to the police and asked about him. He went into hiding and borrowed money from his uncle to go to [Country 1].
 - If he returns to Vietnam he fears being imprisoned, where his life would be in danger from being starved, beaten, and tortured. His fears result from being raised a Catholic and practising that religion.

Refugee assessment

4. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

5. Under s.5J of the Act ‘well-founded fear of persecution’ involves a number of components which include that:
 - the person fears persecution and there is a real chance that the person would be persecuted
 - the real chance of persecution relates to all areas of the receiving country
 - the persecution involves serious harm and systematic and discriminatory conduct
 - the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
 - the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
 - the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.
6. The applicant has consistently claimed he is a Vietnamese citizen. Although no official government documents have been provided to support his identity, his identity is not in dispute. I accept he is a citizen of Vietnam, and Vietnam is the receiving county for the purpose of this assessment.
7. I accept the applicant’s consistent evidence that he was born in [Ha Tinh Province] of Vietnam and that he is of Kinh ethnicity. He claims he is unmarried, and I accept that to be the case.
8. The applicant has consistently claimed he is of the Catholic religion. The delegate questioned the applicant during the TPV interview about his beliefs, and he provided cogent responses to the questions asked. During the TPV interview the delegate asked the applicant whether his local parish church was a registered or unregistered church, and the applicant said it is a very old church belonging to the Vinh diocese. When the delegate asked whether it is a registered church, in a church building, and mass is celebrated, the applicant said yes. The applicant confirmed he had always attended that church, and said he attended every day. He provided a plausible description of his participation in a youth group within the parish, called The Rosary, of which he was the [Position 1]. I accept the applicant is of the Catholic religion, and that he attended a registered church in Vietnam, and participated in a youth group, including being the [Position 1].
9. During the Arrival interview, on 31 October 2012, when asked why he left Vietnam the applicant said the State did not respect his human rights or his religion in his home country, and religious services were disrupted, however he did not describe ever being beaten or

detained by authorities, and when specifically asked if he was ever arrested or detained by the police or security organisations he said 'no'. During that interview the applicant was also asked whether he had been involved with any political groups or organisations, and he said the previous year he joined a group involved in anti-government activities, and that he left the group when he came to Australia. The applicant said he did not remember the name of the group, and when asked why, said they were working in secrecy and if the government learns anything about them they would be arrested. I consider the applicant would be able to remember the name of a group he was involved in for about a year immediately before leaving Vietnam, and I do not accept he was involved in such a group. In any event, the applicant did not subsequently refer to that involvement in his TPV application, or during the TPV interview, and accordingly the claim will not be considered further.

10. In his TPV application the applicant indicates problems started for him when local government authorities wanted to "steal" land belonging to the parish church. He described a number of incidents in 2012 where local authorities attended the church and disrupted church activities. At the TPV interview the applicant said in 2011 authorities wanted to take the parish land, along with land of parishioners who lived nearby. They forced parishioners to sign an agreement to donate the land. He became involved in 2012 after the parish priest announced that authorities wanted to take the land to transform it into a park. He said prior to 2011 authorities sent people to try to stop them participating in youth group activities and to menace them, however he kept participating and doing charitable work. He said the main things happened in 2011 and 2012.
11. In his TPV application the applicant said [in] August 2012 he was praying with The Rosary group in the church when local police attended and told them the land had been confiscated and they should stop their religious activities. He was beaten and handcuffed and the group was dispersed. He was taken to the local police where he was beaten and interrogated, and released the next morning with a warning that if he continued to go to the church he would be imprisoned. The delegate asked the applicant to describe what happened [in] August 2012 when he was at The Rosary group and police came to the church. The applicant said they were praying and police came in big numbers, about 40 people, and started destroying everything. Police dispersed the group and he went home, where he later received a summons to present to the police station the next day. When he went to the police station he received a warning, and nothing worse happened on that day.
12. In his TPV application the applicant described a further incident [in] August 2012 during Mass at the church when about 150 armed people from the local authority came to the church and ordered the priest to stop the Mass. The priest was beaten, along with office bearers of the parish board, including the applicant's father who was [in a certain role]. The applicant went to assist his father and was beaten, but managed to run from the scene. Local police arrested the priest, the applicant's father and two other parish board members, and they were released after several hours of investigation. [The next day] the applicant was given an Order to report to local police. He attended the police station at 10am and was accused of committing a crime, attending Mass without permission, and obstructing police on duty, he was detained and further interrogated the next day, during which he felt ill and fainted. When he recovered consciousness he was released. During the TPV interview the applicant said in relation to the events [in] August 2012 that when he went to help his father he was beaten and lost consciousness, and when he woke up he was outside the church and his father had been taken somewhere.
13. The delegate questioned the applicant about whether any of his siblings were at the church on [that day], and whether they assisted his father, or were beaten by the police, or

summonsed to the police station. Although the applicant said some of his siblings were at the church at the time of the incident and they also came to help his father, he said they did not dare to get involved much because they had their own families and fear for their families. In regard to whether his siblings were summoned to the police station, the applicant initially said he was not clear if they had also been summoned, then he said only he and his father were summoned. When questioned again by the delegate whether he knew if his siblings were summoned he said he was not sure, and when the delegate said 'so to this day you don't know?' the applicant said his siblings were not summoned, and that he is sure of that. I find the applicant's evidence regarding this incident was vague and unconvincing, and was internally inconsistent regarding whether his siblings and father were summoned or not.

14. The delegate questioned the applicant about the inconsistencies between information in his TPV application and that given at the TPV interview, and the applicant said he could not remember exactly what he put in his statement, but he remembers the two events, [date] August and that he turned up [next day], referring to attendance at the police station on the next day, and the other event on [another date in] August, and that he turned up [next day]. I consider if the applicant were recounting events that actually occurred he would be able to provide a consistent account of the events. The significant inconsistencies between the applicant's TPV application and the evidence given at the TPV interview lead me to believe he has exaggerated his involvement in the incidents. Although I am prepared to accept there may have been an issue regarding church land, and that authorities may have attended the church on the two occasions claimed, I do not accept the applicant was of interest to authorities as a result of those incidents.
15. The applicant describes a further incident in his TPV application, on [date] August 2012 when about 400 people, including Police STF, local security men and delinquents surrounded the church and used machinery to knock down the church walls. He and other parishioners came to the church grounds to protect the priest. The parish priest was forced to sign papers to transfer the land to the Government, and parishioners, including the applicant were beaten. They started to arrest people so the applicant ran away to his uncle's [home]. Several days later he telephoned his sister who told him his father and others had been arrested. His father was told to resign from the parish board and without further evidence they released him, however he was repeatedly called to the police and asked about the applicant. The applicant went into hiding and borrowed money from his uncle to go to [Country 1]. Of note, at the TPV interview the applicant said police released his father for health reasons, however four other people who were arrested with his father remained in detention. Although I am prepared to accept the church land was acquired by the government, for a number of reasons I do not accept the applicant's account of the incident. Firstly, I note that all land in Vietnam is formally owned by the Government, which issues land use rights certificates to individuals or organisations, but retains the right to acquire the land for a broad range of purposes at any time.¹ Taking that into account, and in the circumstances described by the applicant where authorities and associated people attended in great numbers to reclaim the land and demolish the premises, I find it fanciful to suggest the priest would have been forced to sign paperwork to transfer the land, a document which would have had no effect. Secondly, I find it implausible that the applicant was beaten, but able to escape, given the purported number of people in attendance from local authorities. Thirdly, I note the suggested reason for his father's release by police is inconsistent with that given in his TPV application. I consider if the applicant's father were of interest to authorities he would have been retained in custody along with the others who were purportedly detained, rather than

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

being released and later repeatedly harassed and beaten. Fourthly, the applicant was one of a number of people involved in the events this day, he has not indicated he otherwise participated in activities or spoke out against the government's repossession of land. Taking into account country information reports that disputes over land use rights can lead to protests and occasional violence,² I am prepared to accept the incident described by the applicant occurred, however, I consider the applicant has fabricated the claimed interest in him by Vietnamese authorities to support his claim for protection, and I do not accept he was of interest to Vietnamese authorities as a result of this incident, or for any other reason related to disputed land repossession, at the time he left Vietnam, or that he went into hiding or left Vietnam as a result of the incident.

16. At the TPV interview the applicant said the church land and the land of close parishioners was confiscated, including his family land being officially confiscated [in] 2014. The applicant said his father kept claiming in relation to the rescission of land, and that his [brother] also stood up to claim and they have put him in prison. When questioned by the delegate as to why authorities are interested in him rather than his father, who holds a higher position in the local parish, the applicant referred to that being the way the Communist party acts, and suggested they could imprison his brother to get his father to calm down and not make claims. The applicant's evidence on this issue was vague and unpersuasive, in particular regarding the reason his brother would be imprisoned, whereas his father was not detained. I accept the applicant's family land may have been acquired by the Vietnamese government, however, I do not accept the applicant's brother was imprisoned in relation to his opposition to land rescission. Taking into account my finding that the applicant was not of interest to Vietnamese authorities at the time he departed the country, and his low level participation in activities in opposition relating to land confiscation in August 2012, and considering that his family land was acquired by the government in 2014, almost four years ago, I am not satisfied the applicant would have a profile of interest to Vietnamese authorities on his return to Vietnam.
17. During the TPV interview the applicant said he attends church regularly in Australia. I accept it is likely the applicant would continue to do so in his home village if returned to Vietnam. Information from DFAT indicates that Catholics constitute seven percent of Vietnam's total population, and the religion is one of 14 distinct religions that hold full government recognition and registration. Catholics are present across most districts, provinces and cities, with a strong presence in central Vietnam: Nghe An, Ha Tinh (the applicant's home area), and Quang Binh, which have approximately 500,000 followers according to the Catholic Church in Vietnam. Although DFAT states that there are still constraints relating to registration of new churches, the situation for Catholics has continued to improve in recent years, and Catholics are able to practise freely at registered churches, and religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the Communist Party of Vietnam and its policies. DFAT assess that Catholics in remote areas who practise at unregistered churches can be subject to periodic incidents of harassment and intimidation. DFAT is aware of more serious incidents of violence, such as local authorities beating citizens; however, this generally appears to be related to other activities such as protesting against land confiscation and anti-government activities rather than merely due to a person's religion. In Nghe An province, which is one of three provinces that constitutes the Diocese of Vinh, credible sources reported a slight improvement compared to previous years due to the increasing strength of the Catholic community and leadership. Local and provincial authorities reportedly continued to harass and forcibly close known house churches;

² DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

however, in-country contacts reported an increase in registered churches with the exception of a few in ethnic minority dominated areas.³

18. The weight of evidence before me suggests that being Catholic does not of itself result in a real chance of harm in Vietnam, including in the applicant's home area of Ha Tinh. Although the applicant suggests local authorities tried to stop Catholic people from holding Mass and participating in church activities, he indicated at the TPV interview that he attended church on a daily basis, including Mass on Sunday and other big celebrations. I am satisfied he was able to practise his religion whilst in Vietnam, and with the exception of the incidents in August 2012, which relate to the church land being confiscated, and in which I consider the applicant has exaggerated his involvement, I am not satisfied the applicant has suffered any harm because of his religion. There is no information before me to indicate the applicant would attend an unregistered church on return to Vietnam, and the applicant is not a member of an ethnic minority. Taking into account the country information and the applicant's evidence, I do not accept the applicant would be seen as a religious activist, and I am not satisfied he faces a real chance of any harm on the basis of his Catholic faith on return to Vietnam, now or in the reasonably foreseeable future.
19. During the TPV interview the applicant claimed he has participated in a number of protests since his arrival in Australia. When asked about the protests the applicant said two protests were against the project of the government to lend parts of the country to foreigners, and also against the law of information control, and that he had attended protests in [City 1 in Australia], which is against the regime for non-respect of human rights, freedom and democracy, and also to support people whose land was confiscated. The applicant provided a number of photographs and videos showing people, presumably including the applicant, attending an event, or events. It is not apparent to me the date any of the images were taken, nevertheless, I am prepared to accept the applicant has attended a number events in Australia.
20. DFAT reports that Vietnam's Constitution enshrines rights with regard to freedom of speech, assembly, association and demonstration; however, these are restricted by a number of 'national security' provisions within Vietnamese law. In practice, the Government does not tolerate political expression against the Communist Party of Vietnam, the Government or its policies. The Government has used specific laws to curb dissent, such as Article 79 of the Penal Code ('overthrowing the State'), Article 88 ('conducting propaganda against the State') and Article 258 ('abusing rights to democracy and freedom to infringe upon the interests of the State'), all of which in practice take precedence over constitutionally enshrined rights. There is information before me that certain political and human rights activists have been targeted by the government. However country information does not suggest that all activists are targeted, but rather that individuals who are known to authorities as active organisers or leaders of political opposition are at high risk of being subject to intrusive surveillance, detention, arrest and prosecution. DFAT assesses that low-level protesters and supporters often feel intimidated by police presence, and are sometimes detained and released the same day by authorities.⁴ Country information does not suggest this occurs at every protest, or against all low-level supporters.
21. Country information reports that an increasingly vocal and organised civil society began to develop from 2007 onwards, primarily using social media and internet forums to foster and discuss political issues. In response to this, the Government increased its suppression of

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

⁴ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

media in 2008, resulting in arrests and prosecutions of several journalists, bloggers and pro-democracy activists. Decree 72 was introduced in 2013 to manage the provision and use of Internet services and online information, making it an offence to discuss and share any political dissent. Blogs and social media platforms are widely available in Vietnam; Facebook and Instagram are popular amongst citizens as a means of sharing information and organising public events. Facebook was sporadically blocked in 2016, most notably during the protests over the mass fish death crisis relating to the Formosa steel plant toxic spill. Individual accounts of high profile activists have reportedly been disabled at various times. Country information supports that it is bloggers and high profile activists who are targeted by authorities in relation to such offences.⁵

22. On the evidence before me I am prepared to accept the applicant holds some views against the current Communist government in Vietnam, including in relation to human rights and land issues, and that he has attended protests about those issues whilst he has been in Australia. No evidence is before me to support any of the images provided by the applicant have been published, including on the internet, such that Vietnamese authorities would be aware of his participation. Even if they had been published, other than attending as a participant, the applicant has provided no evidence he was an organiser of any event in Australia, that he has joined any political organisation, or publically spoken out against the Vietnamese government. I am not satisfied the applicant would be a person of concern on return to Vietnam as a result of his participation in these low-level activities in Australia. In addition, there is no credible evidence before me to indicate the applicant will participate in, or have any interest in participating in, any conduct in which he would be perceived to be a political activist on return to Vietnam, and I conclude he would not do so. I am not satisfied the applicant faces a real chance of harm as a result of any actual or imputed political opinion, on return to Vietnam, now or in the reasonably foreseeable future.
23. I accept the applicant's consistent evidence that he left Vietnam illegally, without any travel documents, and travelled to Australia where he sought asylum. The delegate considered whether the applicant faces a real chance of serious harm on the basis of his illegal departure, or for returning to Vietnam as a failed asylum seeker.
24. Article 91 of the Penal Code 1999 states that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. Returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum.⁶
25. DFAT assesses that Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon return under Article 21 (regarding 'Violations of the regulations on exit, entry and transit') of the Decree on Sanctions against Administrative Violations in the Sector of Security and Social Order. A fine of between VND2 million and VND10 million (approximately AUD120-600) is specified for leaving Vietnam without a passport or equivalent. Notwithstanding this, DFAT assesses that persons who paid money to organisers of people smuggling operations are viewed by the Government as victims of criminal activity (people smuggling), rather than as criminals facing the penalties allowed in the law for illegally departing Vietnam. While some returnees can be briefly

⁵ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

⁶ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

detained and interviewed, DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations.⁷

26. As the applicant departed the country illegally I accept he may be briefly detained and interviewed on return to Vietnam and may be issued with a fine. There is no information before me that the applicant has any particular vulnerability such that he would suffer harm as a result of a short period of detention, even taking into account the country information reports that prison conditions in Vietnam are harsh,⁸ nor that he would be unable to pay any small fine that may be issued to him. I am not satisfied a brief period of detention, being interviewed on arrival in Vietnam, and being issued a fine constitutes serious harm in this case. I am not satisfied the applicant faces a real chance of serious harm if he returns to Vietnam, on the basis of his illegal departure, now or in the reasonably foreseeable future. In any event, any punishment received as a result of his illegal departure would be the consequence of the application of a law that the evidence indicates is non-discriminatory on its face and its application and enforcement. It is not persecution as defined.
27. I am not satisfied the applicant faces a real chance of persecution on return.

Refugee: conclusion

28. 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

29. 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

30. 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.
31. I am satisfied the applicant may be briefly detained and interviewed on return to Vietnam, and he may be issued with a fine as a result of his illegal departure from Vietnam. I am not satisfied being briefly detained, including in poor prison conditions, interviewed and fined constitutes

⁷ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

⁸ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

significant harm as defined. There is no evidence to suggest the applicant faces a real risk of the death penalty for any reason, or will be arbitrarily deprived of his life or tortured during or as a result of this process, or that there is an intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation, such that it can be said he will face a real risk of cruel or inhumane treatment or punishment or degrading treatment or punishment.

32. I have otherwise found there is not a real chance the applicant will suffer harm on return to Vietnam, now or in the reasonably foreseeable future, because of his religion, or because of any actual or imputed political opinion, including regarding land repossession, or relating to any activity engaged in whilst in Australia, or as a returning asylum seeker. As a 'real chance' equates to a 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm, for the same reasons.

Complementary protection: conclusion

33. 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.