



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA20/07987

Date and time of decision: 2 April 2020 10:39:00

I 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant is a citizen of Vietnam. The applicant left Vietnam [in] May 2013 and arrived in Australia [in] June 2013. On 28 September 2017 he lodged an application for protection visa (PV).
2. On 2 March 2020 a delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa. The delegate accepted that the applicant is of Catholic faith and had participated in rallies and demonstrations in Australia. The delegate found that the applicant did not face a real chance of persecution or a real risk of significant harm for these or any other reasons.

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 then Department of Immigration and Border Protection (now the Department of Home Affairs) on 20 July and 25 July 2013. The applicant provided details of his claims at questions 76 to 83 of his PV application. On 27 August 2019 the applicant attended an interview ("the PV interview") with the delegate at which his representative [Mr A] was present. Supporting documents and submissions were provided to the delegate on 3 September 2019. The applicant claims:
 - He is a Catholic. The Vietnamese government is particularly suspicious of Catholic intellectuals and would send thugs to harm him, if he returned to Vietnam;
 - In 2007 he attended a protest in his home village, protesting against the seizure of church land. Following this he was arrested, detained, beaten and tortured. Some days later he was beaten by thugs and hospitalised. The authorities continued to harass and surveil him until his departure from Vietnam in 2013 and still ask his family when he is returning;
 - Since coming to Australia he has participated in further protests and Vietnamese community activities. Because of his open protests the Vietnamese authorities will be aware of his political opinions. His [Social media] page was hacked by the Vietnamese authorities;
 - Because he departed Vietnam illegally he will be arrested and gaoled if he returns.

Factual findings

5. I accept that the applicant's background is as follows: he was born on [Date] and is from Ba Ria-Vung Tau province in southern Vietnam. He resided in [a] village, Chau Duc district from birth to [age], when he moved to Ho Chi Minh City to study, and returned to Ba Ria-Vung Tau in 2008. He is of Catholic faith and Kinh ethnicity. He completed primary and secondary schooling, commenced but did not complete a Bachelor degree in [Subject 1] and completed a Bachelor degree in [Subject 2] in 2005. He was employed in [work sector] from 2005 until his

departure from Vietnam in 2013. He has [a number of siblings]. His parents are farmers and remain in the family home in Chau Duc district. He departed Vietnam illegally, by boat. He travelled to Australia with [members of his extended family]. He is currently [employed].

6. The applicant has consistently claimed to be Catholic and I accept that he is. At the PV interview the applicant was asked whether he had ever been harmed due to being a Catholic. He responded that the Vietnamese authorities always watch people in church and find ways to oppress intellectuals in the Catholic church. He stated that the majority religion in his home area is Catholic, with some 90% of the population following this faith. The applicant has consistently stated that Catholics are oppressed in Vietnam however he has not indicated that he has ever been harmed on the basis of his religion or prevented in any way from practising his Catholic faith and I find he has not.
7. In his arrival interview in 2013 the applicant stated that he left Vietnam because there was no freedom there. For example, there was an event in 2007 when the State attempted to confiscate land belonging to his local parish. The old men and women of his village protested against this. They were beaten by the authorities and the applicant intervened. He was arrested and taken to the police station, where he was accused of being part of the protest and questioned on his involvement in the group of protestors. He was detained for a few hours and released without charge. The applicant also asserted that the police continued to monitor him after this event. "Whenever I got home I always see the police standing there at my house." The Department officer asked the applicant whether the police took any action or did anything and the applicant responded that they did not.
8. There is some variation to the narrative in the applicant's PV application in 2017. In this the applicant stated that "I was beaten up many times. I was also arrested and brought back to the police station for interrogation and beatings. My life thereafter was extremely difficult as I was constantly harassed at home, at work and in the street by men I believe are police, or were hired and working for the police". The applicant also stated that he was in [Country] from December 2007 to August 2008 to avoid police harassment and possible physical violence in Vietnam. In the PV interview the applicant clarified that the demonstration against the seizure of the land had occurred [in] August 2007. All of the Catholic people were there, over 200 people. Men in plain clothes came and started to assault people. The applicant was beaten and taken to the police station where he was beaten again. He was asked about the demonstration including what he did in the demonstration and charged with organising and acting against the authorities. He was later intercepted by thugs hired by the authorities to beat him up. As a result of this beating he was hospitalised. He was also harassed where he worked as well as where he lived. His family have told him that the authorities continue to ask after him, asking his brothers where he is and what he is doing.
9. The applicant provided a detailed work history in his arrival interview in 2013. He stated that after graduating from his tertiary course he "moved to many parts of the country". He was employed by a government company from 2005 to 2007 and worked in Ba Ria-Vung Tau province, Tay Minh province and Dong Nai province in this period. He then secured a contract to work on [a project] in [Country] for six months. A copy of the applicant's passport indicates that it was issued [in] 2007 and I conclude he travelled to [Country] shortly after this. I do not accept that the applicant resided in [Country] to avoid police harassment as claimed in 2017, I conclude that he was there for work purposes. Following the applicant's return to Vietnam in 2008, he returned to his home province of Ba Ria-Vung Tau. He has claimed that during the next five years he was surveilled and constantly harassed by the police. In 2013 he claimed that this harassment comprised police officers standing outside his house but taking no action against him. In 2017 he stated that he was arrested and beaten by the police repeatedly. In

the PV interview in 2019 he stated that the authorities tried to do harm to him where he worked and where he lived.

10. The applicant positively stated in his 2013 interview that he was not charged with any offences however in his PV interview claimed that he was charged with organising and acting against the authorities. He has at no point claimed to have been convicted of any offences. The applicant lodged a number of documents at the time of his PV application in 2017. These included two documents purporting to be summons notices issued by the Vietnamese police dated [January] 2013 and [April] 2013. The applicant did not mention being summonsed to appear at “The investigation Police Office of [name] commune” due to “public order disturbance” in his arrival interviews in 2013 or in his PV application. He did not indicate in the PV interview that he had attended the police station as purportedly required in January 2013 or in April 2013 or if so, what had happened. He did not indicate that there had been any further actions taken by the Vietnamese authorities due to any failure to comply with summons notices. I do not accept as plausible that the applicant would be charged with a public order offence in August 2007 and be required to attend a police station for investigation of such offence more than five years later. I do not accept that the summons notices are genuine documents. Due to this and the variation in the applicant’s statements I do not accept that the applicant was charged with any offences in Vietnam.
11. By his own evidence, the applicant was involved in just the one demonstration in 2007, at which there were some 200 attendees. I accept as plausible that the applicant was a part of a demonstration against the acquisition of church land in 2007. Country information confirms that low-level protests occur periodically over land use and compulsory official land acquisition, occasionally involving violence.¹ Further to this, the Catholic Church has played a prominent role in organising and engaging political demonstrations on a number of issues, including in relation to historical land grievances.² DFAT assesses that Catholics who belong to registered churches and are not politically active face a low risk of official harassment.³ I do not accept as plausible that on the basis of involvement in one protest event in 2007 the applicant would be under police surveillance from 2008 to 2013 or that he is still of any interest to the Vietnamese authorities, more than 12 years after the event. Due to the variation in the applicant’s evidence I also do not accept his later claims that he was repeatedly arrested and beaten by the police. I conclude that the applicant was of no interest to the Vietnamese police or authorities at the time of his departure from Vietnam.
12. The applicant now claims that since coming to Australia he has learned more about the situation of his homeland and “has become firmer in his resolve.” As a result he has become politically active. The applicant has provided a number of photographs as well as a letter of support from the [Organisation]. I am satisfied that the applicant is an active member of this organisation as well as his local Vietnamese community and that he has participated in a wide range of events including social functions, cultural events and demonstrations. The applicant has not claimed to be an organiser of any events and I find he is not. The applicant was not a member of any political parties or otherwise politically active in Vietnam. The photographs provided by the applicant are of very poor quality. I infer that the applicant is in each of the tendered photographs but I am not satisfied that he would be identified by the Vietnamese authorities from these photographs, even the originals. The applicant has not claimed that he would continue to demonstrate against the Vietnamese government on return to Vietnam. He

¹ Department of Foreign Affairs and Trade (DFAT), “DFAT Country Information Report Vietnam”, 20191213145121, 13 December 2019; 3.52

² Ibid; 3.34

³ Ibid; 3.37

was not politically active prior to departing Vietnam at [age]. I conclude that he would be not be involved in political activism on return to Vietnam or have any interest in being so involved.

13. In submissions to the delegate, [Mr A] invites the delegate to look at the applicant's [Social media] account. The reason for this is not stated. There is no indication that the delegate did so. I note that the applicant's [Social media] account is not in his name therefore I am not satisfied that he could in any event be identified from this account. [Mr A] also contends that the Vietnamese authorities know the applicant's identity because "they do have security/police/military personnel operating illegally in Australia (and elsewhere, as tourists, students etc.) to passively prevent any subversive activity, by monitoring and reporting on individuals in Australia to Vietnamese authorities for action". As I have found that the applicant was of no interest to the Vietnamese authorities or government when he departed Vietnam I do not accept that he is subject to surveillance or monitoring in Australia.
14. Among the documents provided to the Department in September 2017 was a psychological report dated [September] 2017. This indicates that the applicant was at that time attending counselling due to stress and anxiety. Neither the applicant nor [Mr A] have indicated that the applicant currently suffers from or is receiving treatment for mental health issues or that he fears harm due to any previous or current mental health issues.
15. At his arrival interview the applicant was asked what he thought would happen if he returned to Vietnam. He replied that he would possibly be arrested and detained in prison for fleeing Vietnam illegally. I accept that the applicant departed Vietnam illegally.

Refugee assessment

16. 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

17. 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.

18. I have found that the applicant is a Vietnamese national; accordingly, Vietnam is his receiving country. I have accepted that the applicant was involved in a protest against the acquisition of church land in August 2007. I have not accepted that he was charged with offences, subject to surveillance and harassment from 2008 to 2013 or that he was of any ongoing interest to the Vietnamese authorities. I am satisfied that there is not a real chance that, in the future, he would be harmed due to his involvement in this protest.
19. I accept that the applicant is of Catholic faith. Some 7% of the Vietnamese population who declare their religion or belief are Catholic.⁴ The Catholic Church is a registered church in Vietnam, and is one of 43 religious organisations from 16 religious traditions that hold full government recognition.⁵ DFAT assesses that Catholics are generally able to practise freely at registered churches, particularly in areas with larger Catholic populations.⁶ The applicant has not claimed that he was at any time prevented from praying or attending church and I do not find that there is any real chance that he would be prevented from practising his religion in the future. 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. The applicant does not face a real chance of harm on the sole basis that he is of Catholic faith.
20. The applicant has further claimed that the Vietnamese government is particularly suspicious of "Catholic intellectuals". He has not clarified what he means by this term however I note that the applicant is tertiary educated, holding a Bachelor degree in [Subject 2]. The review material does not support that intellectuals or Catholic intellectuals are of any adverse interest to the Vietnamese authorities or government. I conclude that the applicant does not face a real chance of harm due to being a tertiary educated Catholic.
21. The applicant contends that he will be imputed with the political opinion of being against the Vietnamese government due to his participation in community and protest activities in Australia. I have accepted that he has attended protest events in Australia as a participant only. I have found that he has not been identified by the Vietnamese authorities due to this participation. I have found that the applicant was and is of no interest to the Vietnamese authorities. The applicant has not claimed that he participated in any political protest events prior to departing Vietnam. I have concluded that he will not participate or have any interest in participating in any conduct in which he would be perceived to be a political activist on return to Vietnam. I am not satisfied that the applicant would be considered to be a political activist or that he faces a real chance of any harm on this basis. I have concluded above that the applicant does not face a real chance of harm on the sole basis of his Catholic faith. I am not satisfied that the cumulative effect of his being a Catholic and his participation in community or protest activities while resident in Australia is to give rise to a well-founded fear of persecution.
22. The applicant has also claimed that he will be arrested and imprisoned, should he return to Vietnam, due to having departed illegally. Country information indicates 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'.⁷ The Constitution of Vietnam provides for freedom of movement, however there are penalties for Vietnamese

⁴ DFAT, "DFAT Country Information Report Vietnam", 20191213145121, 13 December 2019; 2.7

⁵ Ibid; 3.17

⁶ Ibid; 3.32

⁷ Ibid; 5.29

nationals who depart the country unlawfully, including without travel documents or with false passports. Fines for departing without a travel document range between VND 3 Million and VND 5 Million (AUD \$187 to \$310).⁸ In the 2017 DFAT report it was stated that people who have paid money to organisers of people smuggling operations are not subject to such fines.⁹ 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 the *Penal Code 1999*, however, DFAT is unaware of any cases where this provision has been used against failed asylum seekers returned from Australia.¹⁰

23. The current DFAT report notes that would-be migrants who have employed the services of people smugglers typically only face an administrative fine,¹¹ which differs from the information provided in the 2017 report as quoted above. The current report also notes that authorities occasionally question returnees from Australia upon their arrival in Vietnam. The interview process generally takes between one to two hours, and focuses on obtaining information about the facilitation of any illegal movement on their part.¹² The referred information does not indicate that differential treatment is being applied by the Vietnamese Government to returnees known to be Catholics compared to non-Catholics. I do not accept that there is a real chance that the applicant will suffer serious harm on return to Vietnam. I conclude that imposition of an administrative fine and a brief period of questioning does not constitute serious harm in this case. I am not satisfied on the basis of the country information that the applicant faces a real chance of persecution on the basis that he departed Vietnam illegally.

Refugee: conclusion

24. 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

25. 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

26. 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

⁸ DFAT, "DFAT Country Information Report Vietnam", 20191213145121, 13 December 2019; 5.27

⁹ DFAT, "DFAT Vietnam Country Information Report", 21 June 2017, CISED50AD4597; 5.21

¹⁰ DFAT, "DFAT Country Information Report Vietnam", 20191213145121, 13 December 2019; 5.29

¹¹ Ibid; 5.30

¹² Ibid; 5.31

- the person will be subjected to cruel or inhuman treatment or punishment, or
- the person will be subjected to degrading treatment or punishment.

27. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

28. I have concluded above that the applicant does not face a real chance of harm on the basis of his involvement in a protest in 2007, his religion, his tertiary education or his protest or community activities in Australia. As 'real risk' and 'real chance' involve the application of the same standard,¹³ 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.

29. 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 2013. However, on the basis of that information, I am not satisfied being briefly detained and interviewed, or fined, constitutes significant harm as defined. 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, severe pain or suffering or extreme humiliation. I find 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 during this process. I am not satisfied the applicant faces a real risk of significant harm on return to Vietnam on the basis of his illegal departure.

Complementary protection: conclusion

30. 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.

¹³ *MIAC v SZQRB* (2013) 210 FCR 505

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.