



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA16/00486

Date and time of decision: 04 October 2016 18:13:23
Denny Hughes, 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 applied for a Temporary Protection Visa (TPV) [in] January 2016. A delegate of the Minister refused to grant the visa [in] July 2016.

Information before the IAA

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

Applicant's claims for protection

3. The applicant's claims are contained in the information referred to the IAA. They can be summarised as follows:
 - He is a Catholic and as result has been oppressed by the Vietnamese authorities and he does not have freedom to express his religious beliefs and is denied human rights.
 - He attended a protest mass at a church in [Town 1] in Nghe An province, along with several friends and thousands of other Catholics. The church was demolished by the Vietnamese authorities.
 - In February 2013 he attended a demonstration at [Church 1] seeking to prevent the acquisition of church land by the government.
 - He claims he sought paperwork from the authorities in his home village to permit him to leave his village and work in a factory. He claims the permission was refused because he attended the protests.
 - The government had been increasing the rent on the lease to their farm and that they could not make a living. After attending the demonstrations he was informed by the authorities that his family could no longer continue to lease the land and that it would be put to use by the government. His wife has since advised him that the government did not use the land for development or, but instead re-leased the land to another person in the village.
 - After this he went to [Town 2] to work with his [sibling] and when working in a [field], he, his [sibling] and some other workers were detained by [officials], had their [produce] taken from them and were beaten by the [officials] despite having permission from the landowner to collect the [produce]. The [officials] said that it was the [Government]'s land. They raised their complaints with their superiors but no action was taken against the [officials].
 - He then went to [another town] and worked with [a relative] before departing to Australia.
 - He will be punished by the Vietnamese police/authorities due to leaving Vietnam illegally.

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 asked at the visa interview about discrepancies between his name and birth date provided when he arrived in Australia. He said this other name was used when he was little, but not anymore. In terms of his birth date, he claims he was affected by the boat journey and provided an incorrect date. As with the delegate, I accept those explanations. On the basis of the information before me, I accept the applicant’s identity, and that he is a Catholic from Vietnam.

Religion

7. I accept that the applicant is a practising Catholic and that he regularly attended church in his home area, as did his family. I accept that his father has been actively involved in their local church for over [number] years. The applicant’s claims principally relate to his attendance at two protests at two different churches and the consequences that followed.
8. He claims that several years ago he attended a mass and protest at a demolished church in [Town 1] in Nghe Anh province. In addition, in February 2013, he attended a protest or demonstration at [Church 1], to prevent the authorities from acquiring the church’s land.
9. He claimed that his ability to attend church became more restrictive and difficult after he attended the [Town 1] mass and protest. The delegate asked whether he had ever attended the [Town 1] church. He said that before the church was destroyed, he had not been there, but he did afterwards. When asked why he would attend after the church had been destroyed, he said it was a routine among the Catholic community that whenever a church was destroyed by

the government authorities, they would go there to do prayers. He was asked whether he had gone to other churches that had been destroyed. He stated this was the first time he had. He attended the church approximately one or two weeks after it had been destroyed. He said there was nothing there except a piece of land and rubble. In terms of the mass and protest at [Town 1], the applicant claimed he was there for approximately an hour and a half. There was a regular prayer service with thousands of Catholics in attendance. After that they went home. He claims that some attendees were stopped by traffic police and questioned, and this caused them difficulties. The applicant was not stopped, but claims that he encountered difficulties when he returned home.

10. The applicant's claims are not consistent with country information before me. The church in [Town 1] has been a flashpoint for tensions over the last several years and a number of serious incidents have occurred at the church. There were several clashes between parishioners and the authorities in 2011 and 2012, including one incident in [2012] where [details deleted].¹ While there is evidence of religious properties being acquired and destroyed by the authorities in Vietnam, there is nothing in the country information that indicates that the [Town 1] church was destroyed.² While I find it plausible that he could attend an otherwise peaceful mass or protest outside of the incidents reported in the country information, I find it implausible that the applicant would give evidence about attending a mass at a destroyed church in [Town 1], and provide specific details about the destroyed church, when the destruction of that church is not supported by the country information before me.
11. The delegate asked the applicant about the difficulties he faced on return from the provinces. The applicant was seeking to get paperwork (a permission) to leave his home area and work in a factory, but the local authorities caused him difficulties. The applicant confirmed these issues arose after he went to [Town 1]. As the applicant had encountered no difficulties during or after the protest, the delegate asked how the authorities would even know he went to [Town 1]. The applicant said that people in the village would know.
12. In terms of those difficulties, the applicant said he could not get paperwork from the authorities to work in a factory as they would not approve it. He claims the reason it was not approved was because he fought against them (the authorities). He claimed that those who went to [Town 1] had the same problem, but those who did not had no issues. Other than the refusal to provide a permission to allow him to leave his home area and work in a factory, the applicant was asked whether any other restrictions were placed on him. He said there were not.
13. The applicant went to [Town 2] to work on a [farm] in late 2012. The applicant claims that while working on the [farm], he was detained and beaten and his share of a remaining harvest was taken from him by the [officials]. In his visa interview before the delegate, the applicant claimed that he and his [sibling], and a number of other workers, were collecting the remaining [produce] from a field they had harvested after being given permission by the owner. He claims that they were detained by [officials] who said the land was theirs. They were beaten and the [produce] they had collected was taken away.
14. In a written supplementary statement [in] August 2013 provided to the Department, the applicant contended that 'they came and said our land belonged to their farm and took our land for no reason'. In his interview before the delegate, it was clear that they were not the

¹ [Source deleted].

² [Source deleted].

owners of the land, but were given permission to take the remaining [produce] by the farmers. I do not accept the land was taken from them.

15. In his written application, he claims that he was bullied by the [officials] and “often bashed” for no reason. As the applicant only referred to one incident at the interview, I find that the claim in the written application that he was ‘often bashed’ is either an embellishment or a translation error. I do not accept that he was harmed on more than one occasion by the [officials].
16. On the basis of this evidence, I find that the applicant’s religion had nothing to do with this claim. I do accept that the incident occurred. It is consistent with country information before me about the corrupt practices of the Vietnamese authorities and [government officials], including against farmers, which I consider further below.³ There is nothing in his evidence which indicates this incident was religiously motivated, or for any other reason related to the applicant’s background, and I find accordingly.
17. In the written supplementary statement, the applicant made two other claims related to his religion. The first related to his father being arrested and beaten in 1993 when he was assisting with a mass service. He claims this event caused his mother to fall sick and pass away. He claims that his father had experienced many arrests and beatings from the government because of his religion. The second related to a claim that in January 2013, he and his friend went out to wish other friends a happy new year. On the way, they bumped into [a commune official]. They were called into the commune office and beaten. They slapped him on his face twice. His best friend argued with them and they beat him severely. The applicant made no reference to these claims on arrival, in his written protection visa application or in his oral evidence before the delegate. At that interview, he was asked a number of questions about his father and family and difficulties or restrictions he faced in his home area. At each of these points he could have raised these claims. While I accept that unintended omissions can occur, given his failure to raise these matters on a number of occasions, and given the seriousness of the claims and all the circumstances, I do not accept these claims occurred.
18. I do accept that the applicant returned home from [Town 2] in [2012] for Lunar New Year. In early 2013, he claims he attended a protest against an acquisition of property in [Church 1] in [location]. The applicant’s role in the protest was just like that of any other participant, he had no specific or active role.
19. When asked about what happened at the protest, he said they joined in an argument against what the authorities and the use of the land. As a result of the protest, the authorities were unable to get the land. There were no issues during the protest, but after that the authorities caused him problems. Asked to clarify, he said there were two things. He said they would not allow him to re-lease his land for agricultural purposes. And when he wanted to move to other provinces for work, they would not allow him to do so.
20. The applicant did not raise this claim in his written application, however he did raise it in the supplementary statement, and provided a generally consistent account of the event, including its timing, during his interview with the delegate. As with the delegate, I note there is no reference in the country information before me relating to this land dispute and protest. However, as it appears that it was a largely peaceful protest, it may have been unremarkable. I

³ Freedom House, "Countries at the Crossroads 2012 - Vietnam", 20 September 2012, CX295802; Vietnam Human Rights Network, "Report on Human Rights in Vietnam 2012 ", 1 May 2013, CIS36DE0BB1573; Human Rights Watch, "Public Insecurity: Deaths in Custody and Police Brutality in Vietnam", 16 September 2014, CISA447F082797.

note that it is broadly consistent with land disputes that occur in the country, which have related to religious properties in the past.

21. In the supplementary statement, the applicant stated that the authorities created many difficulties for him and did not allow him to do business. In his later evidence, he claimed that those issues were twofold – the refusal to give him permission to leave the area to do other work (factory work) and that they were not permitted to renew their land lease. In terms of the refusal to renew their lease, I note that the applicant claims this occurred between 10 days and two weeks after he attended the protest.
22. As with the delegate, I have doubts about aspects of the applicant's evidence, however, I am prepared to give him the benefit of the doubt and find that he did in fact attend protests in [Town 1] church and [Church 1]. I find that these protests were low profile and did not involve violence or arrests. Moreover, the applicant's role in these protests was also low profile and without active involvement, or other incident.
23. I have not accepted the applicant's claims that his father was arrested and beaten for his past involvement with the Catholic Church. On his own evidence, I find that the applicant has encountered no difficulties as a result of his religion other than the two restrictions he has claimed. I find that he and his family have been able to practise their religion in their home area in peace. In that context, the only profile he has as a Catholic would be his attendance at two relatively peaceful protests.
24. The country information before me does indicate that there are considerable risks to those that are politically and religiously active in Vietnam. There is credible evidence of people being involved in high profile and violent protests being seriously harmed, arrested, and detained, sometimes indefinitely.⁴ DFAT assesses that people who engage in religious activity which is perceived to actively oppose government policy or pose a threat to the state face a high risk of being subject to close monitoring and government action to curtail their activities. These groups can include those with an anti-government agenda that organise large numbers of people in public spaces or promote civil activism.⁵ I am not satisfied that the applicant's low profile religious practise, and his low level participation in two non-violent protests gives him any such profile. While the applicant is frustrated with the authorities and his financial position, I do not accept he holds any anti-government opinions or is actively opposed to the state.
25. The applicant has contended that his involvement in these protests is the reason he was denied a permission to leave his home area to undertake factory work. I have considered the country information relied on by the delegate. I accept that it appears it is no longer necessary to obtain permission from the authorities to move and work in a new location and that residency laws are not strictly enforced.⁶ However, I note both references post-date the applicant's departure and may not be indicative of the situation in 2012-13.
26. I have considered whether his inability to obtain a work permission or renew his lease was because of his involvement in the protests. Given the country information before me, and his

⁴ United States Commission on International Religious Freedom, "U.S. Commission on International Religious Freedom Annual Report Vietnam 2013", 11 January 2013, CIS25872; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; Vietnam Human Rights Network, "Report on Human Rights in Vietnam 2012 ", 1 May 2013, CIS36DE0BB1573.

⁵ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.10.

⁶ World Bank, "Vietnam's Household Registration System", 16 June 2016, CIS38A80121252; US Department of State, "Human Rights Report 2014 Vietnam", 25 June 2015, OG2B06FAF196.

lack of a religious profile, the low profile and peaceful nature of those protests and his low profile involvement, I do not accept that the local authorities would have any interest or motivation in denying him on this basis. I also found the timing of this claim, 10 to 14 days after the protest, to be implausible if the applicant had an existing lease. Instead, I find that their inability to renew the lease was a consequence of his family's strained financial position and their inability to pay for the increases in the rental price. This would also explain why he repeatedly sought to find alternative work outside of his home area during this period – for example in his desire to leave the area and find work in a factory, his time at the [farm] in [Town 2], and when he ultimately joined his [relative] for work in the south.

27. I find a further factor here was almost certainly corruption in the local authorities. The country information indicates that corruption remains a serious issue in Vietnam. The country is regularly ranked among the most corrupt countries in Asia and bribery by officials is common.⁷ Land use is a contentious issue in Vietnam, and corruption in the context of land management is particularly problematic and poor farmers are commonly exploited.⁸ I find that corruption in terms of lease renewal, or the applicant's family's inability to pay the rent or any associated bribes, was the reason the lease could not be renewed, and not for reasons of the applicant's religion. Corruption in local authorities would also explain his inability to obtain a work travel permission. If such a permission was in fact needed, I find that the applicant was either unwilling or unable to pay the bribes necessary to obtain the documentation, and it was not a by-product of his religion or because he was not a member of the party.
28. Given the above, I accept the applicant may experience financial hardship on return. I also find that the applicant may again be exposed to corruption, bribery by local authorities, or mistreatment by [government officials] (as he did in [Town 2]) on return to Vietnam. However I am not satisfied that this would be for reasons of his religion or his involvement in religious protests, but would instead be a consequence of endemic corruption and criminality in Vietnamese government authorities and [government officials] that affects and impacts many Vietnamese people.
29. In terms of his religious practise, DFAT's overall assessment is that it is not aware of credible claims of societal abuse or systemic discrimination based on religious practices. Instead, it indicates that Catholics in Vietnam who worship quietly and in a manner that conforms to government policies and sensitivities are able to do so with a low risk of official interference.⁹ I find this is consistent with the applicant's own religious practise, and that of his father and family, which outside of his claims to have been involved in the two protests has been unhindered. I find this is because the applicant and his family practise their faith in a low profile manner.
30. I accept the applicant is a Catholic. I am satisfied the applicant has experienced no direct harm as a Catholic in Vietnam. I accept the applicant would return to Vietnam as a Catholic. While I have been prepared to accept he was involved in these protests, I find his involvement was low level and low profile. I do not accept he would become religiously activist if he were to return to Vietnam in the future, or that he would seek to involve himself in high profile or politically volatile protests. I find that the applicant will return to his home area in Vietnam and that he would continue to be a regular, but low profile churchgoer who may participate in occasional

⁷ Freedom House, "Countries at the Crossroads 2012 - Vietnam", , 20 September 2012, CX295802; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.6.

⁸ Vietnam Human Rights Network, "Report on Human Rights in Vietnam 2012 ", 1 May 2013, CIS36DE0BB1573, at p.30-34; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.6.

⁹ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.9-10.

peaceful masses or protests. I am satisfied that this is a genuine expression of his faith and that his religious practice is not modified to avoid harm.

31. In view of all the evidence and information before me, I do not accept that the applicant will be deprived of his freedom of religion, or that he would face a real chance of being harmed on the basis of his religion or his religious beliefs. I find that there is not a real chance that he would be seriously harmed for reasons of his or his family's religion in the reasonably foreseeable future if he returns to Vietnam.

Failed asylum seeker and illegal departure

32. The applicant fears harm as a person who left Vietnam illegally and as a failed asylum seeker. He claims that those who escape by boat are classified by the Vietnamese government as traitors of the country. He fears he will be placed in a detention camp by the authorities.
33. In weighing this claim, I have also had regard to his status as a Catholic and his past activities, as well as the effect of the departmental data breach in 2014. As it appears some of the applicant's personal details were released as part of the Departmental data breach, and given his method of departure and time spent in Australia, I accept that the Vietnamese authorities may determine that he has sought asylum in Australia. I also accept that the applicant will be identified as a Catholic.
34. 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.
35. I accept the applicant has previously held a passport, but he did not depart on that travel document and that he left Vietnam by boat. To depart Vietnam in this way would constitute a breach of Vietnamese law. According to DFAT advice, if a person such as the applicant departs the country unlawfully without travel documents, they 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. Fines for departing without a travel document range between VND 2 Million and 10 Million (AUD \$120 to \$600).¹⁰
36. DFAT also indicates that under Article 91 of the Penal Code 1999, it is an offence to flee abroad or defect to stay overseas with a view to opposing the people's administration, however it is unaware of any cases where this provision has been used against failed asylum seekers.¹¹ I note, as referred to by the delegate, that Article 274 of the Penal Code also provides for a fine, VND 5 million and 50 million (AUD\$300 to \$3000) and or a short prison sentence for those who illegally leave or enter the country or stay abroad or in Vietnam, 'have already been administratively sanctioned for such act but continue the violation'.¹² There is nothing in the applicant's evidence or conduct that suggests he has already been sanctioned under the Penal Code. I am satisfied this has no application to the applicant and there is no real chance of him facing a penalty under this provision.

¹⁰ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.19.

¹¹ Ibid, at p.19.

¹² The National Assembly. Socialist Republic of Viet Nam, "Penal Code, No.15/1999/QH10", 1 December 1999, CIS29902. See also Ministry of Justice, "Decree No.136/2007/ND-CP Decree On Vietnamese citizens' exit and entry", 17 August 2007, CIS1ACBC92827.

37. DFAT advice is that there is no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government for having done so, although those that have departed unlawfully may be briefly detained and fined for that departure.¹³
38. DFAT advice indicates that people who have used people smugglers are seen as victims of crime, in contrast to the participants or facilitators of that crime (people smuggling).¹⁴ This is also reflected in Article 275 of the Penal code, which provides for more severe penalties for those involved in people smuggling.¹⁵ The applicant has not claimed, and I am satisfied there is nothing in his past conduct that would suggest he has been involved in people smuggling. It follows that I find that there is no real chance of the applicant being prosecuted or otherwise targeted by the Vietnamese authorities on this basis.
39. I have considered the applicant's claims that he would be viewed as a traitor and sent to a detention camp. I have also considered and accept that there are serious and credible reports of brutality and deaths in custody within Vietnam's police and security forces.¹⁶ While low profile returnees may be briefly detained, interviewed and or fined, DFAT assesses that more serious consequences, such as long-term detention, investigation, arrest, reporting and monitoring, are conducted only in relation to those suspected of involvement in organising people smuggling operations or those who are considered to be political (or religious) activists.¹⁷ I have found that his participation in the two protests would not give the applicant a profile as a political or religious activist. Given his low profile as a Catholic and as a returnee, I am satisfied he would not be seen as a religious or political activist or subject to any differential treatment. I do not accept that there is any real chance of him experiencing any long-term detention, investigation, arrest, reporting and monitoring or otherwise being subject to any harsh treatment from the authorities.
40. Country information provides that, in general, the Vietnamese authorities cooperated with the Office of the UN High Commissioner for Refugees and other humanitarian organisations in relation to returning refugees and asylum seekers.¹⁸ I accept the applicant did not travel with a passport and that he departed Vietnam unlawfully by boat. I do accept that there is a real chance the applicant will be fined under Vietnamese law because he left the country illegally. It follows that I also accept there is a real chance he would be briefly detained and questioned by immigration officials and police on return.
41. I do not accept that any fine would constitute serious harm. While any questioning and detention is likely to be brief, I have considered whether this would amount to serious harm. The High Court has confirmed that whether a loss of liberty amounts to serious harm involves a qualitative judgment, involving the assessment of matters of fact and degree – including an evaluation of the nature and gravity of that loss of liberty.¹⁹ The applicant is an able-bodied male in his [age], with no obvious vulnerabilities or health concerns. There is no suggestion in the country information that detention would happen in a Vietnamese prison. Nevertheless, I have considered country information about those conditions. Prison conditions are described by DFAT as harsh, but generally not life threatening. Reports indicate a lack of quality food and

¹³ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.19-20.

¹⁴ Ibid, at p.19.

¹⁵ The National Assembly. Socialist Republic of Viet Nam, "Penal Code, No.15/1999/QH10", 1 December 1999, CIS29902

¹⁶ Human Rights Watch, "Public Insecurity: Deaths in Custody and Police Brutality in Vietnam", 16 September 2014, CISA447F082797.

¹⁷ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.19-20.

¹⁸ US Department of State, "Human Rights Report 2014 Vietnam", 25 June 2015, OIG2B06FAF196, at p.25-26.

¹⁹ *MIBP v WZAPN; WZARV v MIBP* (2015) 254 CLR 610.

water, and poor sanitation. There is also evidence of insufficient or delayed medical care.²⁰ I am satisfied this is due to economic reasons, and not a result of any systematic or deliberate conduct. Weighing all the circumstances, I find that any questioning and detention the applicant may experience would be relatively brief and would not amount to serious harm under the Act.

42. In view of the circumstances, the country information before me leads me to find that there is not a real chance that the applicant would suffer serious harm or mistreatment from the Vietnamese authorities, or that he would endure anything more than a brief detention, including having regard to his religion, his illegal departure, or status as a failed asylum seeker.

Refugee: conclusion

43. I am satisfied the applicant will not face a real chance of serious harm on return to Vietnam on the basis of his religion, any related religious or political profile, his status as a failed asylum seeker, as someone who left Vietnam illegally, or for any other reason considered above.
44. 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

45. 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

46. 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.
47. I accept the applicant may be briefly detained and questioned on arrival at the airport and he may be fined for his illegal departure. However, on the basis of that information, I am not satisfied that being briefly detained and questioned, and/or fined, constitutes significant harm. It does not amount to the death penalty; an arbitrary deprivation of life or torture. Further, on the evidence, there is no intention to inflict pain or suffering or extreme humiliation. I have also found there is nothing in his profile which would result in him experiencing any long-term detention, investigation, arrest, reporting and monitoring or other harm that may amount to significant harm during this process. Accordingly, I am not satisfied he faces a real risk of

²⁰ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212, at p.18.

significant harm on return to Vietnam either on the basis of being a failed asylum seeker or for his illegal departure.

48. I have also accepted that the applicant may be exposed to corruption, bribery or mistreatment by local authorities or security forces on return to Vietnam. While I accept this would be difficult and highly frustrating, I do not accept it would amount to the death penalty, or result in an arbitrary deprivation of life, or torture. I also do not accept that it involves intentional pain or suffering, is cruel or inhuman in nature, or is intended to cause extreme humiliation. It follows that I do not accept this treatment would constitute significant harm. As above, I have found there is endemic corruption and criminality in Vietnamese government authorities and security forces that affects and impacts many Vietnamese. Given this, I am also satisfied the real risk is one faced by the population of the country generally and is not faced by the applicant personally.

49. In terms of his other claims, I have found that the applicant will not face a real chance of serious harm on return to Vietnam on the basis of his religion, any related religious or political profile, his status as a failed asylum seeker, as someone who left Vietnam illegally, or for any other reason. For the same reasons, and applying the authority in *MIAC v SZQRB* (2013) 210 FCR 505, I am also not satisfied there is a real risk the applicant will face significant harm upon return to Vietnam for these reasons.

Complementary protection: conclusion

50. 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

...

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.