



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA18/06115

Date and time of decision: 11 January 2019 15:03:00

J Bishop, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicant claims to be national of Vietnam and identifies as Catholic. He is [age] years old and arrived in Australia [in] May 2013.
2. On 22 March 2017 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). On 6 December 2018 a delegate of the Minister for Immigration refused the applicant's visa. The delegate determined that the applicant did not have a profile of interest and did not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Vietnam.

### 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) (the review material). No other material was provided to the IAA.

### Applicant's claims for protection

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4. The applicant claims protection on the basis of:
  - Religion (Catholicism)
  - psychological harm
  - unable to subsist and earn a living

### Factual findings

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5. The applicant did not provide original copies of his identity documents and I found his reasons for their non-production unconvincing. However, for the purposes of this decision I am prepared to accept the applicant is who he claims to be.
6. I accept the applicant is a citizen of Vietnam and find that the receiving country is Vietnam.
7. I accept the applicant has his parents and [bothers] living in Vietnam.
8. I accept the applicant was a practising Catholic in Vietnam and continues to practise his religion in Australia at [a] parish.
9. I accept that select details of the applicant were breached and published on the Immigration Department's website in 2014.

#### *The 2009 protest*

10. In the applicant's arrival interview he stated that he attended a demonstration against the local authority because 'they' wanted to confiscate the church land. He stated that 'after that they' made his life difficult. The applicant provided additional claims on 14 August 2013 in Vietnamese. The translation stated that:

“In 2009, the priest and the parish management appealed parishioners for constructing some projects in the cemetery of [a named] parish. While we were working, the police came and stopped us. We struggle against them to protect our projects so we fought the police. Because the police heavily oppressed us, the priest and the parish management asked us to leave the cemetery. I was a member of [specified] association and I was young so I participated actively. Then I was summoned by the police so I went to the South because of the fear.”

11. The applicant states in his statutory declaration dated 10 March 2017 (the applicant’s statutory declaration) that the Vietnamese government wanted the land his Catholic church’s cemetery was situated on for the installation of a [specified construction]. He was not aware of the Vietnamese government offering any compensation and the land is sacred. The Vietnamese government issued a decree for the land acquisition in 2009. This is when the applicant participated in his first peaceful protest and it was successful. During the SHEV interview the applicant stated that his first protest was in 2009 and it was peaceful. He participated in the protest with his family and friends and there were about 1000 to 3000 people. The protest lasted many days and the protest ended when the Vietnamese police left.
12. The applicant did not repeat his claims of working in the cemetery, struggling or fighting with the Vietnamese police when they came to stop him, being a member of the [specified] association, being summoned by the Vietnamese police or going to the South because of fear in his statutory declaration or during his SHEV interview. Likewise, those claims were not provided during his arrival interview. The most consistent evidence before me is that the applicant was involved in a peaceful protest with another 1000 to 3000 people about the Vietnamese government confiscating his local parish’s land and I am prepared to accept that claim. I do not accept any of the applicant’s claims outlined above that were contained in his letter dated 14 August 2013 about events in 2009.

*The 2011 protest*

13. The applicant provided additional claims on 14 August 2013 in Vietnamese. The translation stated that:

“Late 2011, the cemetery of the parish was heavily downgraded. The priest and the parish management continued to appeal parishioners to make the embankment against landslide at the cemetery. While we were working, the police came again to oppress and evict us. This place was where we buried our ancestors as well as dead people, this was the sacred place of the Church but the government wanted to take the land there to build a town. They offended our religious belief so we strongly struggled against them and the police had to leave. Few days later, they returned and chopped the trees in the cemetery. At the same time they summoned me and forced to write self-criticism form and charged money but I refuted. After detaining me for nearly a day, they released me and threatened me that if I continued to work in the cemetery, they would imprison me. It would be dangerous for my family and me.”

14. The applicant’s statutory declaration states that in 2011 ‘we’ had a second demonstration. ‘We’ were unarmed and it was a peaceful protest. Lots of people came – a few thousand – including non-members of the Catholic Church. The second protest was ‘not intended’. People saw the Vietnamese police (the police) arriving with heavy machinery and equipment including batons and smoke bombs and it turned into a protest. The applicant lined up with other people and tried to stop the Vietnamese authorities from undertaking their intended actions. The applicant was standing under a tree and chanting and the police found him and beat him with

a baton. He was arrested – along with many others - and charged with being involved in a demonstration but it did not proceed to court. The applicant states that his family had to pay a bribe to get him out of jail. He was held for seven to eight hours with many others. He was held in a police room with other people and one by one ‘they’ were exited from the room and beaten up with a police baton. After the applicant was released from jail the police followed him everywhere. He lived in fear. He fled to Ho Chi Minh City after finding out that the Church leaders were also arrested. He went into hiding fearing for his personal safety and life.

15. During the SHEV interview the applicant stated that he was involved in a second protest towards the end of 2011 at the same parish that the 2009 protest was held. The protest involved “many many” people and “many” policemen. The protest went for many hours. The police beat many people – including the applicant – and took many people to the police station. The police had ‘stuff’ with them to make people weep. He was dragged into a police car and put in custody for seven to eight hours. When the delegate asked the applicant when he was arrested he responded in the afternoon. He said he had been protesting from the morning. He was put in a room with many people and one by one each person was taken out and beaten. When the delegate asked why he was arrested he responded because he was one of the people who protested and was an active member. His parents came and paid a bribe and he was released. The delegate asked the applicant if he had to sign anything before he left the police station and he responded that ‘they’ wanted him to sign papers that said he wouldn’t protest again but he refused. When he didn’t sign the papers he was beaten. However, when the applicant was asked during his arrival interview if he was ever arrested or detained by the police or security organisations he responded no. Likewise, when the applicant was asked during his arrival interview if the police and security or intelligence organisations impacted on his day to day life in his home country he responded no. The delegate put to the applicant that during his arrival interview he was asked if he had ever been arrested and he responded no. The applicant responded that he wasn’t arrested and put in prison. He was only arrested and kept for seven to eight hours. He was not a prisoner.
16. The applicant said that after he was released from jail he returned to his parents’ house. His name had been put on a blacklist and when he went in and out of his parents’ house ‘someone’ would keep an eye on him. The police followed him and he had problems with the police everywhere he went. He then went into hiding in Ho Chi Minh City where he moved around. Sometimes he would live alone and sometimes he would live with friends. He did have relatives in Ho Chi Minh City but did not live with them because he feared the police would cause problems for them. The delegate asked the applicant when he went to Ho Chi Minh City after his release from jail and his response did not answer the question. The delegate then asked “how many days” from being released from jail and going to Ho Chi Minh City and the applicant responded in general terms ‘at the end of the year’.
17. The applicant’s statutory declaration states that he returned to his home village in 2013. He was a [occupation] in Vietnam and wanted to open his own [business]. However, during the applicant’s arrival interview he said that from 2007 until he left Vietnam in 2013 he travelled back and forth from Ho Chi Minh City and [Village 1] (his home village) for work. He said he would obtain work for himself [as] a self-contractor. He would go back to his village every year and stay at his parents’ home for one to a few months. It just depended. When he was working in Ho Chi Minh City he slept where he worked. When the Department officer asked the applicant when the last time he returned to his home village was he responded in 2012. Likewise, the applicant’s SHEV application states that from 2007 to 2013 he worked as a self-employed [contractor] in Ho Chi Minh City and [Village 1].

18. The delegate put to the applicant that he said he was self-employed from 2007 to 2013 in Ho Chi Minh City in his arrival interview and SHEV application but his evidence now is that he went back to his home village to be self-employed in 2013. The applicant responded that he wanted to open a legal business. The delegate put to the applicant that his evidence during his arrival interview and in his SHEV application was that he lived and worked in Ho Chi Minh City until he left Vietnam and the applicant responded that he returned to Ho Chi Minh City to obtain his passport in 2008. I accept the applicant's own evidence that he was operating a business – with or without the proper papers – from 2007 to 2013 in Ho Chi Minh City and in [Village 1].
19. During the SHEV interview the applicant stated that he established his own business and was earning [amount] Dong (about A\$[amount]) per month. He confirmed that this was good money in Vietnam and that he had [people] working for him. When the delegate asked the applicant how he obtained his work he responded that he opened a shop, had a telephone and went to the newspaper to let people know. The delegate put to the applicant that he was capable of living in Ho Chi Minh City for some time and he responded that Ho Chi Minh City is a very large city and he could stay one or two days with friends or family but if he wanted to stay longer he would need to have papers. I do not accept that if a person was moving from place to place every one to two days because he was in hiding in Ho Chi Minh City that he would open a shop and go to the newspaper to let people know about his business.
20. The applicant stated during his arrival interview that he attended a protest in 2009 but made no claims of attending a protest, being beaten by the police, being arrested by the police, being followed by the police or having to flee his home village and hide in Ho Chi Minh City in 2011. Likewise, the applicant did not claim during his arrival interview, during his SHEV interview or in his statutory declaration that he was working in the cemetery, that the police came to the cemetery to oppress and evict him, that he struggled with the police, that the police returned to chop down trees, that the police summoned him and forced him to “self-criticism form and charged money”.
21. The applicant has provided inconsistent and implausible evidence. When some of those inconsistencies were put to him during the SHEV interview his responses were vague and unconvincing. I have found that from 2007 to 2013 the applicant operated a business in Ho Chi Minh City and in [Village 1]. I do not accept that the applicant ever protested in 2011, was ever arrested in 2011, was ever charged in 2011, was ever beaten by the police in 2011, was ever followed by the police in 2011, was ever blacklisted or was ever required to flee his home village and go into hiding in Ho Chi Minh City. I do not accept that the applicant had to move from place to place when he lived in Ho Chi Minh City. I am of the view that the applicant fabricated the claims to strengthen his claims for protection. Likewise I do not accept any of the applicant's claims that were contained in his letter dated 14 August 2013 about events in 2011.

*Moving back to [Village 1] in 2013 to start a business*

22. The applicant provided additional claims on 14 August 2013 in Vietnamese. The translation stated that:

“When I intended to set up my business in my home town and asked for business permission, they used many reasons to refused me. They said that I was followed because I was against people on duty so they did not grant me the business permission. It was an unreasonable decision so I argued and fought with the police then I went home. After that, they summoned me, I was afraid that if I came, they would imprison me so I fled away. Since

then, I returned my home town less, I just visited my family for some days then left because I was afraid that the police would find out and arrest me.”

23. The applicant’s statutory declaration states that after he returned from Ho Chi Minh City in 2013 he thought that the local authorities would not recognise him. However, when he applied for a business licence at the local police station he was arrested. He was not told the reason for his arrest and was held for a few hours. He then ran away from the police and the police station around noon. He states that this was the best time to escape as many police were on the phone. The police that arrested him were in another room discussing what to do with him. The applicant states that after his business licence was refused and his arrest/escape from police he made arrangements to leave Vietnam.
24. During the SHEV interview the applicant said he was on a blacklist and was arrested about lunch time and put in a room. He then said that the police asked him politely to go into a room to sign the papers for his business. He heard people talking to each other about him being a protester and their intentions to ‘get’ him and beat him. He opened the door and went into hiding after he heard that. The delegate asked the applicant where he went into hiding and he responded his parents’ house. He said some people came to ask about his whereabouts after he left the police station but his family said he was not there. The delegate put to the applicant that if the police wanted to find him they would have searched his parents’ house. The applicant responded that his parents knew what to tell the police and it was a short time since he had left the police station and ‘they’ wouldn’t have had a lot of policemen to come and search his parents’ house. The applicant said he was at his parents’ house for ‘some’ hours and then went to another relative’s house for a number of hours and so on. He said that this went on for about a week and then he went into hiding longer. When the delegate asked the applicant how many months he was in hiding he responded many months. He went into hiding in Ho Chi Minh City.
25. The delegate asked the applicant why he would go to the police station if he was on a blacklist and he responded that he thought he didn’t do anything wrong and he didn’t know he was blacklisted. The delegate put to the applicant that he had stated earlier in the SHEV interview that he left his home village in 2011 and went into hiding because he was being followed and had been blacklisted. The applicant responded that his parents live in his home village and he wanted to open a business there. When the delegate asked the applicant why he would return to his home village to open a business if he feared for his life he responded that he had protested two years ago and he thought ‘everything’ would have settled down. He returned to be nearer to his parents. The delegate put to the applicant that despite being arrested in 2011, having to go into hiding and being blacklisted he went to the police station and brought attention to himself. The applicant responded that his parents had paid a ransom and he thought that would erase everything and that is why he returned to get the papers.
26. On one account the applicant is arrested at noon and on another account he is arrested, held for a few hours and escaped at noon because the police were on the phone. On one account the applicant was arrested and on another account he was asked politely to go into a room and sign some papers. On yet another account he fought and argued with the police and, when he was summoned, he feared being arrested. Likewise, on one account the applicant thought he could bring himself to the attention of the local police because everything had settled down and on another account he thought that his parents’ paying a ransom in 2011 would have erased everything.
27. The applicant’s evidence about returning to his home village in 2013, being arrested and escaping from the police is inconsistent. His answers to specific questions – for example how

long were you in hiding – were vague and general. His reasons for the police not searching his parents' house were implausible.

28. During his arrival interview the applicant's evidence was that he applied to open a business in recent months (2013) but 'they' made it difficult for him and did not allow him to run the business as a [occupation]. When the Department officer asked if there were any other reasons he was seeking asylum he responded no. He said he was not planning to seek protection or asylum in another country when he left Vietnam. He said he worries about how to live in Vietnam because as a human being he would like to earn a living and set up a life. He said it is very hard to earn a living in Vietnam because the Vietnamese authorities make it so hard. I have found that the applicant has fabricated claims to strengthen his claims for protection. I do not accept that the applicant was arrested or asked politely into a room by the police, that the applicant escaped or had to run away from the police, that the applicant heard the police talking about him being a protestor that they would 'get' and 'beat' or that the applicant had to go into hiding before leaving Vietnam. However, I am prepared to accept that the applicant – for whatever reason - experienced difficulties obtaining the required official paperwork for his [business]. I do not accept that those difficulties were related to the applicant having an adverse profile with the Vietnamese authorities or because of his religion.

#### *How the applicant left Vietnam*

29. The applicant's statutory declaration states that he travelled from Vietnam to [Country 1] and then to [Country 2] and got his passport stamped along the way. He then took a plane from [Country 2] to [Country 3]. He states that he gave his passport to the trip organisers in [Country 3] and it was never returned.
30. During the SHEV interview the delegate put to the applicant that despite being blacklisted and arrested he was able to leave Vietnam legally on his own valid passport. The applicant responded that to get out of Vietnam you have to be with a smuggler. He said the smuggler asked for his passport and he just sat down. The smuggler gave all the passports to the police and the police stamped them and that was how he left Vietnam and went into [Country 1].
31. The applicant did not claim that his passport was handed to the smuggler and that the smuggler presented all the passports to the police to be stamped to exit Vietnam prior to the delegate putting to him that – despite his claim of being blacklisted and in hiding – he was able to leave Vietnam legally. I am of the view that the applicant fabricated the claim to explain how he could leave Vietnam legally despite his claimed adverse profile with the Vietnamese authorities. I do not accept that the applicant required the intervention of a smuggler to exit Vietnam legally. I accept and so find that the applicant left Vietnam legally using a valid passport in his own name.

#### *Psychological harm*

32. The applicant's statutory declaration states that the pattern of discrimination (for example his parents having to pay school fees and Catholics not being chosen for school events or leadership positions) has affected him psychologically. He experienced constant feelings of disappointment and frustration growing up and an understanding that his faith was considered substandard in Vietnamese society.
33. The applicant states that Catholics cannot apply to join the public service or police force or undertake any work within the government. He states that this hardship has affected him psychologically, especially after repeated arrests and releases from prison. He has a feeling of

anxiety that makes every day difficult and he fears for his state of mind if he is forced to return to Vietnam.

34. I accept that the applicant's parents had to pay school fees for the applicant and I am prepared to accept that Catholics were not chosen for school events or leadership positions. Likewise, I accept that Catholics are restricted from working for the public service. However, the applicant has provided no corroborating evidence from any mental health professional to substantiate his claim that he has suffered psychological harm in Vietnam and I did not accept that the applicant was ever arrested or released from prison. Based on the evidence before me, I do not accept that the applicant suffered any psychological harm because he is a Catholic in Vietnam and I do not accept that the applicant would suffer any psychological harm if he returned to Vietnam now and/or in the foreseeable future.

#### *Family's harassment in Vietnam*

35. The applicant states in his statutory declaration that his family is being harassed by the police and it is very hard to contact them for fear of getting them into trouble. However, in the applicant's SHEV application he indicates that he contacts his family once or twice a week. The applicant's evidence is inconsistent and I have found that he has fabricated claims. I do not accept that the applicant's family are being harassed by the police or that it is hard for the applicant to contact them for fear of getting them into trouble.

### **Refugee assessment**

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36. 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**

37. 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.



38. The applicant provided several sources with his SHEV application to support his claims. The US Department of State report<sup>1</sup> referred to a Catholic priest who advocated for human rights being harassed and of restrictions and prohibitions being placed on religious group. The applicant provided a newspaper article dated 2 December 2016 that described Catholics being harassed<sup>2</sup> – for example police interrupting masses to undertake spot checks – and outlined concerns related to the passing of a new law about religion. The Human Rights Watch January 2017 country report for Vietnam refers to the government monitoring, harassing and, at times, violent crackdowns on religious groups that operate outside official government registered and controlled religious institutions. The Freedom House report<sup>3</sup> states that religious groups are supervised and require permission for most of their activities. The Open Doors World Watch List 2017 lists the 50 top ranking countries where Christians face severe persecution with Vietnam being ranked the 17<sup>th</sup>.
39. The most recent DFAT report<sup>4</sup> assesses that religious observance and practise only becomes an issue when it is perceived to challenge the authority or interests of the CPV<sup>5</sup> and its policies. Political and human rights activists who openly criticise the Government, the CPV and its policies are at high risk of attracting adverse attention from authorities; however, the treatment from authorities generally depends on the individual's level of involvement. 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 low-level protesters and supporters often feel intimidated by police presence, and are sometimes detained and released the same day by authorities. There have been a few reported cases of uniformed and plain-clothed officers using violence to break up protests in 2016, such as beating protesters with batons to disperse crowds.
40. I accepted that the applicant was involved in a peaceful protest in 2009 with 1000 to 3000 other people. I did not accept that the applicant ever protested in 2011, was ever arrested in 2011, was ever charged in 2011, was ever beaten by the police in 2011, was ever followed by the police in 2011, was ever blacklisted or was ever required to flee to Ho Chi Minh City and go into hiding. I did not accept that the applicant had to move from place to place when he lived in Ho Chi Minh City. I did not accept that in 2013 the applicant was arrested or asked politely into a room by the police, that the applicant escaped or had to run away from the police, that the applicant heard the police talking about him being a protestor that they would 'get' and 'beat' or that the applicant had to go into hiding before leaving Vietnam. I did not accept that the applicant suffered any psychological harm because he is a Catholic in Vietnam and I did not accept that the applicant would suffer any psychological harm if he returned to Vietnam now and/or in the foreseeable future. I did not accept that the applicant's family are being harassed by the police or that it is hard for the applicant to contact them for fear of getting them into trouble.
41. The information contained in the DFAT report is consistent with the information contained in the articles/reports included in the applicant's SHEV interview. That is, religious observance and practise only becomes an issue when it is perceived to challenge the authority or interests of the CPV. There is no credible evidence before me to indicate that the applicant is of any

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<sup>1</sup> United States Department of State, *2015 Report on International Religious Freedom - Vietnam*, 10 August 2016 available at: <http://www.refworld.org/docid/57add80811.html> [accessed 5 December 2016]

<sup>2</sup> The applicant also provided an article dated 16 February 2017 about incidents involving Catholics (including priests) being harassed.

<sup>3</sup> Freedom in the World 2016, Vietnam, 29 June 2016, available at: <http://www.refworld.org/docid/577a614424.html> [accessed 5 December 2016]

<sup>4</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597.

<sup>5</sup> Communist Party of Vietnam

adverse interest to the Vietnamese authorities because he is a Catholic who participated in a peaceful protest in 2009 with 1000 to 3000 other people. I am not satisfied that the applicant's profile would give rise to any adverse interest in him by the Vietnamese government/authorities on account of his religion and/or his activities associated with his religion.

42. DFAT reports that the law prohibits discrimination with respect to employment and occupation based on sex, race, disability, social class, marital status, religion, and HIV/AIDS-positive status. The law promotes and encourages the employment of persons with disabilities; however, in practice social and attitudinal barriers exist to varying degrees. Roman Catholics make up about 7% of the Vietnamese population and Vietnamese public servants must not claim any religious affiliation. On the applicant's own evidence he was earning good money in Vietnam and had [people] working for him. He is working 30 to 55 hours in Australia, saving money and sending some money back to Vietnam. I do not accept that the applicant would be unable to subsist or earn a living in Vietnam for any reason. I accept that the applicant, as a practising Catholic, could experience some social and attitudinal barriers however I do not accept that those barriers would amount to serious harm now or in the foreseeable future.
43. I accepted that the applicant left Vietnam legally using a valid passport in his own name. The most recent DFAT report states that it has no information to suggest that people known or believed to have sought asylum in another country are mistreated by the Vietnamese government on their return<sup>6</sup>. The DFAT report states:

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. 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'<sup>7</sup>.

44. In February 2014, over a period of about eight and a half days, the full names, gender, citizenship, date of birth, date when immigration detention began, the location of immigration detention, boat arrival details and the reason for being unlawful (for example illegal maritime arrival) of approximately 9,250 people were inadvertently published on the Immigration Department's website (the data breach). I accept that limited details about the applicant— as outlined — were capable of being accessed on the website for a period of eight and a half days. However, even if the data breach had not occurred, and whether or not the applicant's details were in fact accessed by the Vietnamese government/authorities, those details — apart from details about when and where the applicant was detained - would have been otherwise evident to the Vietnamese authorities upon his return to Vietnam. I have found that the applicant does not have a profile of any concern and I am not satisfied that the applicant faces a real chance of any harm on the basis of seeking asylum and/or because of the data breach.
45. I accept that there are credible reports of some returnees being held for a brief period upon their return to Vietnam for the purpose of being interviewed by the Ministry of Public Security (MPS) officials to confirm their identity where no documentation exists. Other cases involve individuals detained by authorities in order to obtain information relevant to the investigation

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<sup>6</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597 at 5.21.

<sup>7</sup> Ibid.

of people smuggling operations<sup>8</sup>. DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations.

46. The applicant's SHEV application indicated that he has never been charged, convicted or wanted for an offence in Vietnam. I am not satisfied that the applicant would be at risk of serious harm as a consequence of this routine investigation.
47. Based on all the information before me, I am not satisfied that, having regard to the applicant's profile he would face a real chance of persecution now or in the foreseeable future if he returned to Vietnam for any of the reasons claimed.

### **Refugee: conclusion**

48. 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**

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49. Under s.36(2)(aa) of the Act, 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**

50. 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.
51. I have found that the applicant is not a person of adverse interest to the Vietnamese authorities and I did not accept that he would be unable to earn a living and support himself or that he would suffer any psychological harm if he returned to Vietnam. I accepted that the applicant, as a practising Catholic, could experience some social and attitudinal barriers in Vietnam however I do not accept that those barriers would amount to significant harm. Likewise, I am not satisfied that the applicant would suffer significant harm as a consequence of being subjected to the routine investigation – as outlined above – upon his return to Vietnam.
52. I am satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Vietnam (the receiving country), there is not a real risk that he will suffer significant harm now or in the foreseeable future.

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<sup>8</sup> DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597.

**Complementary protection: conclusion**

53. 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**

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

## Applicable law

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### **Migration Act 1958**

#### **5 (1) Interpretation**

In this Act, unless the contrary intention appears:

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**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.