



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA19/06277

Date and time of decision: 5 April 2019 15:37:00
S Ryan, 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 national of Vietnam and arrived in Australia [in] June 2013. On 4 May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV). A delegate of the Minister for Immigration (the delegate) refused to grant the visa on 23 January 2019 and referred the matter to the IAA on 29 January 2019.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act).
3. The portions of the submission to the IAA reasserting claims and evidence that was before the delegate are not new information and I have had regard to those matters. The submission to the IAA also included personal statements by the applicant and his wife about their relationship and the potential impact of the refusal of his visa application. The applicant advised the delegate that he had married whilst in Australia and had a child, provided their details, and claimed he and his family would find it difficult living apart if he were returned to Vietnam. The submission also identification documents for the applicant's wife and child, and evidence of their marriage. This was not provided to the delegate and is new information.
4. Under s.473DD(b) the applicant must satisfy the IAA in relation to any new information given by the applicant that either the new information was not, and could not, have been provided to the delegate before the decision was made, or, that it is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims. Additionally, under s.473DD(a), the IAA must be satisfied that there are exceptional circumstances to justify considering the new information.
5. The change in the applicant's family circumstances to which these documents attest was discussed in some detail at the SHEV interview and is not new information. The submission from the applicant's representative does not explain how the new information complies with s473DD. The applicant declared in the SHEV interview that he was married [in] January 2018, but this appears to be contradicted by the photos he has provided to the IAA of an event that took place on the same day that he has described as an engagement ceremony. The applicant has provided to the IAA a copy of his marriage certificate and photos of his wedding ceremony which indicate they were married [in] February 2019. It appears that at that time of the SHEV interview he was engaged to be married, but not married. This wedding occurred after the delegate had finalised the SHEV application and so I accept this information could not have been provided to the delegate.
6. Regardless, on the basis of the information he provided to the delegate, I have accepted that the applicant is the father of a child born in Australia and that he is in a spousal relationship with the mother of his child. The statements made by the applicant and his wife, the wedding certificate, and the photos of their engagement and wedding are all personal in nature, as are the documents attesting to the identities of the applicant's wife and child. However I consider the new information has very limited probative value in the context of the assessment of the applicant's claims for protection. I am not satisfied that there are exceptional circumstances to justify the consideration of this information.

Applicant's claims for protection

7. The applicant's claims can be summarised as follows:

- He was born in PQ in Kien Giang Province in Vietnam, is of Kinh ethnicity and is a practicing Catholic.
- He suffered severe domestic violence from an early age, as his biological father physically and verbally abused him and his mother. His father left them when the applicant was [a certain age] and he has since had no further contact with his father. A few years later his mother began a relationship with another man he now refers to as his step-father, and he too physically abused them.
- He and his mother fled PQ when he was [a certain age]. For the next two years he and his mother lived in [City 1] and were able to find sufficient work to subsist. His mother decided to send him to Australia in 2013 as she was getting older and was concerned that she could not protect him and support him much longer.
- Since he left Vietnam his mother has moved back to PQ and resumed living with his step-father. He is unsure whether his mother is being assaulted by his step-father, however it would not be safe for him to reside with his mother as he does not know what his stepfather would do if he returned.
- Two weeks after he left Vietnam authorities came to his mother's house to ask his whereabouts. They visited another time shortly after as they wanted to conscript him for military service. He will be prosecuted for having failed to undertake compulsory military service in Vietnam.
- He will be harmed as a result of his illegal departure from Vietnam. He will be interrogated, assaulted, prosecuted and imprisoned by Vietnamese authorities as he cannot provide them with information about the trip to Australia and does not want to implicate his mother for having organised his passage.
- His adverse profile with Vietnamese authorities will be worsened as he is a Catholic who has escaped and betrayed his country. He has a number of prominent religious-themed tattoos on his [body] that identify him as Catholic.
- His childhood experiences of domestic violence mean that the prospect of being detained and assaulted by Vietnamese authorities is unbearable.
- His mother has been told to take his name off the family registration book (Ho Khau) and if she does this he is worried he will have no access to identity documents in Vietnam. Vietnamese authorities will put him on a blacklist as he will be suspected to have sought asylum in a Western democratic country and this will make it impossible to live or work anywhere in Vietnam.
- He cannot stay with his mother, his education in Vietnam was interrupted, and he doesn't know where else he would stay or how he would survive.
- Life would be difficult living in Vietnam without his partner and child.

Factual findings

8. The applicant was born and continued to live in PQ in Kien Giang Province of Vietnam until [a certain age], at which point he and his mother moved to [City 1] where he stayed until his departure from Vietnam in 2013. He is a member of the ethnic Kinh majority in Vietnam, was a

practicing Catholic in Vietnam and continues to practice his religion in Australia. He has had no contact with his biological father [since] he was [a certain age], and he has [a number of] half siblings born to his mother from an earlier relationship. [Some] of his half-siblings live in Vietnam and one half sibling in Australia was also on the same boat that took the applicant to Australia.

9. The applicant completed primary school and was completed Grade [specified] at high school in Vietnam, up until his departure in 2013. He continued his studies in Australia completed high school to year [specified] in 2015 and quit studies in 2016 whilst studying Year [specified]. He has worked in [Occupation 1] in [Australia] since October 2016 and confirmed during the January 2019 SHEV interview that he remained employed as [Occupation 1].
10. He has never been issued with a national identity card or passport and remains registered as a member of his mother's household in her Ho Khau. He departed the country unlawfully as he bypassed official exit procedures when he left by boat in Binh Thuan Province in April 2013. He has claimed that he had little to do with his half-siblings, and that he was unaware that his [sibling] and [his sibling's partner] were going to be on the same boat. Given he and his sibling have the same mother and lived in the same city it is difficult to believe that it was a matter of extraordinary coincidence that the [siblings] caught the same bus from [City 1] to a different province and then left Vietnam on the same boat. I accept the applicant's account that he had little or no awareness of his mother's arrangements with regard to the journey; however the information before me indicates that his mother had almost certainly planned for the applicant, who was a minor at the time, to be accompanied by his adult sibling on the journey.
11. I accept that the applicant is a practicing Catholic and would be readily identifiable as such on account of his religion being declared in the household registration book (Ho Khau), his manner of practicing religion, and the fact that he has a number of prominent religious-themed tattoos on his [body].
12. The applicant married his wife in Australia and they have one child together.

Domestic violence

13. The applicant has claimed that he and his mother suffered frequent and severe mental and physical abuse at the hands of his biological father until he was [a certain age], and then, between the ages of [specified], from his step-father. The applicant indicated that neither he nor his mother ever reported the assaults to authorities. There is no independent evidence corroborating his account of these events, however I am mindful of the highly personal nature of this type of abuse and accept that there are many factors, such as stigma, shame and cultural norms, which work to inhibit the reporting of such conduct, and which can also lead victims to remain in the abusive relationships. I accept that these same factors, as well as his young age at the time of his 2013 Entry Interview, may have caused the applicant to be initially unwilling to disclose these circumstances when asked about his reasons for leaving Vietnam. I do not draw any adverse inference from the omission this claim during the Entry Interview.
14. I have found the applicant's description during the SHEV interview of his and his mother's treatment by his biological and step fathers to be consistent, credible and without apparent embellishment. The country information before me, including that provided by the applicant, confirms that domestic violence involving the abuse of women and their children is widespread in Vietnam, and that frequently the perpetrators are not reported or prosecuted.

I accept that the applicant and his mother were the victims of repeated incidents of domestic violence throughout his childhood, up until the age of [specified].

15. I note that the applicant has provided very limited evidence as to the severity and impact of the physical assaults he personally suffered. He has not claimed to have sustained any lasting or permanent physical injuries as result of the domestic violence he experienced in his childhood, and I am satisfied that this is the case. In the SHEV application the applicant has indirectly referred to the psychological effects of having been the victim of serious physical and mental assault for most of his childhood. In describing his fear of Vietnamese authorities he stated "*the threat of being detained and further assaulted is unbearable*". He did not mention this claim during the SHEV interview or elaborate on this fear. I accept that the applicant has had a past history of family violence trauma and may hold some subjective fear in this regard. However there has been no evidence provided by the applicant; either in the form of personal testimony, or independent, professionally qualified evidence; that would indicate he suffers from any ongoing mental health issues.

Adverse Profile in Vietnam

16. The applicant states that, [after] his departure from Vietnam, police officers attended his mother's house in [City 1] and queried his whereabouts and wanted to conscript him for military service. She told them that he had left Vietnam for good and they demanded he be removed from her Ho Khu. In the SHEV interview the applicant confirmed that they had attended his mother's house only once and that he was unsure how they knew he had departed Vietnam. He speculated that someone in his community may have reported his departure to authorities or that the visit to his mother may have been as a result of him being a student who had failed to attend school examinations. I note that the applicant's written claims clearly indicated that authorities visited his mother on multiple occasions and during the SHEV interview he declared that they had visited her in [City 1] only once. He did not provide any explanation for the apparent inconsistency. Regardless, given he was a minor who had and abandoned school after failing to attend school examinations, I am willing to accept that Vietnamese local police may have visited the applicant's mother on one occasion in June 2013 and that they were aware, either before their visit, or as a result of their visit that the applicant had departed Vietnam. Either way, I accept the applicant would be known to Vietnamese authorities as a person who is registered as a member of his mother's household, and who has departed Vietnam illegally.
17. The applicant has claimed that during their visit to his mother in June 2013 the police had also sought to register him for future military service. However, given he was [a certain age] at that time, more than [number] years away from conscription eligibility age, and noting his scant and inconsistent descriptions of the police visit to his mother, I find his claim in this regard to be highly speculative and unsubstantiated. Noting the very limited questioning during this visit, and the fact that no further attention has been paid to the applicant's mother with regard to his military service since that time, I am satisfied that the 2013 visit made by local authorities to his mother were related only to his circumstances in having left school and/or departed Vietnam. The information before me does not suggest that the applicant had an adverse profile with Vietnamese authorities, such that they would have had any other reason to have made enquiries about him in 2013.
18. During the SHEV interview the applicant confirmed that, in September 2016, after his mother had moved back to PQ, she had been approached by local authorities and that they had requested the applicant be removed from her Ho Khu. In May 2017 the applicant has provided a copy of his mother's Ho Khu with his SHEV application in which he is listed as a

member of her household and in the SHEV interview held in November 2018 the applicant reiterated that his mother had been asked to remove him, but did not suggest that he his mother had complied by removing him from her Ho Khau. The evidence before me indicates, and I am satisfied, is that the applicant remains registered as a member of his mother's household in her Ho Khau. The applicant did not indicate that his mother has had repeated visits, or any experiences of harassment from local authorities, or faced any penalties for having disregarded their request to remove the applicant from her Ho Khau. I am satisfied that any attention paid by local authorities with regard to the persons listed in the applicant's mother's Ho Khau relates only to their interest in ensuring the accuracy of their household registration records.

19. I do not accept that any of the applicant's mother's interactions with Vietnamese authorities subsequent to his departure from Vietnam are an indication that the applicant has been, is currently, or would be on return, a person of adverse interest to Vietnamese authorities.

Military Service

20. DFAT confirms that compulsory military service of a period between 18 and 24 months applies to all Vietnamese men between the ages of 18 and 25. I have considered the 1995 Canada Immigration and Refugee Board report provided by the applicant which indicated that persons as young as 16 may be eligible to register for military service. I put little weight on this information given that more than 20 years have elapsed since its publication, and on account of the fact that this provision is not mentioned in any of the more contemporary information before me (including DFAT 2017 report and the UK Home Office 2013 report). Regardless, at the time he departed Vietnam, the applicant had not reached an age at which he was liable for military service. He has not provided any evidence that he has subsequently been the subject of any order or summons to register for or complete military service and I am not satisfied that this has occurred. There are no indications suggesting that upon return to Vietnam, he would be perceived by authorities as a person who had fled Vietnam to evade military service. Nevertheless the applicant is now [a certain age] and I accept that, if returned to Vietnam, he may be liable to undertake a period of military service under Vietnamese law.

Area to which he would return

21. The applicant advised his mother returned to live with her husband in PQ in 2014 but stated that he would not return to his mother's household, and I accept this is so. The applicant has claimed he doesn't know where else he would stay, however I note that the applicant and his mother had lived in [City 1] for more than two years in the period immediately leading up to his departure, and he attended high school whilst there. He has confirmed that he has many members of his wider family, including a grandparent, siblings and aunts and uncles, who live in that city. His aunty had provided him and his mother with accommodation while they lived in [City 1]. I find that [City 1], where the applicant resided for a substantial period of time immediately prior to leaving Vietnam, and where he has substantial personal ties, is the area to which the applicant would return. I accept that, if returning to [City 1], the applicant would need to apply to register as a temporary resident in [City 1] as he is currently registered as a member of his mother's household in PQ.

Data Breach

22. The applicant's personal information (name, date of birth, nationality, gender, and detention details) was temporarily available for public access on the Department of Immigration's

website for a brief period in February 2014. This report may have been downloaded for distribution or republication. I am willing to accept that it may be inferred from such matters as the applicant being in immigration detention that he was seeking asylum.

Refugee assessment

23. 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

24. 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.

25. I have found that the area to which the applicant would return in Vietnam is [City 1]. I have accepted that the applicant was the victim of repeated incidents of domestic violence in PQ and that one of the perpetrators, his step-father is in a spousal relationship with his mother and that they now live together in PQ. While I accept that the applicant fears harm from his step-father, I note that the applicant and his mother lived apart from his step-father in [City 1] for a period of two years (2011-2013), and the applicant did not suggest that he or his mother have had any experiences of harm, threat of harm or harassment from his step-father during that period. The applicant has stated he has not had any contact with his biological father since he left the family and has not indicated he fears harm from this man. On the information before me, I am satisfied that, if he returned to Vietnam, the applicant would return to [City 1] and would not face a chance of harm from his step-father or his biological father.

26. The applicant is a practicing Catholic and he claims Catholics are treated badly in Vietnam and that those who participate in demonstrations to express their concern about this are arrested and tortured by the government. He gave an example of having avoided indicating his religion on his paperwork, where he could, as this would lead to discriminatory treatment. He did not specify what that discriminatory treatment involved, or whether he had personally experienced such treatment. The applicant stated that his mother insisted on declaring his Catholicism in the Ho Khu. If he returned to [City 1], the applicant would very likely regularly

attend public areas and events frequented by Catholics such as community events and Church ceremonies. I also accept that the applicant's [religious] themed tattoos may also make him recognisable as a Catholic.

27. The US State Department has observed that the Socialist Republic of Vietnam is an authoritarian state ruled by a single party, the Communist Party of Vietnam (CPV). The Department of Foreign Affairs and Trade (DFAT) 2017 Country Report on Vietnam reports there are approximately 6.7 million Roman Catholics in Vietnam (constituting 7% of Vietnam's 93.4 million people). While Vietnam's Constitution gives people the right to follow any religion, the treatment of religious groups varies widely across different areas of the country and is further dependent upon their relationship with the CPV.
28. Catholicism holds full government recognition and registration in Vietnam. DFAT reports the situation for Catholics in Vietnam has improved in recent years; the number of people joining the Catholic Church has increased, the government has approved the registration of new churches in central Vietnam as well as Hanoi and Ho Chi Minh City, and the Vietnamese government has at times permitted large religious gatherings of Catholics. Recent reporting from DFAT and the US State Department assess that religious observance and practice for recognised religions like Catholicism generally only becomes an issue when it is perceived to challenge the authority or interests of the CPV and its policies. Authorities continue to harass, intimidate and prosecute those involved in what it regards as 'unregistered activities'. The information before me indicates that, while there are certainly restrictions on the freedom of religious expression for some Catholics in Vietnam, a risk of harm is generally limited to individuals who are known to authorities to participate in or lead unauthorised religious activities, anti-government dissident activities and/or are persons who are leaders and organisers of political opposition. This analysis of the situation for Catholics in Vietnam is supported by the country information provided by the applicant.
29. The applicant is a Catholic who is a member of the ethnic majority Kinh, and who states he regularly attended Catholic churches in PQ and [City 1]. He did not specify whether those churches were registered with Vietnamese authorities. While I note that he has claimed that his mother's commitment to Catholicism was a factor in the conflicts between his mother and both his biological and step-fathers, he does not claim that he has ever experienced any issues in terms of official interference with his religious observance and practice. The applicant has not claimed that he has ever held a prominent position in his church, either in Vietnam or Australia. He did not mention having ever participated in unauthorised religious activities, or to have engaged in any form of Catholic rights activism that may have brought him to the attention of Vietnamese authorities. I note that, even in the less restrictive confines of Australia, there is no information suggesting the applicant has involved himself in any such activities with the Catholic community. There are no indications that, if he were returned to Vietnam that he would commence anti-government political activism or begin participating in unauthorised religious activities. I am satisfied that this would not be due to any fear of harm, but rather a lack of any genuine interest.
30. There is no information before me that indicates that Catholics who may be more visibly identifiable as such by the presence of religious [tattoos] are imputed to be activists or to hold particular political opinions, or that the mere fact that a person had religious tattoos would otherwise materially change their profile with Vietnamese authorities or the broader public. I note too country information indicates that tattoos are legal and are increasingly commonplace amongst Vietnamese youth. I am satisfied that, if he returned to [City 1], the applicant would very likely re-engage with his local, registered church as an ordinary Catholic

parishioner, in a manner consistent with past behaviour. I am also satisfied that he would not be prevented from doing so, and does not face a chance of harm on this basis.

31. The applicant has claimed that, as a Catholic, there are limitations on his career in certain fields, providing the example that he would be unable to join the Vietnamese police force. The US State Department 2017 country report confirms that CPV membership is a prerequisite to career advancement for nearly all government and government-linked organizations and businesses. However the same report observes that the economic diversification in Vietnam in recent years has made membership in the CPV less essential for financial and social advancement. I accept that the applicant may be unwilling or unable to join the CPV on account of his religious beliefs, and that he may also wish to have greater access to careers with government-linked organizations and businesses in Vietnam. However I am not satisfied that any educational or economic restrictions on Catholics, such that they exist, are to the extent that they would amount to significant economic hardship that threatens the applicant's capacity to subsist, or amounts to a denial of capacity to earn a livelihood of any kind. I am not satisfied that the applicant faces a real chance of harm on this basis.
32. The applicant fears he will be punished for having failed to undertake military service in Vietnam. He departed Vietnam years before he was eligible to be called for service and, for the reasons given earlier, I am satisfied the applicant would not be considered by Vietnamese authorities to be a person who had fled Vietnam to evade military service. I am not satisfied he faces a chance of harm on this basis. Nevertheless I accept that, if he returned to Vietnam, the applicant may now be obliged to register to undergo two years of military service. He did not indicate that he feared any harm as a result of being enlisted and completing a period of military service.
33. DFAT indicates that while all eligible Vietnamese males must register with the military, in practice very few are called up to serve for the full two year military service period. Further to this, DFAT and the UK Home Office also indicate that there are a range of exemptions to military service, such as people engaged in tertiary study or employed in certain professions that are essential to the economy. However, in the event that the applicant was not exempt, I am not satisfied that the applicant would seek to be a conscientious objector or otherwise not comply with his obligations. I accept the applicant is a practicing Catholic, but I am not satisfied that he otherwise holds anything more than low level religious or political opinions beyond his faith and I do not accept he would be outspoken about any views he may hold. For the same reasons, I do not accept that he would seek to avoid military service on the basis of conscientious objection or any other grounds. I am not satisfied that the applicant faces a real chance of harm on this basis.
34. The applicant left Vietnam by boat in April 2013 without a passport and bypassed Vietnam's official exit procedures. I accept that if he returned, he would need to provide his personal details in order to apply for a temporary travel document, and in doing so, the circumstances of his departure would be readily apparent to Vietnamese authorities, as would the fact that he was returning from Australia after having unsuccessfully sought asylum.
35. DFAT confirm that there are penalties in place for Vietnamese nationals that depart the country unlawfully, including those such as the applicant who leave the country without a passport and without having undergone official exit procedures. I accept the applicant may be liable to pay a fine of between VND2 million and VND10 million (approximately AUD120-600). DFAT advise that Vietnamese law prohibits 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration'. However, DFAT advise they are unaware of any cases where this provision has been used against failed asylum seekers. DFAT advised in June

2017 that there is no information to suggest that people known or believed to have sought asylum in other countries are mistreated on return by Vietnamese authorities on this basis.

36. DFAT assesses that longer term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people smuggling operations, and reporting and monitoring is confined to returned political activists, and not those that have only sought asylum in another country. DFAT assesses that persons who paid money to organisers of people smuggling operations are generally viewed by the government as victims of criminal activity rather than as criminals facing the penalties allowed in the law for departing Vietnam illegally.
37. The applicant provided information (November 2016 and February 2017 ABC News articles) which relate claims by returned asylum seekers claiming that Vietnamese authorities detained and prosecuted returning asylum seekers for having left illegally and/or organised the boat journey. In the February 2017 article one woman describes having been detained for three months, and having been beaten whilst in detention. She reports that she was released and fled Vietnam again and was later sentenced to three years in prison for having illegally left the country. DFAT's June 2017 report noted that several individuals who were on board vessels returned to Vietnam in 2016 were arrested, subject to long-term detention, investigation and prosecution. DFAT understands this was conducted only in relation to those persons suspected of involvement in organising people-smuggling operations.
38. There are credible reports of certain returnees being detained, jailed, beaten, and mistreated on return to the country, including dissidents, activists, people smugglers, and members of certain minority ethnic groups. Noting the applicant was a minor at the time of his departure, and considering his circumstances upon return to Vietnam, I am not satisfied that the applicant would have a profile with Vietnamese authorities as an anti-government dissident, or as a person suspected to be involved in the organisation of a people smuggling operation. The information before me also does not indicate that Catholics are targeted for differential treatment by authorities when returning to Vietnam. I am not satisfied there is a real chance of the applicant being subject to long-term detention, investigation and prosecution.
39. Nevertheless, considering the manner of his departure and return to Vietnam, I accept the applicant may be briefly detained and interviewed by airport authorities to gather information about his identity and/or obtain information relevant to their investigations into people smuggling operations. The applicant has not provided any evidence that he is affected by a physical vulnerability that that would heighten his risk of harm during a short interview. The applicant has indirectly suggested that he has psychological vulnerabilities that may triggered or exacerbated by being detained by Vietnamese authorities, however I am not satisfied, on the information before me, that this is the case. Regardless, there is no credible evidence before me that a brief period of detention for questioning of this nature involves a real chance of being beaten, mistreated or otherwise seriously harmed.
40. I am not satisfied the applicant faces a real chance of harm as a returning asylum seeker. I am also not satisfied that the potential disclosure of his basic personal details in the data breach would materially change these circumstances or otherwise give rise to a real chance of harm.
41. The applicant has claimed that he feared harm upon return to Vietnam on the basis that he would be unable to obtain paperwork to register and would not know how to survive in Vietnam. I accept that the applicant did not complete schooling in Vietnam and does not have any employment history or professional networks in Vietnam and may face some difficulties in establishing himself. I accept his claim that his schooling in Vietnam was interrupted, however

I note that he completed High School in Australia up to [a certain year] and chose to leave school to take up a trade after completing [some study] in [a certain] year. Since that time he has worked continuously in a skilled trade as a [Occupation 1]. I accept that the applicant may be worried about how he would establish himself in [City 1], having left as a [specified age], nevertheless he would be returning to Vietnam in substantially different circumstances. He would be returning as an adult, married man who has lived independently in an overseas country for more than six years and who is free to live in a separate household to his parents.

42. I accept that networks of patronage and nepotism may play a more significant role in finding employment in Vietnam than is the case in Australia. I have serious concerns with the veracity of the evidence provided by the applicant as to the number of family members he has living in Vietnam, the contact he has had with them, and the degree to which they have previously supported he and his mother in [City 1]. I have concerns that the applicant has sought to downplay his capacity to draw on family connections in the event he returned to Vietnam. Regardless, even if it does eventuate that the applicant's family in [City 1] are unable or unwilling to assist him, the evidence does not indicate that the situation in Vietnam is such that a person such as the applicant would be unable to find any employment and accommodation in [City 1] without family connections.
43. The information before me suggests that the applicant would not be 'blacklisted' and would be able to obtain documentation necessary to register himself as a resident in Vietnam in order to access health and other services and to obtain employment. Considering the circumstances of the applicant and the country information concerning the current socioeconomic circumstances in Vietnam, I am not satisfied that the capacity of the applicant to subsist would be threatened, or that he faces a real chance of harm on this basis.
44. The applicant has stated that he cannot imagine returning to Vietnam without his wife and child and I accept that the prospect of living in a different country to his wife and young child would be very difficult. I note that there is no information before me indicating that the applicant's wife and child would be unable to accompany the applicant to Vietnam to reside with him, or that any period of separation would be permanent in nature. Regardless, there is no information before me that would indicate that these circumstances meet the relevant thresholds for either persecution or serious harm as provided in section 5J.
45. I am not satisfied the applicant faces a real chance of harm as a Catholic with visible religious tattoos, as person who was abused as a child, as person who has an Australian wife and child, as a person who left Vietnam illegally without completing military service, or as a returning asylum seeker from Australia whose details were disclosed on the internet.

Refugee: conclusion

46. I am not satisfied the applicant has a well-founded fear of persecution. 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

47. 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

48. 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.

49. I accept that, as a consequence of being removed from Australia to Vietnam, the applicant may be briefly detained and questioned by Vietnamese authorities in order to confirm his identity and/or gather information relevant to their investigations into people smuggling operations. As noted above, the applicant is an able-bodied adult and does not have any physical or other vulnerability that would heighten the risk of harm during a short period of detention during processing at the airport. The information before me does not indicate that the conditions in which the applicant would be briefly held or the circumstances in which he would be interviewed about his departure from Vietnam would amount to cruel, inhuman or degrading treatment or would be undertaken with this intent.

50. I accept that the applicant may face difficulties in the event that he were to live in a different country to his wife and young child, however I am satisfied that these circumstances would not result in the applicant suffering significant harm; in that he would not be arbitrarily deprived of his life, have the death penalty being carried out on him, be subjected to torture or cruel or inhuman treatment or punishment, or be subjected to degrading treatment or punishment.

51. I have otherwise concluded above that the applicant does not face a real chance of any harm on the other bases claimed. As 'real risk' and 'real chance' involve the application of the same standard, I am also not satisfied that the applicant would face a real risk of significant harm for the purposes of s.36(2)(aa) on these grounds.

Complementary protection: conclusion

52. There are not substantial grounds for believing that, as a necessary and foreseeable consequence of being returned from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

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

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

- (1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:
 - (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of *well-founded fear of persecution*, see section 5J.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
- (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.

- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.

- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
- (b) conceal an innate or immutable characteristic of the person; or
- (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):

- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
- (b) the persecution must involve serious harm to the person; and
- (c) the persecution must involve systematic and discriminatory conduct.

- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:

- (a) a threat to the person's life or liberty;
- (b) significant physical harassment of the person;
- (c) significant physical ill-treatment of the person;
- (d) significant economic hardship that threatens the person's capacity to subsist;
- (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
- (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
 - (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
 - (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

36 Protection visas – criteria provided for by this Act

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
 - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
 - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
 - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
 - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
 - (a) the non-citizen will be arbitrarily deprived of his or her life; or

- (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

Protection obligations

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.