



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA19/06504

Date and time of decision: 8 May 2019 10:39:00

K Juttner, 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 Vietnamese citizen. The applicant arrived in Australia in June 2013 with his fiancé, who he married in December 2013. The applicant subsequently separated from his wife. They have two children who are not included in this application. On 9 May 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 25 March 2019, a delegate of the Minister for Immigration (the delegate) refused to grant the visa on the grounds that Australia did not owe protection obligations in respect of the applicant. She found that the applicant had interactions with the Vietnamese police during Vietnamese National Day and in relation to registration of his motorcycle, but that he does not have a well-founded fear of persecution for reasons of these interactions. She also accepted that the applicant left Vietnam illegally, would be returning to Vietnam as a failed asylum seeker, and that he may be briefly detained and issued with a fine, but that this would not amount to serious harm.

Information before the IAA

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

Applicant's claims for protection

4. The applicant's claims in his SHEV application can be summarised as follows:
 - His parents borrowed money from a hui scheme and in around 2007 – 2008 the creditors came to his house to recover the debt and broke the applicant's arm.
 - He went out on Vietnamese National Day on 2 September and was pushed by police and hit in the back with a rubber bullet.
 - He was stopped by police who checked his motorcycle papers and accused him of either stealing the motorcycle, receiving stolen goods or failing to transfer ownership. He was arrested and detained for a few hours and was beaten by police.
 - He is a Catholic. He was a practising Catholic in Vietnam and attends church in Australia.
 - The applicant left Vietnam because he was fed up with the Communists. He would not be able to live under the Communists if he returned to Vietnam.
 - He assisted the people smugglers by helping maintain the engine, navigate the boat and transfer people from smaller boats onto the larger boat and will be regarded as a people smuggler if he returns to Vietnam.
 - He fears that his personal information has been disclosed to people in Vietnam because his personal details were released on the Department's website in early 2014.
 - He will be regarded as a traitor if he returns to Vietnam because he came to Australia.
5. At his arrival interview in July 2013, and at interviews with the Department in September and October 2013, the applicant also raised the following:
 - He was unemployed in Vietnam.

- His parents and grandparents were strongly against the Communist government and had problems because they had worked for the South Vietnamese government. His grandparents left Vietnam after the change of government but his parents were arrested and badly suppressed.
- He was stopped by security people when he was driving his truck and had to blackmail them on many occasions. If he had no money, they would take his driver's licence.

Refugee assessment

6. 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

7. 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.
8. The applicant has provided a copy of his Vietnamese citizen identity card and driver's licence and I accept that he is a Vietnamese national and that Vietnam is his receiving country.
9. At his arrival interview on 11 July 2013, the applicant claimed that his reason for leaving Vietnam was that he and his wife were unemployed and had come to Australia to find a job. He gave evidence that his mother had asked if he wanted to take part in the trip to Australia with his [brother]. The applicant did not raise any other claims for protection in his arrival interview. When asked if anything had happened to him in Vietnam, he said no. He also said that he had never been arrested by the police or security organisations.
10. At the SHEV interview, the delegate referred to the reasons the applicant gave for leaving Vietnam in his arrival interview, and the applicant gave evidence that he said what he had because "he did not dare tell the authority about something that happened over there, because he was worried they will be arrested by them over there". Later in his SHEV interview, he stated that he did not disclose a lot of things to the authorities because he fixed the oil and got the engine working on the boat trip to Australia. He went on to claim that he

helped the people smugglers and this could cause problems if the authorities find out, but this does not explain why he did not raise his claims at his arrival interview. The applicant raised a number of claims several months after his arrival interview when he was given two further opportunities to provide reasons about why he could not return to Vietnam. He was interviewed and gave further statements in September and October 2013 and raised claims about his problems with police over a stolen motorbike, with a lender over a debt, and in relation to his truck licence, as well as his grandparents' and parents' problems with the Communist government in Vietnam. Therefore, it appears that the applicant had no concerns about raising claims only several months after his arrival interview. Further, the applicant was put on notice by the arrival interviewer about the purpose of the interview, and that inconsistencies between the evidence at the arrival interview and later interviews or statements may raise doubts over the credibility of what he had said. I do not find the applicant's explanation for providing the reasons for leaving Vietnam that he did compelling and I am not satisfied that the applicant's responses to the delegate adequately explains the failure to raise the later claims at his arrival interview.

11. The applicant claims that he was involved in two incidents with police in Vietnam. In his statutory declaration included with his SHEV application made on 9 May 2017 (2017 statutory declaration), the applicant claimed for the first time that he was involved in an incident with police on Vietnamese National Day, which is a Vietnamese public holiday on 2 September. He claims that he was standing by the side of the street with his wife, that it was very crowded and there was traffic congestion, and the police fired rubber bullets at them from behind. When asked by the delegate why police would be firing bullets on a national day of celebrations, the applicant said he didn't know. I have had regard to the country information on Vietnam in the 2017 DFAT report¹ that the police in Vietnam, who are controlled by the Ministry of Public Security, are generally effective at maintaining public order. Security and law enforcement personnel are highly visible throughout Vietnam, particularly during politically sensitive occasions or potential demonstrations.
12. While the applicant has not make any claims that he or the people present at the National Day celebrations were involved in any sort of demonstration or protest against the Government, I accept that police may have been present at the National Day celebrations. I accept that the applicant was out with his wife on Vietnamese National Day, and am willing to accept that the police fired rubber bullets as claimed. However, I am not satisfied on the evidence before me that the applicant came to the adverse attention of the police or the Vietnamese authorities in relation to his attendance at the national day celebrations.
13. The applicant also claims that he was stopped by police when he was riding his motorcycle in Vietnam, and that they checked his papers and then arrested, detained and beat him. He first raised this claim on 9 September 2013, two months after his arrival interview. He claimed that he bought a motorbike during the time he was a truck driver, which according to evidence in his SHEV application about working as a delivery driver, suggests that it happened between January 2009 and June 2010. He claimed that he paid 300,000 dong penalty for receiving stolen goods, but not the 1 million dong penalty for being a thief because he left the country. The applicant has provided inconsistent evidence about the reason he was stopped by police, claiming in September 2013 that the police accused him of buying stolen goods, but stating in his October 2013 statement and in his 2017 statutory declaration that the police accused him of stealing the motorbike. He gave a third version at his SHEV interview, claiming that the police accused him of not transferring the bike into his name, and he did not make any claims that police had accused him of either stealing the motorbike or of

¹ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597.

buying a stolen bike. The SHEV interview evidence suggested that the motorbike had not been transferred into the applicant's name, which seems contrary to the evidence in his statutory declaration and in the September 2013 statement, which suggested that he showed police the registration documents but there were concerns over their authenticity.

14. He also gave inconsistent evidence about how long he was detained for, claiming in his September 2013 statement that he was held by police for two days and one night but at his SHEV interview he said that he was in the police station for two hours. When asked about the inconsistency with his earlier evidence, he denied that he had said that he was held for two days, which is clearly contradicted by his earlier statement. Further, his evidence about the injuries that he sustained during his detention has changed over time. He did not raise any claims that he was injured by police in his September 2013 statement, but in his 2017 statutory declaration he claimed that the police broke his tooth, and he expanded on this further at his SHEV interview by saying they broke his tooth, as well as smashing the back of his hand and smashing his face to the table.
15. After considering the applicant's evidence about this incident, and the number of inconsistencies and differences in his account, I have considerable concerns about the credibility of this claim. While he may have been stopped by police when riding his motorbike, I do not accept that he was or arrested, detained or fined, or that he was beaten or sustained any injuries.
16. Given my findings about the applicant's claims regarding the two incidents involving the police, I am not satisfied that the applicant came to the adverse attention of police when he was in Vietnam, or that he is regarded as a person of interest to the Vietnamese authorities. I am satisfied that the incident on Vietnamese National Day was isolated and random, and that the chance of a similar incident occurring in the future is remote. I am not satisfied that there is a real chance that the applicant will face harm in relation to these claimed past incidents if he returns to Vietnam, or of similar incidents occurring in the future.
17. The applicant claims that he was attacked by creditors in Vietnam. He first claimed that his mother had a debt and that they were harassed by the lender in his 23 October 2013 statement, that at times they were beaten and his arm was broken, and that his father was beaten and mildly injured. He provided further details in his 2017 statutory declaration that his parents borrowed money to carry out their fishery business, and that the creditors and bad people in the community came to their house many times to steal and cause damage, and that once they beat up the applicant and broke his arm. He gave further evidence at his SHEV interview that his mother borrowed money from a hui scheme, and that the owner of the hui scheme hired members from a gang who came and hit the applicant until his arm was broken. He gave evidence at his SHEV interview that the creditors came to his house in 2007 or 2008 and there has been no further contact with them after that time. The applicant is in contact with his family in Vietnam and is not aware of his family being visited by members of the hui scheme or creditors since he came to Australia. He does not know if money has been repaid. He claimed that his father has run away to the countryside, but his sister and brother still live in the same town.
18. While there are some differences and omissions in the applicant's evidence about whether they were beaten many times or on one occasion; whether he was beaten by the lender/creditor or gang members hired by the creditor; and whether his father was also injured, I am willing to accept that the applicant's mother or parents borrowed money and that the applicant and his family may have been harassed and injured by or on behalf of the creditors in Vietnam. The applicant made claims in his statutory declaration that his parents

were arrested, but has not provided any details about the reason for the arrest or involvement by the police. I find it implausible that the police arrested the applicant's parents in relation to a debt entered into between private parties, and do not accept this claim.

19. The applicant made claims in his statutory declaration that he lived under intimidation and in fear from these people until he left Vietnam. After considering the applicant's evidence, and having regard to the length of time that has passed since this incident took place in 2007 or 2008, the fact that he and his family have not had any subsequent contact or difficulties with the creditors, and that the applicant has not made any claims that the debt is still outstanding, I do not accept that there has been any contact with the creditors for many years. I am not satisfied that the applicant would face a real chance of harm from his parents' creditors if he returned to Vietnam.
20. The applicant also claimed that he would not be able to live under the Communists if he returns to Vietnam. At his SHEV interview, he claimed that he was fed up with the Communists and that this is why he left Vietnam. The applicant also made claims in his October 2013 statement that his parents and grandparents were strongly against the Communist government and had problems with the government because they had worked for the South Vietnamese government. He also claimed that his grandparents left Vietnam after the change of government but that his parents were arrested and badly suppressed. The DFAT report provides that Vietnam is one of the world's few remaining one-party communist states. DFAT also provides that the 1954 Geneva Accord divided the country into two separate republics – the Republic of Vietnam (South) and the Democratic Republic of Vietnam (North) – with decades of conflict between the republics gradually intensifying and resulting in the Vietnam War which ended in April 1975. The Communist Party of Vietnam (CPV) is the only legal political party in the country. In practice, political expression is not tolerated against the CPV, the Government or its policies and the Government has used specific laws to curb dissent. After considering the country information, I am willing to accept that the applicant's grandparents and parents may have had problems with the Vietnamese government, but note that they occurred decades ago. I accept that the applicant may be dissatisfied with the Communist regime in Vietnam and hold anti-Communist views. However, the applicant has not made any claims that he has been politically active in either Vietnam or Australia or that he has openly criticised the Government, the CPV or its policies. He has not indicated that he intends to be politically active or openly criticise the Government or CPV in the future if he returns to Vietnam. He has not provided any other details about why he would be unable live under the Communist regime, or any difficulties that he faced for this reason when he lived in Vietnam. The applicant also did not mention his parents' and grandparents' problems with the Communist regime when making his claim about being unable to live under the Communists, and he has not made any claims that he came to the adverse attention of the Vietnamese authorities because of his parents' and grandparents' political views. In these circumstances, I am not satisfied there is a real chance of the applicant coming to the adverse attention of the Vietnamese authorities for his political views or the political views of his grandparents or parents, or otherwise facing harm from or as a result of the regime.
21. The applicant has not made any claims in his SHEV application or SHEV interview to fear harm in relation to unemployment or the lack of economic opportunity in Vietnam, but as he raised this claim at his arrival interview, I have considered it. In his SHEV application form, he stated that he was employed continuously in the period between July 2001 and June 2010 as [various occupations], and that between 2010 and May 2013 he was unemployed. In Australia, he has been working [since] August 2015, which was shortly after he left immigration detention. When asked at his SHEV interview about how he had supported

himself during his period of unemployment in Vietnam, he gave evidence that food and drink is cheap in Vietnam and he did not have to pay for rent or electricity, which is cheap in any event. The DFAT report provides that Vietnam introduced new minimum wage standards effective from 1 January 2017, with four regional minimum wages currently ranging from VND2.58 million to VND3.76 million (AUD153 – 224) per month, and that it is described as a development success story by the World Bank. Economic reforms in 1986 transformed the country from one of the poorest in the world at that time to 'low middle income status' over a period of 25 years, and at the end of 2015, per capita income is around USD2,100. In light of the applicant's experience in Vietnam and Australia in a number of different professions, and the country information about the economic situation in Vietnam, I am not satisfied there is a real chance that the applicant would be unable to obtain employment or support himself financially if he returns to Vietnam.

22. The applicant also raised a claim in his September 2013 statement that when working as a truck driver, the security people would always stop his truck and on many occasions the applicant had to blackmail them. It seems the applicant may have meant that he was the person being blackmailed by the security people, or that he had to bribe them, as he also claimed that if he had no money, they would take his driver's license. According to his SHEV application form, he worked as a delivery driver between January 2009 and June 2010. He has not indicated who the "security people" were and whether they were from the authorities or private individuals; why they stopped and blackmailed him; and the amount of money taken. This claim is vague and lacking in detail, and the applicant did not raise this claim at his arrival interview, SHEV application or SHEV interview. In these circumstances, I do not accept that the applicant was blackmailed by security people, and I am not satisfied that the applicant will face a real chance of harm from any security people if he returns to Vietnam as claimed.
23. The applicant has consistently claimed that he is a Catholic. At his SHEV interview, he gave evidence that he attended a Catholic church in Vietnam but was not involved in any other Catholic activities. He has continued to attend church in Australia. After considering the applicant's evidence about attending church in Vietnam and Australia, I am satisfied that he is a Catholic. In his September 2013 statement, the applicant claimed that he was harassed for being a Catholic in Vietnam, and gave examples that if he wants documents certified, they refuse to do it, and that his parents live in Nghe An and that some people that they know were stopped from going to church, and were injured. He has not provided any other details about who refused to certify his documents or the reasons for the refusal, and in the absence of any further information, I am not satisfied that this amounts to harassment for being a Catholic. He has also not provided details about the people who were injured or the church that they were stopped from attending but I note that the applicant lives in [another location] and not in Nghe An.
24. The applicant has not indicated whether he will continue to practise his Catholic faith if he returns to Vietnam, but I accept that he is likely to continue to do so. According to the 2017 DFAT report², the Vietnamese Constitution states that all people have the right to freedom of belief and religion, and the right to follow any religion or to follow no religion. It also states that all religions are equal before the law, and the state must respect and protect freedom of belief and religion. However, these rights are conditional and the Penal Code establishes penalties for practices that, in the Government's view, undermine peace, national independence and unity. Roman Catholics constitute seven percent of Vietnam's total

² DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597; US Department of State, "International Religious Freedom Report for 2016 - Vietnam", 1 August 2017, OGD95BE927128.

population (approximately 6.7 million) and is one of 14 distinct religions that hold full government recognition and registration. The country information indicates that the situation for Catholics has continued to improve in recent years, and that Catholics are able to practise freely at registered churches, with bibles and other religious texts readily available in cities and towns. Religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the CPV and its policies. There is no information before me that the applicant intends to worship at an unregistered church or to engage in any religious activities that would be perceived as a challenge to the authorities or to the state, such that he would be of interest to the authorities for that reason. There is no evidence before me that the applicant was harmed for practising his Catholic faith and I am not satisfied he was harassed for that reason. Considering this and the country information, I am not satisfied that the applicant faces a real chance of harm on the basis of his Catholic faith on his return to Vietnam, now or in the reasonably foreseeable future.

25. The applicant claims that he is worried and scared for his family because the Department disclosed his personal details and the details of his family on the internet. The delegate's decision indicates that information about the applicant's name, date of birth, nationality, gender, details of when he was detained and if he had other family members in detention was unintentionally released on the Department's website in January 2014. I accept that the applicant's details, and details of family members in detention, were disclosed on the Department's website, but not the details of his family members in Vietnam. There is no information before me to suggest that details about the applicant's or his family members' claims for protection were included in the information that was released. There is no evidence before me to suggest the Vietnamese authorities or people living in Vietnam were aware of the data breach or were able to access the personal information of the applicant and his family members in detention. However, even if this information has come to the attention of the Vietnamese authorities or people in Vietnam more generally, it would reveal no more than that the applicant had travelled to, been detained in and possibly sought asylum in Australia, which would be apparent as a result of the manner of his return to Vietnam in any event. For the reasons discussed below, I do not accept that this will give rise to a real chance of any harm. I am not satisfied that the publication of the applicant's and his family's details will otherwise lead to a real chance of harm.
26. In his statutory declaration, the applicant claimed that he will be regarded as a traitor if he returns to Vietnam because he came to Australia. I accept that the applicant departed Vietnam illegally by boat, and travelled to Australia where he sought asylum. The applicant made further claims at his SHEV interview that he will be considered to be a people smuggler if returns to Vietnam because on the boat journey to Australia, he helped fix the engine and to navigate and drive the boat, and transferred people from small boats onto the bigger boat. The delegate put to the applicant that the Vietnamese Government considers people smugglers to be the people who get paid for transporting people, and who recruit passengers from different parts of Vietnam to take the journey. When asked why the Vietnamese government would consider him to be a people smuggler, the applicant reiterated the help he provided on board the boat in relation to the oil and getting people into the boat, but did not make any claims that he received any money from the people smugglers or the passengers travelling on the boat with him. He gave evidence at his arrival interview that his mother arranged for his travel to Australia and paid 30 million dong. After considering the applicant's evidence, I am not satisfied that he is a people smuggler or the Vietnamese Government would consider him one.
27. The delegate considered whether the first applicant will face harm on return to Vietnam because he departed illegally and sought asylum in Australia, and I will do the same. DFAT has

no information to suggest that people known or believed to have sought asylum in other countries are mistreated on return by the Government. The evidence before me does not suggest that returning asylum seekers face harm from other people in Vietnam. Some returnees may be held for a brief period upon return to Vietnam for the purpose of interview by officials from the Ministry of Public Security, to confirm their identity where no documentation exists, or to obtain information relevant to the investigation of people smuggling operations, although it is generally those suspected of organising or assisting with people smuggling who are detained.

28. Under Article 91 of the Penal Code, it is an offence to flee abroad or defect to stay overseas with a view to opposing the people's administration. 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, and a Memorandum of Understanding (MOU) signed between the Australian and Vietnamese governments in 2016 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'. DFAT assesses that Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon return under Article 21 of the Decree on Sanctions against Administrative Violations in the Sector of Security and Social Order. A fine of between VND2 million and VND10 million (approximately AUD120-600) is specified for leaving Vietnam without a passport or equivalent or departing without undergoing official exit procedures. Further, DFAT assesses that persons who paid money to organisers of people smuggling operations are viewed by the Government as victims of criminal activity (people smuggling), rather than as criminals facing the penalties allowed in the law for illegally departing Vietnam. As indicated above, while some returnees can be briefly detained and interviewed, DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations.
29. I accept that the applicant will be returning to Vietnam as a person who has sought asylum in Australia. I have not accepted that he is a people smuggler, and I am not satisfied there is a real chance that he would be perceived to be a people smuggler by the Vietnamese authorities, or that he would be regarded as a traitor for coming to Australia. I am not satisfied on the evidence before me that the applicant is a person of any adverse interest to the Vietnamese authorities, or that he faces a real chance of any harm on the basis that he sought asylum in Australia.
30. I accept that the applicant left Vietnam illegally. The country information refers to some returnees being briefly detained and questioned, but this appears to be for the purpose of identity verification or obtaining information about people smuggling and the information does not suggest this to be the case for all illegal departees. The applicant has a Vietnamese identity card and documentation about his identity, and I have not accepted that he was involved in people smuggling. I accept that he may be briefly questioned at the airport on his return and fined in respect of his illegal departure, but I am not satisfied that he would be held for anything other than a brief period while the questioning takes place, or that there is a real chance of him being further detained or imprisoned. There is no information before me that the applicant would be unable to pay any fine that may be issued to him. I am not satisfied that a brief period of questioning and being issued with a fine amounts to serious harm in his circumstances. I am not satisfied that the applicant faces a real chance of serious harm if he returns to Vietnam on the basis of his illegal departure. In any event, any punishment received as a result of his illegal departure would be the consequence of the

application of a law that the evidence indicates is non-discriminatory on its face and in its application and enforcement, and is not persecution as defined.

31. I have considered the applicant's claims as a whole. Taking his claims together, I am not satisfied that the applicant faces a real chance of persecution now or in the reasonably foreseeable future, from the Vietnamese police, his parents' creditors or security people; for his Catholic or his or his family's political beliefs; as a result of the Communist regime, because he would be unable to support himself in Vietnam; or because he left Vietnam illegally, made a claim for asylum in Australia and his personal data was released on the department's website, any combination of these matters or for any other reason.

Refugee: conclusion

32. 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

33. 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

34. 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.
35. I accept that the applicant may be held and briefly interviewed on his return to Vietnam, and that he may be issued with a fine because of his illegal departure from Vietnam. I am not satisfied that being questioned briefly and fined constitutes significant harm as defined for this applicant. There is no evidence to suggest that the applicant faces a real risk of experiencing treatment that will involve the level of pain, suffering or humiliation contemplated in the definitions of cruel, inhumane or degrading treatment or punishment or torture, or that there is otherwise a real risk of him suffering significant harm as defined.
36. Beyond this, I have found that there is not a real chance of the applicant experiencing any harm if he were to return to Vietnam. The Court has held that real chance in the refugee context has the same standard as real risk in a complementary protection assessment³. Having regard to the country information and the reasoning above, I find that there is no real

³ *MIAC v SZQRB* (2013) 210 FCR 505.

risk that the applicant will suffer significant harm in connection with any of the matters raised, alone or cumulatively.

Complementary protection: conclusion

37. 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.