



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA19/07133

Date and time of decision: 8 October 2019 13:46:00

J Maclean, 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 an referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He arrived in Australia as an unauthorised maritime arrival in June 2013. In September 2017 he lodged a valid application for a Safe Haven Enterprise Visa (SHEV).
2. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 4 September 2019 on the basis that the applicant was not a person in respect of whom Australia has protection obligations.

Information before the IAA

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

Applicant's claims for protection

5. The applicant's claims can be summarised as follows:
 - He left Vietnam because he was mistreated by the local authorities, and believes he will be mistreated by them if he returns.
 - In early 2012 Vietnamese authorities forced the sale of his family's land and home. They protested against them, and the home was destroyed because they did not give the authorities money they had demanded. Authorities continued to threaten them even after they had moved.
 - He believes he will be harmed or mistreated if he returns to Vietnam because of his previous activities against the authorities, especially because he is a Catholic who has engaged in the church protesting against the government confiscation of our lands, and because the Catholic church in Ha Tinh has taken to the street to protest the government for their support of Formosa company, who discharged toxic chemical into the sea killing marine life.
 - Those who have been absent illegally from Vietnam, like him, have been suspected of engineering the home community to demonstrate against the government.
 - Since his release from immigration detention he has participated in activities with [Organisation 1]. The Vietnamese government know about his activities in Australia, and his grandmother in Vietnam told him the local police came to their home looking for him, and threatening to send him to a re-education centre if he were to return home. He fears returning to Vietnam.

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 claims to have been born in the Ha Tinh Province of Vietnam, and to be of Kinh ethnicity. Although the department requested he provide documentary evidence of his identity, nationality or citizenship for inspection, other than documents provided to him by the Australian government, no documentation has been provided to support his identity. Despite the lack of such evidence, the applicant has consistently claimed to be a Vietnamese citizen, and all interviews with the department have been conducted in the Vietnamese language. I am satisfied he is a citizen of Vietnam, that he is of Kinh ethnicity, and Vietnam is the receiving country for the purposes of this assessment.

9. The applicant arrived in Australia in June 2013. In his initial interactions with the department he claimed he was born in [date], and therefore that he was under 18 years of age when he arrived in Australia. An Age Assessment interview was conducted on 28 June 2013, and I have listened to the audio of that interview. The assessing officers noted it was difficult to establish a firm timeline due to the applicant’s inconsistent responses and differing versions of events, and they formed the view the applicant was over 18 years of age, and recorded his date of birth as [date]. An Arrival interview was conducted in two parts, on 1 and 6 July 2013. A written record of the Arrival interview and the audio of Part 2 is in the information before me. During Part 2 of that interview the applicant continued to claim he was born in [date], however at the SHEV interview, when asked his date of birth, the applicant said it was [date]. I accept the applicant was born in [year].

10. I accept the applicant’s broadly consistent evidence regarding his early life and family in Vietnam. His parents divorced and left the family home when he was in Year 5 at school, and he continued to live with his grandmother in the Ha Tinh Province. He has not seen his parents since that time. He left school before completing Year 7 of school, and sometime afterwards went to [Country 1] to work for two years. During the SHEV interview he said he cannot remember what year he went to [Country 1], but he was about [age] years of age at the time. He has no siblings.

11. During the Arrival interview the applicant was asked why he left Vietnam, and his response is recorded as 'because I feel that the government policies were not what I wanted them to be, things such as high taxes and difficult economic circumstances at home. Land taxes are too high and my grandmother cannot afford to pay the taxes'. He went on to say his grandmother asked him to write a letter to the ward authority to request them to reduce land taxes but the request was not approved, and when his parents divorced and left the family home they left behind some debts, and if he stayed at home people would come and look for him and ask him to pay the debts. When asked how he was able to afford to make the trip to Australia his response is recorded as 'I heard from my grandmother that she had to put up the land for security with the bank', and when asked whether there are any other reasons he left the country he said 'no'. In regard to what would happen to him if he returned to Vietnam the applicant referred to his parents' debtors coming looking for him, and to his grandmother not being able to repay the money she borrowed and she would lose her land. Towards the end of the interview he is reported to have said that the pay in Australia is high, and he was told in a few months after arrival he can look for a job to have money to support himself and his family. When asked 'Were you or any members of your family involved in any activities or protests against the government?', 'Were you ever arrested or detained by the police or security organisations?' and 'Did the police and security or intelligence organisations impact on your day to day life in your home country?' the applicant's response is shown as 'No' to each question.
12. With regard to the claims made during the Arrival interview: that his parents incurred debts, and if he is returned to Vietnam their debtors may come looking for him; and that his grandmother put up the family land up for security with the bank, the applicant did not repeat these claim in his SHEV application, or during the SHEV interview, or provide any information to support the claims. I note the applicant was assisted by a migration agent to prepare his SHEV application, and at the commencement of the SHEV interview the delegate warned the applicant of the importance of raising all his claims and providing evidence in support of those claims, and that he may not have another opportunity to do so. In the circumstances described, I consider the applicant's failure to mention these claims during the SHEV application process is significant, and leads me to believe the claims are not genuine. I do not accept the applicant's parents have outstanding debts, or that the family land was used as security by his grandmother, or that the applicant would be harmed on return to Vietnam for the reasons claimed.
13. The applicant claims he is a Catholic. At the Arrival interview the applicant is reported to have said he had 'No religion'. When asked about his religion during the SHEV interview he initially said he has 'no religion', however, when questioned about the SHEV application, which indicates his religion as Catholic, he said 'I am no religion', but that [Organisation 1] introduced him and said come along. He went on to say he is not a Catholic, but believes in the doctrine, and goes to church about every two to three weeks. When asked if he practices the religion in any way he said he goes to church when he needs some spiritual help. When asked if he had considered converting to the religion he said he had considered it. The delegate asked why he had not converted, and he said in Australia, even if you are not Catholic you can come to church, and that Catholics in Vietnam are second rate citizens, and that is why he was scared and could not join in in Vietnam. When asked if he had been baptised the applicant said he was baptised about three weeks ago. The delegate then asked why he did not consider himself a Catholic if he has been baptised, and why he would say he has no religion, and the applicant indicated it happened not really long ago, he did not know that if you are baptised you are a Catholic, and from now on he will consider himself a Catholic. He also referred to talking to the priest who said you can come to the church without doing anything. He said the priest told him he should study a course before the baptism ceremony, but he said he did not want to go to

the course, and even though he does not know much about Catholicism he still wanted to be baptised, and learn a little bit more after that. When asked to describe the baptism ceremony he referred to the priest giving him a piece of paper in Vietnamese to read, and he used 'special water' on his forehead, and saying something.

14. I consider the applicant's evidence about religion during the SHEV interview was inconsistent, extremely vague and entirely unconvincing. Other than suggesting the Communists do not like Catholics, he provided no details of any incident where Catholics were of interest to Vietnamese authorities, and which founded his purported fears. I am not satisfied the applicant had any genuine desire to engage in the Catholic religion whilst he was in Vietnam, or that any fear of harm prevented him from doing so. In relation to activities in Australia, I consider a person who had recently participated in a baptism ceremony would understand they were entering into that religion, and they would identify themselves as such. The applicant did not appear to have any significant knowledge of Catholic terminology or practices, and other than his oral evidence, no documentary evidence was provided to support he has had any involvement in the church in Australia, including regarding being baptised shortly before the SHEV interview. I can accept a number of the applicant's friends in Australia are Catholics, however, I do not accept he has attended a Catholic church in Australia, that he has been baptised, that he is a Catholic, or that he would engage in any religious activities if returned to Vietnam, including Catholic activities.
15. In his SHEV application the applicant claims he left Vietnam because he was mistreated by the local authorities, who forced the sale of his family's land and home in early 2012. He claims he protested against them, and they destroyed the home because they did not give the authorities money they had demanded, and although he and his grandmother moved to their relative's home the authorities continued to threaten them. During the SHEV interview the applicant said that in 2012 the government wanted to broaden the road and his family home was affected by the plan. He and his grandmother tried to resist, and stayed in the home, but were abused for doing so, and the property was damaged. They sought assistance from the local government but were told they need to listen to the government, and eventually the land was confiscated without any compensation being paid and they moved to live elsewhere. The applicant claims he had many clashes with the authorities over them trying to take the land and home, and he shouted at them a lot to show his frustration. Although a few other houses were affected by the road project only the applicant protested, and the others just kept their mouths shut. When discussing this issue the delegate asked the applicant if he had ever been arrested or convicted of any crime. The applicant said he was arrested in 2012, but not for long, because there was no evidence against him and they had to release him. He claims he was held from morning to night, during which he was slapped on the face, and told the land belongs to the government, and not to fight against them. In contrast to the information in the SHEV application, indicating authorities forced them to sell the home in early 2012, during the SHEV interview the applicant said his grandmother moved out of the home in 2013. At the SHEV interview he provided internally inconsistent evidence regarding whether they were given any money or compensation for the home, initially indicating they were given some money, but immediately after stating that because he was against the government they just confiscated it. In his SHEV application the applicant claims that even after they moved from the home Vietnamese authorities continued to threaten them. During the SHEV interview he said they kept coming to make their life difficult, and even after he left Vietnam they continued to harass his grandmother, every two weeks since he left Vietnam.
16. Country information reports that land use is a contentious issue in Vietnam. All land is formally owned by the state, which issues land use rights to citizens but retains significant power over land use, including through compulsory acquisition powers. The use of land is often subject to

dispute due to poorly defined property rights and the potential for corruption. These disputes can lead to protests and, occasionally, violence, and individuals or groups who protest against the Government, for example protesting against land confiscation, or openly criticise the CPV are likely to attract adverse attention from authorities, however, the treatment from authorities generally depends on the individual's level of involvement.¹

17. I note the applicant's evidence contained inconsistencies regarding when the land was confiscated, when he and his grandmother moved out of the home, and whether any money was received in compensation. Despite that, taking into account the country information regarding compulsory acquisition of land, it is plausible, and I accept the applicant's family home was acquired by the government. I consider it highly likely the inconsistencies have resulted because the applicant seeks to bolster his protection claims, and that the information given in the SHEV application, given more contemporaneously to the events in issue, is more likely to be accurate. I accept the applicant's family land was confiscated and he and his grandmother moved from the land in early 2012, and that his grandmother was paid an amount of compensation for the land. I also accept the applicant may have been displeased, and voiced his opinion on the issue by shouting at the authorities, and that he was detained once for that reason in 2012, and mistreated during that detention. The applicant did not describe being detained on any other occasion, which I consider would have been the case had he continued to protest against, or shout at, the authorities, and I find that he did not continue to do so after the land was acquired. In addition, I consider the alleged level of interest authorities had in the applicant after he departed Vietnam, visiting his grandmother every week for about six years, is out of all proportion with the low-level activities the applicant described. Considering the nature of the applicant's protests, being a young individual who shouted at the authorities on a number of occasions, I consider it entirely implausible the applicant would have been of continued interest to authorities after the land had been confiscated and he and his grandmother had moved to alternate accommodation. I do not accept the applicant has been of interest to Vietnamese authorities since he departed Vietnam, as a result of the land confiscation or his activities surrounding that, that they have visited his grandmother looking for him, or that he would be of interest if returned to Vietnam now or in the reasonably foreseeable future.
18. In the applicant's SHEV application, in response to the question regarding whether he thinks he will be harmed or mistreated if returned to Vietnam, the applicant refers to his previous activities against the authorities, especially because he is a Catholic who has engaged in the church protesting against the government confiscation of our lands, and because the Catholic church in Ha Tinh has taken to the street to protest the government for their support of Formosa company, who discharged toxic chemical into the sea killing marine life. Taking into account my finding that the applicant is not a Catholic, and that he made no reference during the SHEV interview of attending protests organised by the Catholic church either in Vietnam or Australia, I am not satisfied the applicant has done so, and I do not accept that he has.
19. The applicant claims that since being released from immigration detention, he moved to [City 1] where he has participated in events organised by [Organisation 1], including demonstrations. He expressed concerns that Communist sympathisers or pro-Vietnamese government people may have taken photographs at the demonstrations, and he will be considered a traitor.

¹ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212; DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

20. Along with his SHEV application he provided a letter from [Ms A], [Official 1], [Organisation 1], dated [July] 2017. [Ms A] indicates her letter is based on her interactions with the applicant in her capacity as [Official 1] of [Organisation 1], and she does not appear to have any first-hand knowledge of the experience of the applicant or his family in Vietnam. Notably the letter suggests the applicant's family received 'different treatment' from Vietnamese authorities for raising concerns about land issues, but provides no information about that treatment, nor exactly who was affected. She appears to be unaware that the applicant claims to have had no contact with his parents for many years when she suggests his family were forced to make the difficult decision to let their only son escape. In addition, she refers to the applicant's family being fishermen affected by the 2016 Formosa environmental disaster, who cannot afford to live, however the applicant made no mention of having contact with any family in Vietnam other than his grandmother, or to his family members being fishermen who were so affected. Also notable is [Ms A's] reference to seeing the applicant at [functions], but making no reference to attendance at protests, and to her reference in the second last paragraph to a person who is not the applicant, suggesting the community supports '[applicant]' in his integration in Australia, which leads me to believe this is a form letter containing information not specifically relevant to the applicant. I afford the letter little weight in my assessment.
21. The applicant provided a number of photographs with his SHEV application, purporting to show him attending various events with [Organisation 1], including a conference in 2015, a festival in [City 1] in 2016. One photograph is labelled 'with the [officials] in [City 1] (2015)', and the applicant appears to be wearing traditional Vietnamese dress in a number of the photographs. Additional photographs of activities in Australia were provided at the SHEV interview. A number of those photographs [completing tasks], along with a group of other people. He claims they were taken at a demonstration he attended on 22 September 2018 in front of [a location] in [City 2]. He claims to have attended a number of protests, and said normally over 1000 people attend such demonstrations, and he is always waving the flag and in front of everyone. I consider the applicant's evidence at the SHEV interview on this issue was extremely vague. When asked how many times he had participated in demonstrations he simply said 'many times' and said he could not recall every time, or the particular dates he did so. His response was similarly vague when asked the reason for the demonstrations, mentioning 'prisoner of conscience', but not specifying any particular person of interest. He said whenever [Organisation 1] demonstrated he would join in, that they told him the purpose of the demonstrations, but he could not remember. Although the applicant suggested he would be able to remember the details of other demonstrations if he saw photographs from those, his phone is broken and he is unable to recover the photographs. I accept the applicant has attended various events organised by [Organisation 1], including an event in [City 2] on 22 September 2018 which may have been a protest. Considering his evidence overall, although I can accept the applicant may hold some views against the Vietnamese government, I consider his participation with the organisation is primarily of a social or cultural nature, rather than politically based, and other than one protest in September 2018, I do not accept he has attended other political demonstrations, or that he has otherwise spoken out against the Vietnamese government, or that he has played any leadership or organisational role with [Organisation 1].
22. DFAT reports that Vietnam's Constitution enshrines rights with regard to freedom of speech, assembly, association and demonstration; however, these are restricted by a number of 'national security' provisions within Vietnamese law. In practice, the Government does not tolerate political expression against the CPV, the Government or its policies. The Government has used specific laws to curb dissent, such as Article 79 of the Penal Code ('overthrowing the State'), Article 88 ('conducting propaganda against the State') and Article 258 ('abusing rights to democracy and freedom to infringe upon the interests of the State'), all of which in practice

take precedence over constitutionally enshrined rights. There is information before me that certain political and human rights activists have been targeted by the government, such as prominent and regular bloggers who publish anti-state information, those who spread anti-state propaganda on Facebook, and leading land rights activists. However country information does not suggest that all activists are at risk of being targeted, but rather that individuals who are known to authorities as active organisers or leaders of political opposition are at high risk of being subject to intrusive surveillance, detention, arrest and prosecution. DFAT assesses that low-level protesters and supporters often feel intimidated by police presence, and are sometimes detained and released the same day by authorities.² Country information does not suggest this occurs at every protest, or against all low-level supporters.

23. Taking into account the applicant's evidence in the context of the country information, I consider that even if Vietnamese authorities were to become aware of the applicant's participation in the activities noted in Australia, including what may have been a protest in September 2018, I am not satisfied he would be considered other than a low-level participant, which country information indicates would not lead to him having an adverse profile on return. Other than the applicant shouting at authorities in Vietnam, which the applicant described as protesting, there is nothing in the evidence before me to indicate the applicant previously engaged in any political activities in Vietnam, that he has published any anti-government information online, or that he intends to engage in such activities if returned to Vietnam. I am not satisfied the applicant would be politically active or outspoken on return to Vietnam, and I do not consider the reason for not doing so is out of any fear of the consequences, but rather because he does not have any genuine interest in political activism. I am not satisfied the applicant has a well-founded fear of persecution on the basis of his political opinion if returned to Vietnam, now or in the reasonably foreseeable future.
24. Overall, I am not satisfied the applicant had a profile of interest to Vietnamese authorities, or any other person, prior to his departure from the country, and I do not accept there is a real chance of him being harmed, now or in the reasonably foreseeable future, on return to Vietnam.
25. During the SHEV interview the applicant claimed his grandmother passed away [in] June 2019, aged [age] years, and that her death resulted because authorities put her under so much pressure that she collapsed and passed away. As noted above the applicant claims Vietnamese authorities have visited his grandmother every two weeks since he departed Vietnam in 2013. During the SHEV he said they visit anytime they feel like looking for him, and saying that they know her grandson is against them and saying things against the Communists. He also claims they had his photographs and knew he joined [Organisation 1], that they threaten to put her in jail if he does not return home, and pushed her, but did not torture her. I have not accepted Vietnamese authorities visited the applicant's grandmother as a result of his protests regarding confiscation of their land. Even if Vietnamese authorities were aware of the applicant's participation in activities in Australia and had photographs of the events, the nature of the activities he has participated in are primarily community events rather than political protests, and taking into account my finding that he is a low-level participant, and not an organiser, I am not satisfied he would be of interests as a result of his participation in those activities whilst in Australia. Although I can accept the applicant's grandmother passed away in June 2019, taking into account my findings that the applicant was not of adverse interest at the time he departed Vietnam, and that he would not be of interest on return to Vietnam for any reason, and that there is no credible evidence to support that the applicant's grandmother's death was related

² DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED850AD4597; US Department of State, "Country Reports on Human Rights Practices for 2017 - Vietnam", 20 April 2018, OGD95BE927332

to mistreatment by Vietnamese authorities, I do not accept Vietnamese authorities were responsible for her death.

26. Included in the review materials is a copy of a letter to the applicant from the Department of Immigration and Border Protection, dated 12 March 2014, regarding an 'Unauthorised access to personal information' ('data breach'). The letter advises the applicant about the unintentional release of a report on the department's website, which enabled access to some personal information about people who were in immigration detention on [date] for a short period of time. The letter confirms the applicant was in immigration detention on [date], and that the information it was possible to access were the applicant's name, date of birth, nationality, gender, details of detention (when and where detained, and the reason) and if there are other family members in detention, but did not include any details regarding the applicant's contact information or any information about his protection claims.
27. I accept the applicant was in immigration detention on [date] and that he was affected by the data breach, and it is possible the information was accessed, including by Vietnamese authorities. I consider the information would reveal no more than that the applicant had possibly applied for asylum in Australia, which will be apparent in any case as a result of the manner of his return to Vietnam, and which for reasons discussed below, I do not accept will give rise to a real chance of serious harm. I am otherwise not satisfied the applicant faces a real chance of any harm on return to Vietnam as a result of the data breach.
28. The applicant's SHEV application indicates he left Vietnam legally from [a location], using a Vietnamese passport, which he threw into the sea whilst travelling by boat from [Country 2] to Australia. However, this is not consistent with the applicant's evidence during the Arrival and SHEV interviews, which is broadly consistent in claiming he paid a people smuggler to take him over the border to [a country], then travelled on to [Country 1], where he got on a plane to [Country 2], and then went by boat to Australia. During the Arrival interview he said a passport was provided by the people smuggler to travel to [Country 2], but it was a fake passport. I accept the applicant's account given during interview, and that he departed Vietnam illegally and travelled to Australia where he sought asylum. The applicant also claims that people who have been absent illegally from Vietnam, like himself, have been suspected of 'engineering the home community' to demonstrate against the government. I consider this statement is a claim that the applicant fears harm for being imputed with anti-government views because he left Vietnam illegally and has been absent for a long time.
29. I have considered whether the applicant is at risk of harm on return to Vietnam as a returning asylum seeker. I accept the Vietnamese government may be aware the applicant sought asylum in Australia as a result of the manner of his return to the country. Information from DFAT indicates that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the Vietnamese *Penal Code 1999*. However, recent information from DFAT is that they are unaware of any cases where this provision has been used against failed asylum seekers. Current information is that returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. Moreover, DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum. Although there are credible reports of some returnees being held for a brief period upon return for the purpose of interview by Ministry of Public Security officials, to confirm their identity where no documentation exists, DFAT assesses that long-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 who have only sought asylum in another country.³ There is country information before me that some individuals have been imprisoned on return from Australia. However, the information suggests this was not because they were failed asylum seekers, but rather because they committed criminal offences such as people smuggling or inciting others to flee the country, were known political or religious dissidents or activists, or members of ethnic minorities.⁴ The information before me does not support that returnees are viewed suspiciously by the Vietnamese government, or assumed to hold anti-government views, because they left Vietnam, illegally or otherwise, or as a result of spending time in Australia. The applicant is not a member of an ethnic minority, and I am not satisfied he would have a profile of interest on return, including as an anti-government dissident, such that there is a real chance he would be at risk of harm on that basis, including being imprisoned and subjected to the conditions in a Vietnamese prison.

30. 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 (regarding 'Violations of the regulations on exit, entry and transit') of the Decree on Sanctions against Administrative Violations in the Sector of Security and Social Order. A fine of between VND2 million and VND10 million (approximately AUD120-600) is specified for leaving Vietnam without a passport or equivalent. Notwithstanding this, 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. 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.⁵
31. As the applicant departed the country illegally I accept he may be briefly detained and interviewed on return to Vietnam and may be issued with a fine. There is no information before me that the applicant has any particular vulnerability such that he would suffer harm as a result of a short period of detention, even taking into account the country information reports that prison conditions in Vietnam are harsh,⁶ nor that he would be unable to pay any small fine that may be issued to him. I am not satisfied a brief period of detention, being interviewed on arrival in Vietnam, and being issued a fine constitutes serious harm in this case. I am not satisfied the applicant faces a real chance of serious harm if he returns to Vietnam, on the basis of his illegal departure, now or in the reasonably foreseeable future. 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 its application and enforcement. It is not persecution as defined.
32. I am not satisfied on the evidence before me that the applicant would face a real chance of harm on return to Vietnam as a result of his illegal departure or as a returning asylum seeker.
33. I am not satisfied the applicant faces a real chance of persecution on return to Vietnam, now or in the reasonably foreseeable future, whether his claims are considered individually or cumulatively.

³ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

⁴ DFAT, "DFAT Vietnam Country Information Report", 31 August 2015, CISEC96CF13212

⁵ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

⁶ DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

Refugee: conclusion

34. 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

35. 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

36. 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.

37. I am satisfied the applicant may be briefly detained and interviewed on return to Vietnam, and he may be issued with a fine as a result of his illegal departure from Vietnam. I am not satisfied being briefly detained, including in poor prison conditions, interviewed and fined constitutes significant harm as defined. There is no evidence to suggest the applicant faces a real risk of the death penalty for any reason, or will be arbitrarily deprived of his life or tortured during or as a result of this process, or that there is an intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation, such that it can be said he will face a real risk of cruel or inhumane treatment or punishment or degrading treatment or punishment.

38. I have otherwise found there is not a real chance the applicant will suffer harm on return to Vietnam, now or in the reasonably foreseeable future, for any reason, including as a result of his history and experiences in Vietnam, for any actual or imputed political opinion, or as a returning asylum seeker, including because his personal information was released in a data breach. As a 'real chance' equates to a 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm, for the same reasons.

Complementary protection: conclusion

39. 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.