



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA20/08690

VIETNAM
IAA reference: IAA20/08691

VIETNAM
IAA reference: IAA20/08692

Date and time of decision: 22 October 2020 12:01:00
J Maclean, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- Applicant 1 is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of Applicants 2 and 3, the IAA remits the decision for reconsideration with the direction that:

- they are members of the same family unit as Applicant 1, and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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 applicants (the applicants) are a family, consisting of a husband and wife and one child, respectively Applicant 1 (IAA20/08690), Applicant 2 (IAA20/08691), and Applicant 3 (IAA20/08692). Applicant 1 and 2 claim to be Vietnamese citizens, and arrived in Australia as unauthorised maritime arrivals. Applicant 3 was born in Australia. The applicants made a combined application for Safe Haven Enterprise Visas (SHEVs), submitted on 8 January 2016. Applicant 1 and 2 make claims for protection, and advance claims on behalf of Applicant 3.
2. A delegate of the Minister for Immigration refused to grant the visas on 12 January 2017. In summary, the delegate accepted Applicant 1 and 2 are Catholics, that they had departed Vietnam unlawfully, and had been subject to a data breach by the Department of Immigration and Border Protection. However, the delegate did not accept there was a real chance or real risk they would be harmed on return to Vietnam for reasons relating to their religion or imputed political opinion, because of their unlawful departure, returning as failed asylum seekers, the data breach, or Applicant 3's birth outside Vietnam. The delegate also did not accept Applicant 3 would be harmed on return to Vietnam as a result of being born in Australia.
3. On 17 May 2017 the IAA affirmed the delegate's decision not to grant the applicant a protection visa. The decision was appealed to the Federal Circuit Court of Australia, and [in] December 2019 the Court dismissed the application. The applicants appealed to the Federal Court of Australia, and [in] August 2020 the Court quashed the IAA's decision and remitted the matter for redetermination according to law.

Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act)(the review material).
5. On 1 October 2020 the IAA received an email from the applicants' representative, attaching a submission (the 2020 IAA submission) and a number of country information reports. To the extent the submission reiterates the applicants' claims or takes issue with the delegate's decision, I do not consider it is new information and I have had regard to it.
6. Provided with the 2020 IAA submission are three letters of support. The first is a letter from a Chaplain at the Vietnamese Catholic Community in [State 1], dated 18 September 2020, and relating to Applicant 1 and his family living in [City] until March 2020, and their regular involvement with Sunday worship. The second letter is from the President of the Vietnamese Community in Australia/[deleted] Chapter, dated [September] 2020, and refers to Applicant 1's membership of the [State 1] Chapter from September 2014 until March 2020 and attendance at events including peaceful rallies. A photograph of Applicant 1 at such a rally [in] July 2018 is attached with the letter. The third letter is from a [State 1] Chapter representative of Viet Tan dated 24 September 2020, and among other things provides information about Applicant 1's participation in activities with the Viet Tan, including becoming a member in 2018. Although it is submitted this is not new information, but rather additional information about claims that were before the delegate, it is suggested the information could not have been provided to the Minister, and therefore it should be included in the review. The specific information provided was not before the delegate, and is new information. I am satisfied the letters and photograph could not have been provided to the delegate, as they are dated after the decision, and a

significant amount of the information relates to events occurring after the delegate's decision and that there are exceptional circumstances to justify considering it.

7. The 2020 IAA submission also refers to a number of country information reports that were not before the delegate and are new information. Firstly reference is made to DFAT's December 2019 Country information report for Vietnam, a copy of which was also attached.¹ Given that the 2019 DFAT report was published after the date of the delegate's decision I am satisfied it could not have been provided to the delegate before the decision was made. It is submitted that given it has been four years since the Delegate's decision the updated country information should be considered in assessing the current risk of harm on return to Vietnam. I am also satisfied there are exceptional circumstances to justify considering it. Secondly, the submission refers to a number of reports from 2013, to support that at that time police took action against even peaceful protestors, including arresting some participants. It is not apparent this information could not have been provided to the delegate before the decision was made, nor is it personal information in the relevant sense. It is submitted this information should be considered 'because that indicate the context of the Applicant's risk of participating in anti-China protest generally in 2013 in Vietnam, in which the Delegate and the IAA previously have failed to take into consideration'. There was other information before the delegate regarding the Vietnamese government not tolerating protests regarding China's territorial claims over Vietnamese islands, even though the protests were not aimed at Vietnam's government, and reports of people being arrested for participation. The applicant has not satisfied me either of the s.473DD(b) factors are met, or that there are exceptional circumstances to justify considering these reports.
8. The footnotes of the 2020 IAA submission also refer to 'Human Rights Watch World Report 2013, 31 Jan 2013', to support that the Vietnamese government suppresses freedom of expression and association and persecutes those who question government policies. Contrary to the *IAA Practice Direction for Applicants, Representatives and Authorised Recipients*, a copy of which was sent to the applicants' representative, a solicitor and migration agent, after the referral in September 2020, along with other information about the IAA, a copy of the information has not been provided with the submission. I have decided not to accept this new information.
9. On 5 February 2017 the applicants' representative, at that time, sent an email to the IAA, and attaching a submission (the 2017 IAA submission) and a number of country information reports. The 2020 IAA submission indicates the 2017 IAA submission is withdrawn, and the 2017 submission will not be considered in relation to the applicants' claims. It is not clear if it was the representative's intention to also withdraw the country information provided with the 2017 IAA submission, consisting of online media reports relating to the treatment of Catholics in Vietnam, dated from 2011 to 2016, and a media report from 2016 regarding an incident where pollution was responsible for killing fish. That information was not before the delegate, and is new information. All the reports pre-date the delegate's decision. The submission does not address the s.473DD(b) factors, and the applicant has not satisfied me either of those factors are met. There is other more recent information from credible sources before me regarding the treatment of Catholics in Vietnam, and the April 2016 Formosa environmental disaster, and I am also not satisfied there are exceptional circumstances to justify considering this information.
10. On 11 April 2017, pursuant to s.473DE of *the Act*, the IAA invited Applicant 1 to attend an interview to provide information relating to his claim to have participated in protests since arriving in Australia. Applicant 1 attended the interview with the IAA by video conference on 19

¹ Department of Foreign Affairs and Trade, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

April 2017, during which he provided further details about his attendance at events in Australia, including a number of protests and prayer masses and the reasons for attending those events, and showed the IAA reviewer a number of photographs relevant to the events. Having listened to the IAA interview, I am satisfied the new information provided by the applicant during the interview is credible personal information that may have affected consideration of the applicants' claims. Given the extensive amount of new documentary evidence that has been provided about Applicant 1's political opinion and activities in Australia, and that the information provided during the IAA interview is significant for assessing the credibility of the applicant's claims on those issues, I am satisfied there are exceptional circumstances to justify considering the IAA interview.

11. After the IAA interview, on 19 April 2017, the applicants' representative sent an email to the IAA. Attached to the email are three photographs purporting to show Applicant 1's attendance at a protest in May 2016. One is of Applicant 1 and one other person standing next to a sign in Vietnamese and English, the English portion stating 'prays For VIETNAM'S Coastal Survival 31.5.2016'. Another is of Applicant 1 and two other people holding signs, one of which states [deleted]. Another is of Applicant 1 holding Applicant 3 and the former South Vietnamese flag, and standing with Applicant 2 [in] May 2016. A further collage of five photographs was attached to the email, which purports to show how protesters are treated by police in Vietnam, and shows a number of people apparently being apprehended by people in uniform, and some of those people having injuries. The photographs were not before the delegate and are new information. It is asserted this new information was not provided to the delegate because the applicants, although they had assistance of a migration agent to prepare their SHEV application, did not have ongoing representation, and they were not advised about what it was important to say during the interview, and they did not know Applicant 1's attendance at protests would assist the case, and no representative was present at the SHEV interview with them. I note, however, that even if this was the case it was the applicant's responsibility to raise claims for protection and provide evidence of those claims. Nevertheless, in relation to the three photographs of the applicant/s, I am satisfied they are credible personal information that may have affected consideration of the applicants' claims. Moreover, given the potential probative value of these documents, I am also satisfied there are exceptional circumstances to justify considering those photographs.
12. With regard to the collage, none of the photographs therein are dated, nor is there any indication who took the photographs, where they were taken, the reason for the event, or why the people are being apprehended or mistreated. Presumably the photographs have been provided to support that there were protests in 2016 regarding the Formosa disaster. Of note, there is other information before me from credible sources supporting those who protested in 2016 in relation to the Formosa disaster were beaten and arrested by police. The applicant has not satisfied me either of the s.473DD(b) factors are met in relation to this information, nor am I satisfied there are exceptional circumstances to justify considering it.
13. On 28 September 2020 the applicants' representative provided a further email to the IAA, which attaches 'photo evidence of the applicant's participation in protests and Viet Tan activities and [Social media] posts with English translation'. The photographic evidence relates primarily to Applicant 1's attendance at various events, and includes the date of each event, from November 2015 to April 2019, and a description of the event. Hyperlinks to various websites have also been provided with several of the images, however no explanation of the significance of the hyperlinks has been provided. The *IAA Practice Direction* specifies that hyperlinks to publicly available documents are not acceptable. I have not accepted these hyperlinks. The [Social media] posts are from an account using Applicant 1's first and middle name, and are dated from April 2018 to September 2020.

14. The IAA received a further email from the applicants' representative on 12 October 2020, attaching a statutory declaration from Applicant 1, dated 9 October 2020 (the October 2020 statement), and associated attachments. The attachments include a copy of Applicant 1 and 2's statement of claims submitted with the SHEV application and dated 8 January 2016 (the 2016 statement), a handwritten document in Vietnamese purporting to be the text of a speech Applicant 1 gave at an event [in] April 2016 and English translation, copies of various affidavits provided in the Federal Circuit Court of Australia proceedings in relation to the first IAA decision, the birth certificate of Applicant 1 and 2's child born on [Date], and a photograph of the front page of a Vietnamese newspaper dated [November] 2019, which includes a photograph of a group of people attending an event, including Applicant 1. Annexures to the affidavits include transcripts of a portion of the SHEV interview, and of the IAA interview. One of the affidavits is from Applicant 1, dated 10 July 2019, in which he explains he had some difficulty accessing a DVD of his [April] 2016 speech, and it only became available to him in late May or early June 2017, and that his previous representative provided only four photographs to the IAA, despite him giving her more photographs. The 2016 statement, and two of the photographs referred to above, were before the delegate, and are not new information. However, the remaining information, including Applicant 1's October 2020 statement and attachments, the photographic evidence, and the information regarding [Social media] posts, was not before the delegate and is new information.
15. The October 2020 statement also contains a number of claims that were not before the delegate, and are new information. Applicant 1 claims he attended Viet Tan training and seminars and became a member of the Viet Tan in 2018, and that he started 'blogging activities on [Social media] on about June 2018' that are critical of the Vietnamese government, and has continued 'to date'.
16. With regard to the photographic evidence, [Social media] posts, the October 2020 statement and attachments, and the new claims referred to above, although some of the events evidenced by the new information, or described in the new claims, occurred prior to the delegate's decision, the majority of the new information related to events that occurred after the delegate made the decision. Overall, I am satisfied the information is credible personal information that may have affected consideration of the applicants' claims, and given the potential probative value of such documentary evidence, I am satisfied there are exceptional circumstances to justify considering this information.
17. In the October 2020 statement Applicant 1 makes a further claim regarding his son's death in Australia in 2015 not being registered with Vietnamese authorities in the 15 days required by Vietnamese law. He claims he is likely to face 'issues' registering the death because of the delay, and his profile as an activist in Australia. This claim was not before the delegate and is new information. No explanation has been provided as to why this claim was not, and could not, have been made prior to the delegate's decision. The claim that Applicant 1 has not registered the 2015 death of his child with the Vietnamese authorities presents as personal information and is capable of being believed, but no country information has been provided to support the claim the applicants would face 'issues' in such circumstances, and I am not satisfied there are exceptional circumstances to justify considering this information.
18. Applicant 1 also made an additional claim relating to his third child (SN), born in Australia in 2018, that if returned to Vietnam he will be unable to register SN's birth because of the 'one-to-two child policy' in Vietnam, and the family would face official discrimination, be unable obtain government work or a promotion, have to pay fines for non-compliance, be unable to move into urban centres, and SN would not be able to go to school or gain employment without identity documents. There were claims before the delegate regarding inability to register Applicant 3's

birth with Vietnamese authorities on return to Vietnam and resulting difficulties. As SN was born after the delegate's decision it is unsurprising the claims specific to her were not in issue at the relevant time. Applicant 1 indicates his SHEV application was subject to judicial review at the time of SN's birth, that SN was not included on that application, and he requests the IAA include her in this review process. The IAA can only review fast track applicants referred by the Department of Home Affairs. As SN is not one of the referred applicants I am unable to include her as an applicant or consider claims relating specifically to her.

19. With regard to the 'one-to-two child policy' claim, and the purported impact on the applicants more generally, as noted above, SN was not born at the time of the delegate's decision, and I am satisfied this claim could not have been made before the delegate's decision. Other than Applicant 1's assertion regarding the impact of the policy in Vietnam regarding the number of children a family has, no country information has been provided to support the policy is presently in effect in Vietnam, that it would apply to their particular circumstances, or how it would apply. I am not satisfied there are exceptional circumstances to justify considering this claim.
20. The delegate referred to the 2015 US Department of State report on Human Rights Practices for Vietnam, and I have obtained the more recent version of that report, published in March 2020.² Several years have elapsed since the delegate made the decision, and I consider it important to make reference to the updated version of the document, reflecting the present situation in Vietnam, and I am satisfied there are exceptional circumstances to justify considering this information.

Applicants' claims for protection

21. Applicant 1 and 2 have made claims for protection, and advance claims on behalf of Applicant 3, their minor child.
22. The applicants' claims are contained in the review material, and the information subsequently given to the IAA. The claims can be summarised as follows:
 - Applicant 1 and 2 are Vietnamese citizens. Applicant 3 was born in Australia.
 - They are practising Catholics, and Applicant 1 and 2 were discriminated against by the Vietnamese government because of their religion.
 - Applicant 1 is the child of a former soldier of the South Vietnamese Army, and this affected his father and the family, as they were given the lowest rank in society, were discriminated against, and their activities were monitored.
 - Applicant 1 and 2 are perceived to be opposed to the government because of Applicant 1's participation in a peaceful protest in Saigon in 2012.
 - Whilst in Australia Applicant 1 has participated in protests, prayer masses, and commemorative events, and been actively involved in activities with the Viet Tan since 2015, and in 2018 joined the group. Applicant 2 and 3 have also been in attendance at some events.
 - The applicants fear if returned to Vietnam they would be harmed by Vietnamese authorities on account of their Catholic religion, because Applicant 1's father is a former

² United States (US) Department of State, 'Country Reports on Human Rights Practices for 2019 – Vietnam', 11 March 2020, 20200312104733

member of the South Vietnamese Army, as a result of their participation in activities in Australia that would be deemed to be against the Vietnamese government, including Applicant 1's membership of the Viet Tan, the data breach where some of their personal information was made available on the Department of Immigration website, and their illegal departure from Vietnam and return to Vietnam as failed asylum seekers.

- They also indicate that their son is buried in Australia and they will not be able to attend his gravesite if returned to Vietnam, and that this is very important to them as Catholics, and that Applicant 3 does not have any Vietnamese identity documents, which will cause problems in Vietnam, including access to education, work and healthcare.

Refugee assessment

23. Under s.36(2)(a) of the Act a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee. Section 5H(1) of the Act provides that a person is a refugee if, in a case where the person has a nationality, he or she is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Well-founded fear of persecution

24. Under s.5J of the Act 'well-founded fear of persecution' involves a number of components which include that:

- the person fears persecution and there is a real chance that the person would be persecuted
- the real chance of persecution relates to all areas of the receiving country
- the persecution involves serious harm and systematic and discriminatory conduct
- the essential and significant reason (or reasons) for the persecution is race, religion, nationality, membership of a particular social group or political opinion
- the person does not have a well-founded fear of persecution if effective protection measures are available to the person, and
- the person does not have a well-founded fear of persecution if they could take reasonable steps to modify their behaviour, other than certain types of modification.

25. Applicant 1 and 2 were interviewed separately by the delegate. They provided a broadly consistent and reasonably detailed account of events that took place in Vietnam leading up to their departure. They also provided a consistent account of events that have taken place since their arrival in Australia, and I am satisfied they are generally credible witnesses.

26. Applicant 1 and 2 have consistently referred to being born in Vietnam, and to being Vietnamese citizens. Applicant 1 has consistently referred to his birth place in the province now known as Ba Ria – Vung Tau, and to always living in that province. Applicant 2 consistently stated she was born in Quang Nam province, and that she moved to live with her husband after their marriage. Documentary evidence has been provided in support of their identities, including their birth certificates, National Identity Cards, marriage certificate, and Household Registration booklet

(*ho khau*). Applicant 3 was born in Australia, and a copy of her Australian birth certificate has been provided to support her identity. The Law on Vietnamese Nationality specifies that a child born inside or outside the Vietnamese territory whose parents, at the time of their birth, are both Vietnamese citizens has Vietnamese nationality.³ I am satisfied both parents of Applicant 3 are Vietnamese citizens, and Applicant 3 is a Vietnamese citizen. I accept the applicants' identity is as claimed, and find that Vietnam is the receiving country for the purpose of this assessment.

27. Applicant 1 and 2 have consistently referred to being Catholics, Applicant 2 indicating she was baptised at the time of her marriage. The Catholic Family Book from Vietnam has been provided to support this claim. At the SHEV interview the applicants said they regularly practised their religion in Vietnam, that Applicant 3 was baptised in Australia, and they continue to practise the religion in Australia. I accept the applicants are practising Catholics.

Attendance at a protest in Vietnam

28. Applicant 1 and 2 claim they are perceived to be opposed to the Vietnamese government because of Applicant 1's participation in a peaceful protest in Saigon in 2012. Applicant 1 consistently described his involvement in the protest, at the Arrival interview, and throughout the SHEV application process. He claims to have happened across a protest about stopping China taking Vietnamese islands, which involved about 100 people, whilst going to get a coffee with a friend, and whilst waiting for their truck/s to be loaded in Saigon. He said he shared the concerns of the protestors and joined in for about 10 to 15 minutes, and shouted slogans with the other protestors. He said there were people at the protest taking photographs, and he suspects some of them were police in plain clothes who took his photograph. Both Applicant 1 and 2 claim the authorities issued five or six summonses for Applicant 1 to attend for questioning, the first about a month after his attendance at the protest, but that the documents did not state the reason they were issued. At the SHEV interview Applicant 2 said authorities kept hassling their family, they sent people to search their house, and wanted her husband to come to their station urgently, but he was often away from home driving a truck and would not dare to come home, and only did so on the weekends or after hours, and only for a few hours.
29. Applicant 1 did not claim he had been involved in any other political or protest activities in Vietnam. He also did not suggest he had been stopped and asked to show his identify himself or show his identity documents to authorities at the time of the protest. I consider it rather improbable authorities would have been able to identify him as a result of his coincidental and brief participation in a single protest event. In addition, on the information before me, I consider it purely speculative that the summonses were issued, or the authorities were interested in Applicant 1, because of his involvement in the protest. I can accept Applicant 1 attended the protest as claimed, however I am not satisfied he was of interest to Vietnamese authorities, or identified as a political activist because of that participation.

Activities in Australia and future harm

30. During the SHEV interview Applicant 1 suggested he would be identified as a member of the Viet Tan on return to Vietnam because he has been involved in protests in Australia and will be seen as opposed to the government. He referred to attending a couple of protests, including one relating to 'Formosa that cause pollution and killed fish in Vietnam'. On questioning he said he was not a member of the Viet Tan, and the protests were not for the Viet Tan party. The delegate did not question Applicant 1 further on this issue, nor was it referred to in the decision.

³ "Law on Vietnamese Nationality Pursuant to the 1992 Constitution of Vietnam under Resolution No 51-2001-QH10", Ministry of Justice (Socialist Republic of Vietnam), 1 July 2009, CX5E56FED19418

31. The IAA decided to interview Applicant 1 to obtain information about his participation in protests since his arrival in Australia. During the IAA interview Applicant 1 described attending two protests in front of the [State 1] Parliament, the first in about May 2016, and the second in December 2016. He said he found out about the protests through [Social media] posts, created by the Viet Tan group and shared by a friend. He said the first protest was to support the people of Vietnam regarding Formosa, which is a major disaster causing the death of fish, and for Formosa to get out of Vietnam. He attended with his brother and a friend, held up a sign, yelled statements led by the protest leaders, and stayed for over an hour. He said attendance at the protest was a way for him to express his sympathy for people suffering in Vietnam and to make Australians aware of the disaster. With regard to the December 2016 protest, he said it concerned the bad human rights for Vietnamese people and to give that message to Australian people, and that he attended for one or two hours with his wife and child, held up signs and yelled out statements.
32. Applicant 1 also described attending Catholic prayer masses, including two at their local church in [State 1] in May 2016, during which the group prayed or lit candles. One event related to praying for justice for people in the area of the Formosa disaster, and the other in memory of the former president of Vietnam, Ngo Dinh Diem. Applicant 1 also said in 2016 he attended an event organised by the Vietnamese Community Organisation, during which he gave a speech to inform Vietnamese people who had been in Australia for a long time about the reality in Vietnam.
33. A handwritten version of the speech the applicant claims to have given [in] April 2016, in Vietnamese with English translation, is in the information before me, along with screenshots from a video of Applicant 1 delivering the speech. In his speech he explains that the communist government of Vietnam considers South Vietnam evil and traitorous, and the true version of the history and facts of South Vietnam are not taught, and books on it are banned. He suggests 30th April 1975, the date the North Vietnamese communists drove the South Vietnamese and American armies out of Vietnam, is a tragic date, especially for people from South Vietnam who used to live in a free society. Although in his October 2020 statement, emailed to the IAA on 11 October 2020, Applicant 1 indicates a copy of his speech 'on USB' had been posted to the IAA, at the time of this decision that information had not been received by the IAA.
34. Also in the information before me are numerous photographs showing the applicants' participation in the above events, and events subsequent to the IAA interview, showing the date of the event, describing the reason for the event, and often who organised the event. The photographs show Applicant 1's involvement with various protests and commemorative events, from November 2015 to February 2020, including in some of the photos showing him holding the former South Vietnamese flag, and various signs such as [deleted]. The protests concern various issues, including the Formosa disaster, the invasion of Vietnam by Communist China, human rights in Vietnam, the arrival in Australia of the Vietnamese prime minister, hunger strike for Vietnam, the Special Economic Zones and Cyber Security Bills in Vietnam, the imprisonment of Vietnamese Australian Chau Van Kham and various other 'prisoners of conscience', and denouncing the torture and murder of Dong Tam and his sons by the Vietnamese government. Some of the photographs also show Applicant 2 and/or Applicant 3 in attendance. Photographs of the cover of an Australian Vietnamese newspaper [dated] [April] 2019, have also been provided. The applicant is highlighted on an image of a group of people, which appears to have been taken at one of the commemorative events evidenced in other photographs referred to above.
35. The text associated with the photographs indicates some of the events attended were organised by the Vietnamese Community in [State 1], some jointly by the Vietnamese Community in [State

1] and the Viet Tan, and others were organised by the Viet Tan. Viet Tan events attended by Applicant 1 include fund raising dinners, conferences, workshops, commemorative events and protests, and he is shown in a number of those photographs assisting with the event, such as working the sound system or holding a microphone for speakers. Some of the photographs show Applicant 1 near or with leaders of the Viet Tan and the Vietnamese Community in Australia, including [Mr A] and [Mr B] from Viet Tan [State 1], [Mr C], a Viet Tan Central Committee member from [Country], and [Mr D], President of the Vietnamese Community in Australia/[State 1].

36. Letters of support have been provided regarding Applicant 1's involvement with activities in Australia, including from the President of the [State 1 Vietnamese Community Organisation] indicating he was a member of the [State 1 Vietnamese Community Organisation] from September 2014 to March 2020 when he moved to regional [State 2], he is a valued member of the community who has eagerly contributed to festival events and volunteered for organising sub-committees, and has been very active in attending peaceful rallies organised by the [State 1 Vietnamese Community Organisation] to raise concerns about human rights and the plight of the Vietnamese people. A further letter is from [Mr A], Viet Tan [State 1] Chapter Representative, stating that Applicant 1 first had contact with Viet Tan in June 2015 when he attended a fundraising dinner, and since that time he became an active supporter of Viet Tan, attending many functions and directly contributing in organising many events. The letter goes on to indicate Applicant 1 officially joined Viet Tan in 2018, and as an active member regularly attends fortnightly meetings and has contributed to events organised by his local chapter, including International Human Rights Day events and 'countless rallies to protest against the Vietnamese communist government' and regarding human rights violations, and events aimed at educating the public about the current political situation in Vietnam.
37. Country information reports that the Vietnamese Constitution establishes the Communist Party of Vietnam (CPV) as the only legal political party in the country, and the CPV tightly controls political discourse, and there are very few formal avenues for political participation for non-members. Opposition political parties are typically based outside of Vietnam to avoid harassment, arrest and detention. The Vietnam Reform Revolutionary Party (known as Viet Tan) is a US-based opposition group with an active branch in Australia, and which advocates for democracy in Vietnam. It is considered a terrorist organisation by the Vietnam government, and have been accused of carrying out activities aimed at overthrowing the government. There are credible recent reports of the Vietnamese government targeting those who are outspoken and critical of the Vietnamese government and the CPV, and some political activists have experienced problems on return to Vietnam. International observers report that arbitrary arrest and detention has been commonly employed against political and religious activists and individuals protesting land seizures. DFAT reports that since late 2017 there has been a significant rise in instances in which authorities have arrested and charged high-profile activists under the national security provisions, and that many of those arrested have received lengthy sentences after highly publicised trials, including some having affiliations with Viet Tan. DFAT assesses that activists who are known to authorities as active organisers of protests, or who openly criticise the state, face a high risk of official sanction, which may include surveillance, harassment, detention, assault, travel bans, arrest and prosecution. The risk is higher for those engaged in areas judged politically sensitive, or who have well-established links with outlawed political organisations. Such activists may not be able to access legal representation, and are unlikely to receive a fair trial.⁴

⁴ DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

38. Official approval is required for all public gatherings in Vietnam, and authorities routinely deny permission for meetings or marches considered politically sensitive, and police and other security authorities routinely use excessive force to disperse unauthorised demonstrations. Despite legal restrictions and often-severe responses from authorities, citizens do continue to protest. DFAT reports instances of protestors being beaten and arrested in 2016 for participating in protests regarding the Formosa disaster, and in response to large scale protests during 2018 over 120 people were reported to have been arrested and convicted for participation in protests, including individuals who were not activists. Many protestors subsequently released by police reported being mistreated, harassed and assaulted during their detention. DFAT assesses that low-level protesters against the government, and their supporters, face a moderate risk of harm from authorities, which may include arrest and being subject to violence.⁵
39. DFAT's assessment is supported by the 2019 US Department of State report. That report indicates instances of arbitrary arrest and prosecution of government critics, interference with the rights of peaceful assembly and freedom of association and significant restrictions on freedom of movement of activists. Some activists reported death threats from plainclothes individuals they believed were associated with the government, and authorities routinely subjected activists to de facto house arrest without charge, and there were numerous instances where activists were taken into custody by plainclothes individuals without an arrest warrant.⁶
40. I accept Applicant 1 has participated in various activities in Australia including many of a political nature, and some that were organised by the Viet Tan, and that Applicant 2 and 3 have accompanied him to some of these events. I can also accept he gave a speech at the 2016 event noted above. I also accept Applicant 1 was a member of Viet Tan [State 1] from 2018 until March 2020 when he relocated with his family to regional [State 2]. I consider Applicant 1's oral evidence and the photographs of him at various events in Australia reflect an anti-Vietnamese government opinion, and I am satisfied his opinions are genuine.
41. The information in the DFAT report regarding the treatment of activists and protestors in Vietnam relates to activities conducted in Vietnam, and does not suggest Vietnamese authorities monitor political activity abroad. Other than the photograph in the Australian Vietnamese newspaper, which appears to relate to a commemorative event, rather than a protest, on the information before me, I am not satisfied images of the applicants participating in the above activities have been made publicly available, such that any of the applicants would be identified as having expressed an anti-Vietnamese government opinion overseas, or that Applicant 1 would be identified as a Viet Tan member, or as having participated in Viet Tan activities. I consider the possibility that the image of Applicant 1 in the Vietnamese newspaper has been viewed by Vietnamese authorities is remote, and even if they were aware of that image and Applicant 1's participation, I am not satisfied he would be of interest on return for participation in that single event. Overall, I am not satisfied Applicant 1 has come to the attention of Vietnamese authorities as a result of participation in activities in Australia, or that there is a real chance he or his family would be of interest for that reason on return.
42. Applicant 1 has also provided over 28 posts from a [Social media] account using his first and second names, and dated between April 2018 and September 2020. The posts are written in the Vietnamese language, and an English translation has been provided for some of the text, however it is not apparent the translation was by a NAATI accredited translator. From the English translations provided it appears the posts express criticism of communism generally, and of the Vietnamese communist government, the one party system, the leaders and judges, the sale or

⁵ DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

⁶ US Department of State, 'Country Reports on Human Rights Practices for 2019 – Vietnam', 11 March 2020, 20200312104733

lease of land to China and oppression of Vietnamese protestors against Chinese invaders, cyber security laws and special economic zones. Other posts advocate for independence and freedom, a multi-party system, and being reactionary or rallying to protest to change the country. Submissions to the IAA suggest these posts evidence that Applicant 1 has consistently posted online content and opinions critical of, and opposed to, the Vietnamese government, and that such activity is subject to sanction and criminalised as an act against the state. It is suggested the information has been publicly posted, and could be known to the Vietnamese government, and that there is a real chance Applicant 1 will be arrested on return to Vietnam for having done so. Although I can accept the applicant made the claimed [Social media] posts, it is not clear to me from the information provided that the [social media] account is publicly accessible. It is also not apparent to me Applicant 1 has claimed he would make such posts on return to Vietnam. I acknowledge there are reports in the country information of suppression of online political opinion, and of prominent bloggers being arrested, detained, subjected to detention, surveillance and intimidation. However, in the present circumstances, I am not satisfied information posted by Applicant 1 is publicly available, such that it would have been viewed by Vietnamese authorities, or that he would be of interest for that reason on return to Vietnam.

43. I have taken into consideration whether Applicant 1 has engaged in the activities in Australia for the sole purpose of strengthening his claims for protection. Considering Applicant 1's limited and coincidental involvement in a single protest in Vietnam, in contrast to the extent of activities he has been involved with in Australia, and that the level of those activities appears to have increased after his IAA interview, I have some doubts about the motivation for his participation in the activities. However, taking into account his reason for attending the protest in Vietnam in 2012, which was because he had similar concerns as the issue being protested, that this reason is consistent with the reason for his later involvement, that his involvement with [State 1 Vietnamese Community Organisation] and Viet Tan [State 1] commenced in 2015 shortly after arriving in [State 1] from [the city] where his son had been receiving medical treatment, that he has attended numerous activities with those groups since that time, including peaceful protests and assisting with the organisation of events, that the level of his involvement appears to be a natural development of his political beliefs over time, and considering the explanation given during the IAA interview as to why he would participate in similar activities if returned to Vietnam, in the hope the communist party would be gone and there will be change, and so his childrens' generation did not have to suffer the same persecution, which along with the level of his participation I found persuasive, I am satisfied the participation of Applicant 1 and his family results from Applicant 1's genuine conviction, and has not been carried out solely for strengthening their claims for protection.
44. During the protection visa process Applicant 1 has been consistent in referring to his interest in, and opinions about, human rights issues whilst he was in Vietnam, as evidenced by his prior attendance at a protest in Vietnam, albeit coincidental. He has had significant and sustained involvement with protest activities in Australia, including about issues that could be considered critical of the Vietnamese government. It appears his involvement has evolved from initially being a mere participant, to having an active role assisting with the organisation of various events, and as noted above, it is active organisers of protests, or those who openly criticise the state, who face a high risk of official sanction, including arrest and prosecution. Although it appears Applicant 1 has not engaged in protest activities since moving to regional [State 2] in March 2020, which as noted in the letter of support from [Mr A] (referred to above) occurred because Applicant 2 was offered stable employment, I consider this is because there is limited opportunity to do so in the area the family currently lives in. Of note the evidence before me supports that Applicant 1 has continued to post content critical of the Vietnamese government on [Social media] since making the move to regional [State 2], which is indicative of his ongoing interest in expressing his political opinions. I am satisfied Applicant 1 is genuinely engaged with

the issues central to his protest and other activities in Australia, and that he has strong political opinions and convictions. I accept if he is returned to Vietnam he is likely to engage in protest activities and take an active role with organisation, as he has done in Australia, and as a result of such activities there is more than a remote chance he would face being arrested and detained, or prosecuted and imprisoned, and subjected to significant physical ill-treatment by authorities. I am satisfied such treatment would amount to serious harm.

45. I am satisfied the essential and significant reason for the harm is Applicant 1's political opinion, and that it is not reasonable to expect Applicant 1 to modify his behaviour to conceal his political beliefs. I am also satisfied the harm involves systematic and discriminatory conduct by Vietnamese authorities, who control the entire state, and I am satisfied effective protection measures would not be available to Applicant 1 anywhere in the receiving country. I am satisfied Applicant 1 will face a real chance of serious harm upon return to Vietnam, and that his fear is well-founded.
46. Given my findings above, it is not necessary for any other aspect of the applicants' claims for protection to be considered.

Refugee: conclusion

47. Applicant 1 meets the requirements of the definition of refugee in s.5H(1), and s.36(2)(a).

Member of same family unit

48. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse or child of the family head.
49. I am satisfied Applicant 2 and 3 are respectively the spouse and child of Applicant 1, who is the head of the family, and who is a refugee within the meaning of s.5H(1) of the Act. I find Applicant 2 and 3 are members of the same family unit as Applicant 1.
50. As Applicant 1 is a person mentioned in s.36(2)(a), Applicant 2 and 3 meet s.36(2)(b)(i).

Decision

The IAA remits the decision for reconsideration with the direction that:

- Applicant 1 is a refugee within the meaning of s.5H(1) of the *Migration Act 1958*.

In respect of Applicants 2 and 3, the IAA remits the decision for reconsideration with the direction that:

- they are members of the same family unit as Applicant 1, and satisfy the criteria in s.36(2)(b)(i) of the *Migration Act 1958*.

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.