



**Australian Government**  

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**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA22/10374

Date and time of decision: 18 November 2022 16:26:00

C Wilson, Reviewer

**Decision**

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

*Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 473EC(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of a referred applicant, or their relative or other dependant.*

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a Catholic from Ba Ria–Vung Tao province, Vietnam. He arrived in Australia as an unauthorised maritime arrival [in] June 2013. He applied for a Temporary Protection visa (TPV) on 29 September 2017.
2. A delegate of the Minister for Home Affairs (the delegate) refused the TPV application on 2 March 2020. The delegate accepted the applicant was a Catholic from Ba Ria-Vung Tao province who had participated in political activities organised by the Vietnamese Community in Australia and posted photos of this on [social media]. The delegate did not accept the applicant was involved in demonstrations against land confiscation in 2007, nor that he was kept in detained by police and tortured for this and assaulted 3 days after. The delegate also did not accept the applicant was monitored from 2007.
3. A reviewer of the IAA affirmed the delegate’s decision on 2 April 2020. The applicant sought judicial review and by consent order dated [August] 2022 the IAA decision was quashed and the matter remitted for reconsideration.

### 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).

#### *New information from applicant*

5. On 25 October 2022 the applicant’s representative provided written submissions and the following new information:
  - a statutory declaration from the applicant dated 25 October 2022;
  - confirmation of an appointment for the applicant with his psychologist;
  - five photographs; and
  - bundle of country information reports.
6. In the written submissions the representative writes ‘we assume the IAA will be addressing the contents of the DFAT report with the applicant at an interview’. There is no otherwise no direct request for an interview to be held, nor any explanation why there should be. Part 7AA of the Act provides for a limited form of review on the papers. Except in limited circumstances the IAA must conduct a review without interviewing the person. I may exercise a discretion under s.473DC to invite a person to give new information at an interview, but there is no obligation to do so. Taking into account the limited form of review provided for by the Act, and the lack of explanation as why there should be an interview or whether there is new information that can only be provided at an interview, I have decided not to exercise the discretion to interview the applicant.
7. The applicant’s statutory declaration dated 25 October is a new document, although much of the information contained therein is a retelling of his claims rather than new information. It does however contain updates of matters such as his health, activities in Australia, his family,

and his fears if he is returned to Vietnam. I accept this statutory declaration outlining his current situation could not have been provided to the delegate before the decision was made, and that it contains credible (as in capable of being believed) personal information that is relevant to the consideration of his claims. Taking into account that this statutory declaration contains updates on his current situation since the delegate's decision some 32 months ago, and that both s.473DD(b)(i) and (ii) are met, I am satisfied there are exceptional circumstances to justify considering it.

8. The applicant provided a copy of an email confirming his next appointment with his psychologist, booked for 17 November 2022. I accept this information could not have been provided to the delegate. It is credible personal information, and it has some relevance to his claims to be under ongoing psychological treatment. However it is not a medical report nor does it indicate whether he has had any other appointments with the psychologist since 2017. As s.473DD(b) is met, and the document supports his claim that he is still receiving counselling, I am satisfied there are exceptional circumstances to justify considering it.
9. The new information photographs purport to show the applicant attending Vietnamese community and protest events in Australia. They are undated, but for the purpose of this assessment I infer they date from the period since the delegate's decision. I am satisfied they are credible personal information that may have affected the consideration of the applicant's claims to be active in the Vietnamese community in Australia. Given the importance of this claim in his TPV application, I am also satisfied there are exceptional circumstances to justify considering these new photographs.
10. The new country information provided by the applicant postdates the delegate's decision, except for one report from the United Kingdom Home Office (UKHO) which is discussed separately below. The new information includes the most recent reports from the Department of Foreign Affairs and Trade (DFAT) and United States Department of State (USDOS) on Vietnam, amongst others, which update the reports relied on by the delegate in 2020. I find the reports satisfy s.473DD(b)(i). Section 473DD(b)(ii) is not met however as the reports are not credible personal information. Taking into account the time that has passed since the delegate's decision and the importance of having current country information for the purpose of the review, I am satisfied there are exceptional circumstances to justify considering these new country information reports.
11. The UKHO Report of a Fact-Finding Mission to Vietnam is dated 9 September 2019, that is, more than 6 months before the delegate finalised their decision. The applicant has not explained why this report could not have been provided to the delegate before the decision was made, and no reason is apparent to me. This new information was not provided as personal information that may have affected the consideration of his claims, but rather as country information on the treatment by the Vietnamese government of anti-regime activists. It is not credible personal information in the relevant sense. I find neither s.473DD(b)(i) or (ii) are met and therefore I must not consider this new information.

#### *Entry Interview*

12. In the consent order dated 29 August 2022 it was recorded that the Irregular Maritime Arrival Entry Interview recording and written transcript were not before the delegate. They are therefore new information and I can only consider them in this review if I am satisfied there are exceptional circumstances to justify doing so: s.473DD(a).

13. The applicant is silent in their written submission dated 25 October 2022 as to the Entry Interview. The applicant makes no complaint about the delegate's failure to have regard to any of the information in the Entry Interview recording of transcript. They have not tried to provide it as new information, nor do they make any request for the IAA to obtain it. In written submissions at paragraph 8 the representative says the applicant's new statement (his statutory declaration) should be read alongside the TPV application and TPV interview. There is no request in that submission to consider or give weight to the Entry Interview as part of his application.
14. I have had regard to the purpose of entry interviews, which is to obtain details of the person's identity, provenance, and how they came to Australia. Some questions are asked at entry interview as to a person's conduct in their home country and a brief explanation of why they left, but it is not intended as the basis for a protection visa application.
15. I have taken into account that the matter was remitted by consent because the previous reviewer had erred in having regard to the Entry Interview information without making a determination first as to whether it satisfied s.473DD(a) and (b). I note the applicant has not provided any information or submission to the IAA for this review on whether they rely on any information in the Entry Interview. I infer from the lack of such a request or reference to the Entry Interview that the applicant does not seek to rely on any of the information contained therein. Taking into account the purpose of entry interviews, and that the applicant is aware his interview recording and transcript are not part of the review materials but has not sought to provide them or asked the IAA to obtain them, nor referred or relied on them in any way in written submissions, I am not satisfied there are exceptional circumstances to justify considering this material.

*Additional Information document*

16. Amongst the material given by the Secretary to the IAA was a typed document titled 'Additional information – verbal and written' dated 14 August 2013. The document contains information not otherwise disclosed by the applicant throughout his visa application, including: he says the communists took his family's land when he was [age] years old; he was a member of a group [against abortion] who collected aborted fetuses from bins and buried them humanely, and he felt persecuted by the local authorities because they did not like this activity; and that he believes the food source from pigs and cattle in Vietnam is chemically tainted and poisonous to humans. There is no mention of any of this information in the delegate's decision or at the interview. I have concluded it was therefore not before the delegate and is new information.
17. On noting that this document was not provided to the applicant by the IAA as part of the administrative release of the file following the court remittal, I instructed an officer of the IAA to send it to them. I also invited them to comment on whether they had a view if I should obtain the document as new information. The applicant responded that it should be obtained by the reviewer, as there are exceptional circumstances to justify considering it when it was not provided to the delegate and it is credible personal information.
18. The document may not have been before the delegate, but the information regarding his family's land, membership of a group [against abortion], and his views on chemical tainting of food is all information the applicant could have included in his TPV application if he believed it was relevant. He has been assisted by migration agents at all stages of the application, including having an agent present at his interview. Whilst the applicant may not have had a copy of this document and could not therefore have himself provided it to the delegate, I consider the information contained therein could have been put to the delegate before the

decision was made. That he never raised any of these three matters in the written application, at the interview, or in submissions to the IAA, raises doubts about how credible they are in addition to how relevant they are to his TPV application. I note also the information is brief and unsupported by the claims the applicant chose to make in his TPV. There is no information of when, where or for how long he was a member of [a group against abortion], nor whether he would join such a group again. The applicant has not sought to provide more information relevant to these possible new claims nor explained why they were never mentioned by him in his TPV application. The credibility of the information is somewhat weakened by these factors. I have considered whether the fact this information was held by the Department but not put before the delegate is a factor that may amount to exceptional circumstances, but when this is weighed against the applicant choosing not to raise any of this information in his TPV application, the limited information contained in this document and the lack of interest in providing further detail now, I am not satisfied there are exceptional circumstances to justify considering this new information.

### **Applicant's claims for protection**

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

- The applicant is a single man from [Ba Ria-Vung Tao province]. He is Catholic. His parents and [brothers] continue to live in Ba Ria-Vung Tao province. He has one sister in [another country].
- He was educated to university level, completing a [degree].
- [In] August 2007 people in his village, including his grandmother, were protesting against an attempted land seizure of church land by the local authority. When he saw his grandmother at risk of harm by government officers he stepped in to protect her. As a result he was taken to the police station as a suspected organiser of the protest, where he was questioned and tortured by police. He was released some hours later.
- Three days later he was attacked by a group of men on motorbikes. He believes they were hired by the local authorities to attack him. They beat him so severely he was hospitalised afterwards.
- From that time the authorities were monitoring him. He tried moving to [another location] to escape scrutiny but the police still monitored him there. He moved to [Country 1] in late 2007 to avoid the monitoring and harassment. He returned to Vietnam in December 2008.
- He was continually monitored until he left Vietnam in 2013. His family has also been harassed because of him. Police summonses were issued in early 2013 for him to attend the police station. Since he left Vietnam the authorities have been asking his family where he is and when he will return.
- In Australia he has been politically active against the Vietnamese government by attending protests and community activities with the Vietnamese community. He posted anti-regime material on his [social media] page and his page was hacked and shut down by the Vietnamese authorities. They will have been monitoring his activities in Australia and know he is a dissident. He will be a person of interest in Vietnam.
- The applicant has been diagnosed with major depressive disorder and post-traumatic stress disorder. He continues to receive treatment in Australia, but would be unable to obtain treatment in Vietnam.

- The applicant fears he will be harmed by the Vietnamese authorities on return for reason of his Catholic faith, his real and imputed opposition to the Vietnamese government, his dissident activities in Australia, his illegal departure from Vietnam, and his mental health condition.

## Refugee assessment

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20. 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

21. 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.
22. Based on the identity documents provided to the Department, including a copy of his Vietnamese passport, I find the applicant is a citizen of Vietnam. I find Vietnam is his receiving country. As his parents and most of his siblings continue to live in Ba Ria–Vung Tao province, I find this is the area he is likely to return to.

#### *Catholic*

23. The applicant has consistently claimed to be a Catholic and I accept that he is.
24. Vietnam is officially an atheist state and the majority of the population do not follow any organised religion. The Constitution does however provide a right of belief and religion. Under the 2018 Law on Belief and Religion religious freedom is protected, but religious groups and religious activities must be registered with the government. Specific religious activities can be disallowed on national security or morality grounds. Catholicism is one of 16 religions recognised by and registered with the Vietnamese government.<sup>1</sup>

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<sup>1</sup> DFAT, Country Information Report Vietnam, January 2022.

25. Around 6% of the population in Vietnam identify as Catholic. DFAT reports that Catholics are generally able to practice freely at registered churches, particularly in areas with large Catholic populations.<sup>2</sup> The applicant told the delegate most people in his home area, about 90%, are Catholic. There is no evidence from the applicant that his local Catholic church is unregistered.
26. Ethnic minority Christians, such as Montagnard Christians, can face harassment and discrimination in Vietnam.<sup>3</sup> So too can Christians from unregistered groups, religious leaders seeking to evangelise, and some Christian converts.<sup>4</sup> However the applicant is not from an ethnic minority or an unregistered group, and is not an evangelising religious leader or a convert.
27. Catholic activists who are perceived to challenge the authority or interests of the government can face harassment, arrest and violence.<sup>5</sup> As discussed below, the applicant was caught up in a protest in 2007 by members of his community against a proposed seizure of church land. However the applicant was not involved in organising the protest. He was not involved in any protests after that time. There is no claim or evidence the applicant was a leader in his church or involved in any activism in Vietnam. I do not accept the applicant was or was perceived to be an activist in his church or community. I find he was an ordinary Catholic, and apart from the alleged incidents arising from the protest in 2007, the applicant has not provided detail of any time he was harmed or harassed in Vietnam for being Catholic. There is also no claim he was prevented from practising his religion in Vietnam, before or after the protest. There is no claim anyone in his family has been prevented from practising the religion or otherwise harmed for being Catholic since he left Vietnam.
28. I find the applicant was an ordinary Catholic attending a registered church where he could freely practice his religion. I find he could do so on return, as he did before he left Vietnam and as his family appear to have done since he left. I find he does not face a real chance of harm for reason of being Catholic in Vietnam.

#### *2007 protest*

29. The applicant claims to have suffered harm in Vietnam because he was a Catholic involved in a protest in 2007 against the local authorities. He does not claim to have been an organiser of the protest, but says he was one of around [number] people who gathered to demonstrate against the local authorities taking land belonging to their parish. The authorities started beating some protestors and the applicant intervened to help his grandmother. As a result he was taken back to the police station where he claims he was tortured and questioned about the protests. He was released 4 hours later when a crowd outside the police station demanded his release. He was not charged with any offence. He says that three days later he was stopped on his way to work and severely beaten by men he assumes were either undercover police or paid by police to attack him.
30. I accept the applicant attended the protest in 2007 and was taken in by police for questioning. That he was released without charge indicates the authorities did not consider him an organiser of the protest nor otherwise a person of adverse interest. I note he says he was released because a crowd gathered demanding it, but I consider it unlikely this was why he was released or that if the police were interested in him they would not have charged him then before or after his release. If he was beaten three days later on his way to work, it is not clear

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<sup>2</sup> DFAT, Country Information Report Vietnam, January 2022.

<sup>3</sup> USCIRF, Religious Freedom in Vietnam in 2021, February 2022.

<sup>4</sup> UKHO, Vietnam: Ethnic and religious minority groups, February 2020; Open Door, Vietnam, 2022.

<sup>5</sup> DFAT, Country Information Report Vietnam, January 2022.

from the details he provided that the police were involved. That he was not taken in and charged or threatened or questioned about the protest on that occasion suggests they may not have been. After the alleged beating he says he was hospitalised, and I note there was no follow up from the police at that time. The applicant says other people at the protests were given lengthy prison sentences or were disappeared. The applicant however was never detained or questioned by the police again after he was released. I consider this supports a conclusion that after questioning him on the day of the protest the police did not consider the applicant a leader or organiser in the protest or otherwise of interest to them.

31. The applicant provided two summons notices he says were issued in January and April 2013 asking him to report to the police station for reason of 'matter of public disturbance'. When asked about these by the delegate at interview the applicant said the police wanted to ask him more questions about the 2007 protest. The applicant does not claim to have attended the police station, nor does he claim to have faced consequences in Vietnam for not attending. The delegate doubted the genuineness of these summons documents and gave them no weight. I note the applicant has not responded to or challenged that finding in the submissions or statutory declaration provided to the IAA. I consider it is unlikely he would be summoned by police 6 years after the 2007 protests and there is no other explanation as to the basis of these summons. I have taken into account the advice from DFAT that document fraud is common in Vietnam.<sup>6</sup> Having regard to the lack of information on why summons would be issued 6 years after the event, why he didn't attend or why there were no consequences, his lack of explanation generally about the summons documents, and the prevalence of document fraud, I am not satisfied these summons notices are genuine and I give them no weight.
32. In his written application the applicant says he was under surveillance, constantly harassed, and his employers were told not to employ him. He says he tried to avoid being followed by police by moving [elsewhere], although it is not evident from his address or employment history in his application that he did so for any length of time. Apart from stating employers were told not to employ him, he has not provided detail of the type of harassment he claims to have suffered. He says he was beaten many times, but has not detailed any other instances of being beaten apart from the day of the protest and three days later. I note that some months after the protest he was able to obtain a passport. He travelled out of and returned to Vietnam without any issues. There is no claim he was questioned at the border. I consider this indicates he was not a person under surveillance or of adverse interest to the authorities. I also find his ability to hold a passport and travel in and out of Vietnam is inconsistent with the claim that his family continued to receive visits from the local authorities asking where he was. If the authorities had such interest in him, I do not accept he would have been able to obtain a passport and travel without incident in 2007 and 2008 and not himself be questioned. If his family have ever been asked where he is, I consider such questioning was in relation to the maintenance of household registration records, something that is closely watched over by Vietnamese police.<sup>7</sup>
33. Whilst I accept the applicant was involved in a protest in 2007, and may have been detained and mistreated for a short time afterwards, I do not accept he was of adverse interest after that incident. There is no evidence he was questioned or detained by the authorities after that time, including when he left and re-entered Vietnam. I consider the applicant's claims to have been under surveillance, constantly harassed and that his employers were told not to employ him, are an exaggeration. I do not accept he had an adverse profile with the Vietnamese authorities when he lived there or when he left to come to Australia. I consider it farfetched

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<sup>6</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>7</sup> DFAT, Country Information Report Vietnam, 11 January 2022.



that he would be of interest now for the events of 2007 if he returns to Vietnam, and I find he does not face a real chance of harm for his involvement in that one protest.

34. Given the above findings, it follows I also do not accept his family has been targeted because of him. I do not accept the authorities are harassing or monitoring them regarding the applicant's eventual return, nor do I accept administrative difficulties and delays they may have had in obtaining a marriage licence for one brother or in obtaining birth certificates for another brother's children are connected to the applicant.

*Political opinion and political activity in Australia*

35. The applicant says he has been politically active in Australia and describes himself as an activist and dissident. He says his resolve against the Vietnamese government is firmer than when he lived in Vietnam.
36. The applicant provided a small bundle of photographs in 2020 said to show the following: the applicant volunteering to support an Australian [official]; a photo with [a named person] said to be taken during a protest for human rights and freedom in front of the Vietnamese embassy; another photo of an undated protest; and two photos said to be of a meeting commemorating the co-operation between the Royal Australian Navy and the navy of the old Vietnamese government. He told the delegate there were more photos on a [social media] account. The delegate described these photos in the decision record as showing the applicant participating in the Boat Memorial in Footscray organised by the Victorian Chapter of the Vietnamese Community in Australia (VCA). The applicant also provided a letter dated 29 August 2017 stating he was an active volunteer in work organised by the VCA.
37. To the IAA the applicant provided a further 5 photographs said to show him attending events in the Vietnamese community in Australia. No further explanation of the events was provided, but I note the South Vietnamese flag is shown in a few of the photographs. It is not clear if the photographs were taken on one day covering one event, or whether they are from several events.
38. The applicant says he was active on [social media] and the Vietnamese government must have been monitoring his account because things were deleted and the account blocked. He did not provide any evidence of this. He said he had no IT skills and had to ask someone to help him restore his page. He doesn't know for sure if it was the Vietnamese government that blocked his page, but friends told him they do that. He relies on this as evidence that he is being monitored by the Vietnamese authorities.
39. Country information indicates the Vietnamese authorities monitor online activity, particularly on topics such as religion, women's and LGBTI rights, and human rights generally.<sup>8</sup> Amnesty International reported in 2021 that they had identified a campaign of spyware attacks targeting Vietnamese human rights defenders from 2018 to 2020, but this falls outside the applicant's use of [social media] and I do not accept he could be considered such a human rights defender that would have been targeted in this campaign.<sup>9</sup> I note that in 2020 [social media] agreed to greater censorship in accordance with Vietnamese law, but this postdates the applicant's use of [social media].<sup>10</sup> DFAT reported in 2022 a repeated pattern of online activity would be

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<sup>8</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>9</sup> Amnesty International, Click and Bait: Vietnamese Human Rights Defenders Targeted with Spyware Attacks, 24 February 2021.

<sup>10</sup> He told the delegate at the interview on 27 August 2019 that his [social media] account was hacked and deleted 2 years prior.

required to attract authorities' attention<sup>11</sup>, but there is no evidence before me that the applicant was involved in such a repeated pattern. I consider it unlikely the Vietnamese authorities have monitored and blocked his [social media] account, given his limited use of it, and noting that in Vietnam alone in 2018 there were some 52 million [social media] accounts.<sup>12</sup> In the unlikely event the authorities found his account, I note also the applicant did not use his real name on [social media]. In the unlikely event the account of 'Hero Tran' was hacked and blocked for containing political material, this does not mean the applicant was personally monitored or identified.

40. The evidence provided by the applicant shows that in the 10 years he has been in Australia he has participated in a handful of events with the VCA or other Vietnamese groups. I accept that some of these events appear to be political protests. He says he wasn't able to attend more in person during COVID-19 lockdowns, but hasn't provided evidence of any online activity during that time either. He said there was an in-person protest at the Vietnamese embassy in the ACT in 2022, but he was unable to attend. He gave no explanation why. There is no evidence he has organised or led any community or political events. The events he has involved himself with appear to be largely organised by VCA, a community organisation, not a political party. He says in his statement dated 25 October 2022 that he has become vocal about opposing the Vietnamese Government, but there is no evidence he has spoken out publicly in person or online. He says he has been active on [social media] about his political beliefs, but has not provided evidence of any [social media] activity since around 2017. Given he no longer posts on [social media], whether it be political material or otherwise, I do not accept he would start such activity if he returned to Vietnam. There is no evidence he has published blogs or been active on any website or other social media. He attended only one protest in Vietnam, and has not indicated he intends to protest should he return. I consider it unlikely he will attend speculative future protests in the reasonably foreseeable future in Vietnam. I accept the applicant is a member of the Vietnamese community in Australia who has personal views opposed to the Vietnamese authorities, and occasionally attends VCA or other organised events that can include political activities or messages. I do not accept however that the applicant is an activist or dissident nor that he will be imputed to be.
41. The country information indicates there are risks in Vietnam for political activists. High-profile activists have a greater chance of adverse attention, but low-profile activists can also face risks.<sup>13</sup> I do not accept however that the applicant's profile can even be described as a low-profile activist. I consider it farfetched his activities in Australia have been monitored by the Vietnamese authorities given the limited activity he has engaged in over a nearly 10-year period. I find the applicant does not face a real chance of harm for his activities in Australia, and nor do I accept he would face a real chance of harm for his personal political opinion of being opposed to the Vietnamese authorities on his return to Vietnam.

*Failed asylum seeker and illegal departure from Vietnam*

42. The applicant held a passport but claims to have departed Vietnam illegally. Under articles 120 and 121 of the Vietnamese Penal Code 'organising, coercing [or] instigating illegal emigration for the purpose of opposing the People's Government' is a criminal offence. However, DFAT reports they are not aware of any cases where these provisions have been used against failed asylum seekers returned from Australia.<sup>14</sup>

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<sup>11</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>12</sup> CSIS, Vietnam's New Cyber Law Could Hobble Foreign Investors and Limit Basic Freedoms, 2 July 2018.

<sup>13</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>14</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

43. DFAT reports failed asylum seekers can face a range of difficulties on return to Vietnam. This can include challenges in finding employment and accessing social services, and indebtedness to moneylenders who funded their travel to Australia.<sup>15</sup> There is no claim the applicant borrowed money for his travel or owes any money in Vietnam. The applicant is well educated with a variety of work experience in Vietnam, [Country 1] and Australia. He has no dependents. He has a large family with [a number of] brothers in Vietnam and I consider they could assist him to resettle in Vietnam. I do not accept the claim that he could not live with them because they are being monitored, as for the reasons given above I do not accept they are being monitored. I do not accept he would face difficulties amounting to serious harm in resettling in Vietnam.
44. DFAT reports returnees from Australia are occasionally questioned on arrival in Vietnam. If they are questioned the interview generally takes between one to two hours and is focused on obtaining information about the facilitation of the illegal journey. Returnees are not kept overnight. DFAT assesses most people who have used people smugglers to travel are seen by the Vietnamese government as victims rather than criminals.<sup>16</sup> If the applicant is one of the occasional returnees who are questioned on arrival, I do not accept questioning on how he travelled to Australia, even if the interview goes for up to 2 hours, amounts to serious harm. I find the applicant does not face a real chance of serious harm on the basis of being a returned failed asylum seeker who departed Vietnam illegally.
45. For the reasons given above, I do not accept the applicant is a person of adverse interest for reason of his religion and/or the 2007 protest, and nor do I accept he has any profile with the Vietnamese authorities as an activist or dissident. I do not accept the claim that he will be detained at the airport on return and questioned about his role in the Catholic church, protest activities in Vietnam and Australia, or his political opinion. I do not accept he will need to go into hiding in Vietnam. Even considering his personal characteristics and circumstances cumulatively with returning as a failed asylum seeker who departed illegally, I find he does not face a real chance of harm.

*Mental health conditions*

46. The applicant claims to fear harm in Vietnam for reason of his mental health conditions. The applicant provided a report from a psychologist dated 20 September 2017. The psychologist said at that date she had seen the applicant three times for counselling and had diagnosed him with major depressive disorder with melancholic features and post-traumatic stress disorder. Evidence was provided to show the applicant has an appointment with this same psychologist in November 2022. There is no evidence he has received treatment other than counselling. It is not clear how much counselling he may have had between 2017 and 2022.
47. The applicant claims to fear harm for reason of his mental health conditions in Vietnam because of stigma, an inability to pay for treatment, and a poorly resourced mental health system. He also says any attempt by him to access treatment would bring him to the attention of the authorities, but does not explain why seeking medical treatment would have this effect.
48. I accept the applicant was diagnosed by the psychologist with major depressive disorder with melancholic features and post-traumatic stress disorder in 2017. I note however his condition was not so severe as to prevent him from working or taking part in activities in the Vietnamese community. On the evidence presented I do not accept the applicant suffers a mental disability,

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<sup>15</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>16</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

as submitted by the representative, that is of the type that attracts social stigmatisation and raises challenges in being able to exercise his rights.<sup>17</sup>

49. DFAT reports mental health care is available in Vietnam, but stigma can be a barrier to accessing it. Younger people may be more willing than older people to seek treatment. The quality of the treatment varies from place to place but is often inadequate. Treatment in Vietnam relies on medication, with psychotherapy often unavailable.<sup>18</sup> The country information before me does not indicate mental health care is withheld for any of the reasons stated in s.5J(1)(a).<sup>19</sup> I find any difficulty the applicant may have in accessing mental health care and the type of counselling he has had in Australia does not amount to persecution as defined in the Act.

### **Refugee: conclusion**

50. The applicant does not meet the requirements of the definition of refugee in s.5H(1). The applicant does not meet s.36(2)(a).

### **Complementary protection assessment**

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51. 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**

52. 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.
53. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.
54. I accept the applicant has sought counselling with a psychologist in Australia. As discussed above, the mental health service in Vietnam may be inadequate. However I do not accept any difficulty the applicant may face in accessing mental health care in Vietnam, if he chooses to do so, would amount to significant harm as defined in the Act. I find any inability to access the type of counselling he has had in Australia would be for reason of the inadequate services, not an act or omission of withholding care with the intention to inflict torture, cruel or inhuman

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<sup>17</sup> USDOS, 2021 Country Reports on Human Rights Practices Vietnam, DATE?

<sup>18</sup> DFAT, Country Information Report Vietnam, 11 January 2022.

<sup>19</sup> DFAT, Country Information Report Vietnam, 11 January 2022; UKHO, Vietnam: Mental Healthcare, May 2021.

treatment or punishment, or degrading treatment or punishment. I do not accept the inadequate mental health care system in Vietnam gives rise to a real risk of significant harm.

55. If the applicant is questioned at the airport on his return, I do not accept such questioning amounts to significant harm as defined in the Act. Even if the applicant is distressed by being briefly detained and questioned for 1 to 2 hours I do not accept this amounts to torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment.
56. I have found the applicant does not face a real chance of harm for reason of his religion, the protest in 2007, his political opinion, activities in Australia, or returning as a failed asylum seeker who left Vietnam illegally, whether these factors are considered individually or cumulatively. 'Real chance' and 'real risk' has been found to equate to the same threshold. For the same reasons given above, I find the applicant does not face a real risk of significant harm for any of the reasons claimed.

#### **Complementary protection: conclusion**

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

#### **Decision**

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

## Applicable law

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### **Migration Act 1958**

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

In this Act, unless the contrary intention appears:

...

**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.