



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM
IAA reference: IAA19/06374

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Date and time of decision: 20 March 2019 15:06:00
J Bishop, Reviewer

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

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 first applicant (the first applicant) claims to be national of Vietnam and identifies as Catholic. He is now [age] and arrived in Australia [in] June 2013. [In] September 2017 the first applicant married another Vietnamese national in Australia. [In] August 2018 the first applicant and his wife had a son (the second applicant).
2. On 3 July 2017 the first applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). [In] October 2017 he notified the Immigration Department of a change in his circumstances and included his wife in his SHEV application. [In] September 2018 he notified the Immigration Department of a second change in his circumstances and included his wife and their son in his SHEV application. Based on the information before me, I am satisfied the first and second applicants fall within the definitions of unauthorised maritime arrivals and fast track applicants.
3. I have no information before me to indicate the first applicant's wife is subject to the fast track process. The delegate of the Minister for Immigration did not include the first applicant's wife in his decision and the IAA has not received any submissions from the first applicant that she should have been included. I am not satisfied the first applicant's wife is a fast track applicant.
4. On 12 February 2019 the delegate refused the first and second applicants' visas. The delegate determined the first and second applicants did not profiles of interest and did not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Vietnam.

Information before the IAA

5. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). No other material was provided to the IAA.

Applicants' claims for protection

6. In essence, the first applicant claim protection on the basis of:
 - religion (Catholic)
 - political opinion (including his Viet Tan activities in Australia)
 - escape from police custody
 - returning as a failed asylum seeker who left Vietnam illegal departure
7. The second applicant relies on the first applicant's claims.

Factual findings

8. I accept the first applicant was born in Vietnam and is a Vietnamese citizen.

9. The second applicant was born in Australia and both of his parents are Vietnamese citizen. The first applicant asserted in his change of circumstances form the second applicant would, or could, hold an Australian passport. However, this assertion is inconsistent with the first applicant including his son in his SHEV application. I accept the second applicant was born in Australia to parents who are Vietnamese nationals. The delegate determined the second applicant was a Vietnamese citizen and his claims for protection were assessed against Vietnam. The first applicant has made no submissions to the IAA the second applicant is stateless or that he is not a national of Vietnam. Based on all the information before me, I am satisfied the second applicant is a national of Vietnam.
10. I find the receiving country is Vietnam.
11. I accept the first applicant departed Vietnam illegally. I accept he wasn't involved in people smuggling or criminal activities in Vietnam.
12. I accept the first applicant would be returning to Vietnam as a failed asylum seeker.
13. I accept the first applicant's personal details were published on the Immigration Department's website in 2014.

The first applicant's involvement with the Viet Tan and other organisations in Australia

14. The first applicant's SHEV application states that since coming to Australia he has become an avid participant in the Vietnamese Human Rights Forum, the Vietnamese Community of Australia – [State 1] Chapter (Vietnamese Community) and the Viet Tan [City 1] Chapter. The Vietnamese Community is a well-known organisation which opposes communism in Vietnam. He has attended many human rights forums and volunteered at these events. He has encouraged others to sign petitions to oppose the Vietnamese government and actively recruited members to join and oppose the communist government of Vietnam. He is also involved with the Viet Tan [City 1] Chapter which helps to raise money for the democratic movement and fund democratic activists in Vietnam. He believes the Vietnamese government will be monitoring him because of his active participation in these events and his past history. The Vietnamese government will believe he will try and cause an uprising and spread his political views and opinions. His family in Vietnam have had many police visits from the local authorities regarding his whereabouts and political actions.
15. The first applicant attended two SHEV interviews. During the first SHEV interview the delegate asked him what made him an avid participant in the Viet Tan and he responded when he came to Australia he felt free. He could protest for the Vietnamese people in jail who are opposed to the Vietnamese government. He is not a member of the Viet Tan but just helps them. He didn't participate in protest in Vietnam because he would have been arrested and beaten to death. It is different in Australia. He started helping the Viet Tan because he wants to help the people in Vietnamese jails. He joins the Viet Tan in protests and sells tickets for them to help fundraise. He has posted on [social media] about them. The first applicant told the second delegate that he has joined the Viet Tan party. He gets involved in the Viet Tan programs and helps cook or sell tickets for them to help raise funds. When the second delegate asked him how the Vietnamese authorities would be aware of his Viet Tan activities he responded because he posts on [social media] and he has joined the Viet Tan news and activities on [social media] about human rights abuses in Vietnam.
16. The first applicant provided a letter from [Mr A] (Viet Tan's [senior member from] [City 1] Chapter) dated [in] February 2017 thanking him as a long term friend of the Viet Tan [City 1]

Chapter and for his contributions setting up for their Lunar Festival. The letter states the event was organised by the Free Vietnamese Community in [State 1] [in] February 2017. A second letter from [Mr A] dated [in] April 2017 thanks the first applicant for his assistance in setting up for a fundraising dinner [in] April 2017. A letter from [Mr B] ([Senior Member] of the Vietnamese Community) dated [in] May 2017 states 'our' community has known the first applicant since he was released from the detention centre. He has been actively involved in various activities such as New Year's Festivals, recent cultural, social and political events and in the Viet Tan and other non-profit or religious organisations.

17. The first applicant provided a number of photographs. Four photographs appeared to be taken at the Vietnam Human Rights Forum in [City 1] 2016. The photographs were taken from the back of the room and I am unable to identify the first applicant in any of those photographs. Two photographs are of people eating around a table looking at a screen with Vietnamese writing across it. I am unable to identify the first applicant in either of those photographs. Two photographs are of a group of people in a home with the South Vietnam flag and the Viet Tan symbol appearing in the background. I am unable to identify the first applicant in either of those photographs. Two photographs are of a group of people at a dinner with the Viet Tan symbol and a South Vietnam flag appearing on a stage. I am unable to identify the first applicant in one of those photographs. One photograph is of a group of people sitting on chairs. I have no information about where the photograph was taken or what the event was about. I find that one photograph, and all the photographs where I was unable to identify the first applicant, have no probative value and I place no weight on them.
18. There is one photograph of the first applicant sitting at a table, amongst a number of tables, in front of a stage. On the stage the symbol for the Viet Tan and the South Vietnam flag can be seen. There are two photographs of the first applicant sitting at a table with other people. There is a sign on the table in Vietnamese and there is a billboard behind them. There are four photographs of the first applicant sitting at a table with a computer in front of billboards. There are 15 photographs of the first applicant attending what appears to be a protest. In some of those photographs he is holding signs in Vietnamese and in others he is holding the South Vietnam flag. I accept there are 22 photographs showing the first applicant attending political events about Vietnam on what appears to be four separate occasions.
19. Based on the information before me, I accept the first applicant has had some involvement with the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan in Australia. I accept he has attended and participated in four political events about Vietnam.
20. The first applicant's evidence about the Viet Tan and his involvement with the group was general and lacking in detail. In his first SHEV interview he said he wasn't a member just a helper. However, in his second SHEV interview he said he had joined the group. Based on all the evidence before me, I am not satisfied the first applicant is a member of the Viet Tan, that he is an avid participant for the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan or that his attendance and support for the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan is on a regular basis.

The Vietnamese authorities' knowledge of the first applicant's political activities in Australia

21. The first applicant states in his SHEV application the Vietnamese police have made many visits to his family in Vietnam regarding his whereabouts and political actions.
22. The first applicant told the first delegate that, in June 2017, the Vietnamese police from the Criminal Investigation office came to see his mother after he became involved in the Viet Tan

party and questioned her about where he was. During the first SHEV interview he said he had photographs on his telephone. The recording of the first delegate's interview appeared to indicate the first applicant showed the first delegate a photograph or photographs on his telephone. However, no photographs appearing to depict police officers were in the review material and the first delegate did not describe what the photograph or photographs she was shown depicted. In those circumstances, I accept the first applicant showed the first delegate a photograph or photographs of the Vietnamese police with another person or persons at a home. However, I do not accept that photograph or photographs is evidence of the Vietnamese police coming to see the first applicant's mother to ask questions about the first applicant.

23. The first delegate put to the first applicant that he said in his SHEV application the Vietnamese government have been monitoring him from overseas and he responded that 'they' came to his house in Vietnam and knew what he was doing in Australia. The first delegate asked why 'they' would ask his family where he was or what he was doing if they knew he was in Australia and what he was doing and he responded he didn't know. The first delegate put to the first applicant that asking where he is and what he is doing is inconsistent with the Vietnamese authorities monitoring him and he responded that he only posted on [social media] and they knew it and then went to see his family. The first delegate put to him country information supports that some people who are involved in political activities and/or are outspoken about the Vietnamese government do experience problems on return to Vietnam. However, ordinary participants would not be targeted. The first applicant responded if a person joins any groups and leaves the country the Vietnamese authorities will think they want to overturn them. If a person holds the Viet Tan flag they will be arrested.
24. The first applicant has provided no evidence of posting about his involvement with the Viet Tan, the Vietnamese Human Rights Forum or the Vietnamese Community on his [social media] account or of being linked to any anti-Vietnamese government [social media] accounts. His written evidence was the Vietnamese police came to his family's home and asked about his whereabouts and his political actions. His oral evidence was the Vietnamese police came to his house and knew what he was doing in Australia. I accepted the first applicant showed the first delegate a photograph or photographs of the Vietnamese police with another person or persons at a home. However, I did not accept that photograph or photographs is evidence of the Vietnamese police coming to see the first applicant's mother to ask questions about the first applicant.
25. Based on the evidence before me, I am not satisfied the Vietnamese police have ever visited the first applicant's home in Vietnam and asked his family questions about where he is or what he is doing. I am not satisfied the Vietnamese authorities have any knowledge of the first applicant's political activities or his association/involvement with the Viet Tan and/or the Vietnamese Community in Australia or any other organisation that is, or could be perceived to be, against the Vietnamese government.

The first applicant's activities in Vietnam and his reasons for leaving

26. The first applicant said he never attended a protest in Vietnam and I accept that claim.
27. In his arrival interview he said when he left Vietnam he was against the Vietnamese government and had to escape. When he was asked if anything specifically happened to him he responded he was called by the Vietnamese police to come and see them. His friend was called up by the Vietnamese police and 'we' couldn't contact him and 'we' believed he might be imprisoned. The first applicant was scared it would happen to him and left Vietnam.

28. The first applicant's written evidence was he was working as a driver for the local Catholic Church community. The communist party would abuse their power and persecuted the people from the local Catholic Church. The Vietnamese government made 'our' lives difficult because 'we' were Catholics. He would often oppose the Vietnamese government and their actions and he would often have to hide from them because he would be summoned and arrested if he was found. He said in July 2012 the local Communist police attacked his local Catholic Church. He was a victim of their beatings. He was arrested and asked for his name and address. However, he managed to escape. He was then summoned to appear in Court. He feared he would be arrested, beaten and tortured if he appeared in Court so he left Vietnam.
29. The first applicant said during his first SHEV interview that 600 plain clothed police officers came to [City 2] Catholic Church and forced open the Church gates. The police assaulted the priest and parishioners. He was arrested because he was nearby and involved in the Catholic Church. He was a member of [a specific] group and attended the Catholic Church twice a week. He said the Vietnamese government wanted the Catholic Church's land and in Vietnam 'we' do not have the freedom to speak. The first delegate asked about his injuries from being beaten and he responded he has a scar [in a specific location]. He doesn't know how he was hurt. The Vietnamese police took his personal details and put 'us' in a small room. He and others broke down the door and ran away. 'We' were worried they would take us to Court or to jail. He went straight to [City 3]. He said 'they' came and delivered a summons to his family for him to attend Court. Later on in the SHEV interview he said the summons was for him to attend a police station. He cannot remember the date. He doesn't know where the summons is now. His parents had the summons and it might have been lost.
30. The second delegate asked the first applicant why he left Vietnam and he responded because he was put in jail and escaped. He hasn't received his sentence yet. There was conflict between the Vietnamese communists and the Catholic Church in [City 2] and he was arrested [in] July 2012. The Vietnamese authorities arrested many people. Some of the Vietnamese police were wearing uniforms and some wore plain clothing. Two policemen, who were wearing plain clothing and not armed, held his hands and took him away. He was beaten up and not fully alert. He was held for a few hours before he and some others broke the door down and ran away. When the second delegate asked where he had been detained he responded in a house.
31. The second delegate put to the first applicant he had said earlier in the SHEV interview he was in jail and he responded he wasn't sure if it was a jail or not. The second delegate put to the first applicant that there was a big difference between a house and a jail and he responded he was put in a house. He didn't know how many people were guarding him. The second delegate asked if there were Vietnamese police outside when he broke the door down and he responded he was the first to run away and he didn't know what the people behind him were doing.
32. The second delegate put to the first applicant that he made no mention of being detained and beaten in his arrival interview and he responded he didn't know if his personal information would be kept confidential and he was scared. The second delegate put to the first applicant he said he was never arrested or charged with an offence in Vietnam during his arrival interview and he responded he was fearful.
33. The second delegate put to the first applicant he didn't mention attending a Catholic Church in his arrival interview and he responded he can't remember what he said when he first arrived. The second delegate put to the first applicant he said in his arrival interview and in his written evidence he was working as a driver for the church community and he responded that he never worked for the church. He said there were errors in what his migration agent had

written down. He worked as a truck driver for his [relative]'s company. He attended the Catholic Church in [City 2] when he started working for his [relative] in the middle of 2011. He continued to work for his [relative] until [day] July 2012. When the second delegate asked the first applicant if he still feared returning to Vietnam because of his activities in [City 2] he responded that he wasn't sure but he thought the Vietnamese authorities will still have kept his records. He will be arrested at the airport.

34. It was put to the first applicant his written statement said he worked in [City 2] until December 2012 and that was consistent with the information he provided during his arrival interview. However, in his first SHEV interview he said he left [City 2] in July 2012. The first applicant responded that he stopped working in July 2012 after the [City 2] incident and it was a mistake. It was what the migration agent wrote down. It was put to the first applicant that he didn't have the assistance of a migration agent during his arrival interview and he responded that he doesn't know why he said he worked until December 2012.
35. The second delegate put to the first applicant that his licence was issued [in] June 2012 and has his home village address on it. The second delegate put to the first applicant that his evidence was this was his first Vietnamese driver's licence. The second delegate asked the first applicant how he could work as a driver from the middle of 2011 without a driver's licence. The first applicant responded it was very easy to obtain a fake driver's license in Vietnam. He was using a fake driver's licence.
36. The second delegate put to the first applicant that, on the one hand, he is applying for a driver's licence with the Vietnamese authorities and, on the other hand, there is a warrant for his arrest. The first applicant responded he had already done the driver's test and the licence was issued later. He said the process is different in Vietnam.
37. The first delegate put to the first applicant that the [City 2] event happened in July 2012 but he didn't leave Vietnam until April 2013. He responded he was in hiding in [City 3]. He said the summons was delivered a few weeks after the incident.
38. The first applicant said it was about 200 kilometres between [City 2] and his home village during his second SHEV interview and said it was about 100 kilometres during his first SHEV interview. He told the second delegate he didn't live in [City 2] when he worked for his [relative] but would travel back and forth. Sometimes he would stay in [City 2] for a few days at a time but he went to the [City 2] Church on the weekend. It would take him about two or three hours to drive from his home village to [City 2]. When the second delegate put to the first applicant that taking two or three hours to drive one way is a long day he responded sometimes he would stay in [City 2] for a week.
39. The second delegate put to the first applicant that his written evidence was that he worked for the Catholic Church and that is inconsistent with his evidence of driving a truck for his [relative]. The second delegate put to the first applicant that he found it implausible he would commute to work over such distances. The second delegate put to the first applicant he was concerned he didn't mention being arrested, detained and escaping in his arrival interview and that didn't make sense given he was claiming protection. The second delegate put to the first applicant that he had concerns about the police issuing a warrant against him to attend a police station. The first applicant responded he was using a fake driver's license, he didn't go back to his home village from [City 2] often - just from time to time - and he didn't understand Australia when he first arrived.

40. The first applicant provided two photographs as evidence of his involvement with his local Catholic Church. The photographs are undated. One photograph shows the first applicant behind the pulpit in a Church with Vietnamese writing in the background. The visible statues are indicative of the Church being Catholic. The second photograph is of a group of people with a priest. There is writing in Vietnamese in the background and all persons in the photograph appear to be of Asian ethnicity. The first applicant can be identified in the group. There is nothing in either of the photographs to indicate when the photographs were taken or where. I accept the first applicant is pictured in a Catholic Church with other people including a Catholic priest. I accept the people he is pictured with appear to be of Asian ethnicity and there is Vietnamese writing in the background. However, I am not satisfied the photographs were – in fact – taken in a Catholic Church in Vietnam. I am of the view the photographs are of no probative value and I place no weight on them.
41. The first applicant's evidence about opposing the Vietnamese government and their actions and having to hide is general, vague and lacking in detail. He has given no details about how, where or when he opposed the Vietnamese government, how often he was in hiding, where he would hide or for how long. I do not accept the first applicant ever opposed the Vietnamese government or their actions when he lived in Vietnam or that he was ever in hiding from the Vietnamese government.
42. The first applicant's claims of breaking down a door and running away are, on their face, fanciful and far-fetched. I find it implausible the first applicant would not know if he was taken to a jail or a house after he was arrested. Likewise, I find it implausible the first applicant would not know if there were Vietnamese police outside when he purportedly broke down the door. I am of the view the first applicant fabricated the claims of breaking down a door and escaping custody to strengthen his claims for protection and I do not accept them.
43. The first applicant has given inconsistent evidence. His evidence is he was working as a driver for the Catholic Church or he was working as a driver for his [relative], he was working as a driver from the middle of 2011 to July 2012 or he was working as a driver from the middle of 2011 to December 2012, he was never arrested or he was arrested and taken to jail or he was arrested and taken to a house, he was issued a summons to attend Court or he was issued a summons to attend the police station, he was commuting between [City 2] and his home village for work or he was not going back to his home village that often.
44. The first applicant's evidence about his activities in Vietnam is inconsistent, lacking in detail, implausible and/or general. I accept the first applicant is a Catholic but I do not accept he was at the [City 2] Catholic Church [in] July 2012, that he was ever arrested, beaten or detained by the Vietnamese police or that he was ever issued a summons for him to attend a police station or a Court. I am of the view the first applicant fabricated the claims to strengthen his claims for protection. This raises doubts about his credibility.
45. The second applicant was born to two Catholic parents who were married in a Catholic Church. For the purposes of this decision, I am prepared to accept the second applicant is also a Catholic.

The first applicant's activities if he returned to Vietnam

46. The second delegate put to first applicant that he had concerns he got involved with the Viet Tan to strengthen his claims for protection and the first applicant responded he got involved because he believes he can help the Vietnamese people and stop the Vietnamese government

from selling Vietnam. He is not fighting for himself. He is fighting to make Vietnam a democratic country.

47. I have found the first applicant has fabricated claims to strengthen his claims for protection. I am not satisfied the first applicant became involved with the Viet Tan and the other organisations as discussed above for any other reason except to strengthen his claims for protection. I am not satisfied that, if the first applicant returned to Vietnam, he has any interest or intention of participating in activities opposing the Vietnamese government.

Employment in Vietnam

48. The first applicant said it might be hard for him to get a job in Vietnam and his life would be controlled. He has given no reasons why he would find it hard to get a job or why he believed his life would be controlled if he returned to Vietnam. There is no evidence before me to indicate the first applicant cannot work and he is working in Australia. I do not accept the first applicant would find it hard to get a job or that his life would be controlled in Vietnam.

Refugee assessment

49. 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

50. 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.

51. The most recent DFAT report states that “Roman Catholics constitute seven percent of Vietnam’s total population (approximately 6.7 million) and is one of 14 distinct religions that hold full government recognition and registration....DFAT has observed that Catholics are able to practise freely at registered churches and that bibles and other religious texts are readily available in cities and towns. DFAT assesses that religious observance and practise only

becomes an issue when it is perceived to challenge the authority or interests of the CPV¹ and its policies.² Political and human rights activists who openly criticise the Vietnamese government, the CPV and its policies are at high risk of attracting adverse attention from authorities; however, the treatment from authorities generally depends on the individual's level of involvement. Individuals who are known to authorities as active organisers or leaders of political opposition are at high risk of being subject to intrusive surveillance, detention, arrest and prosecution. DFAT assesses low-level protesters and supporters often feel intimidated by police presence, and are sometimes detained and released the same day by authorities. There have been a few reported cases of uniformed and plain-clothed officers using violence to break up protests in 2016, such as beating protesters with batons to disperse crowds.

52. I accepted the applicants are Catholics. I accepted the first applicant was not involved in any protests in Vietnam. I accepted the first applicant has had some involvement with the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan in Australia. I accepted he has attended and participated in four political events about Vietnam. However, I was not satisfied the first applicant is a member of the Viet Tan, that he is an avid participant for the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan or that his attendance and support for the Vietnamese Human Rights Forum, the Vietnamese Community and the Viet Tan is on a regular basis.
53. I did not accept the first applicant ever opposed the Vietnamese government or their actions when he lived in Vietnam or that he was ever in hiding from the Vietnamese government. I did not accept he was at the [City 2] Catholic Church [in] July 2012, that he was ever arrested, beaten or detained by the Vietnamese police or that he was ever issued a summons for him to attend a police station or a Court. I did not accept the first applicant broke down a door and escaped custody.
54. I was not satisfied the Vietnamese police have ever visited the first applicant's home in Vietnam and asked his family questions about where he is or what he is doing. I was not satisfied the Vietnamese authorities have any knowledge of the first applicant's political activities or his association/involvement with the Viet Tan and/or the Vietnamese Community in Australia or any other organisation that is, or could be perceived to be, against the Vietnamese government. I was not satisfied that, if the first applicant returned to Vietnam, he has any interest or intention of participating in activities opposing the Vietnamese government. However, even if the Vietnamese government did become aware of the first applicant's political activities in Australia, his involvement is of an irregular low-level supporter and/or protestor and I am not satisfied the first applicant's involvement, would be viewed as challenging the Vietnamese authorities or interests.
55. Based on all my findings and the country information as outlined above, I do not accept the first applicant has any adverse profile that would give rise to any adverse interest in him by the Vietnamese government/authorities because of his religion and/or because of his political activities now or in the foreseeable future. I do not accept the second applicant would have an adverse profile that would give rise to any adverse interest in him by the Vietnamese government because of his religion.
56. The first delegate put to the first applicant that country information indicates claiming asylum is an offence in Vietnam but no one has been charged. It was put to the first applicant that

¹ Communist Party of Vietnam

² DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597 at 3.9.

country information indicated people who paid money to people smugglers were viewed as victims. It was put to the first applicant if he returned to Vietnam he would be asked questions but he would not be arrested. The first applicant responded that he would be arrested because of the Viet Tan. The first delegate put to the first applicant that he has done nothing wrong in Vietnam and was not involved in people smuggling. He responded a lot of people like him go to prison. The first delegate put to the first applicant that country information doesn't support his claim. The first delegate put to the first applicant a short period of detention has been found not to be persecution and the first applicant responded that a boat of Vietnamese people that arrived in Australia in 2015 was returned to Vietnam and those people spent 24 months in prison. The first delegate put to the first applicant that the information that was breached reinforces he would be returning to Vietnam as a failed asylum seeker.

57. I accepted the first applicant would be returning to Vietnam as a failed asylum seeker. The most recent DFAT report states that it has no information to suggest that people known or believed to have sought asylum in another country are mistreated by the Vietnamese government on their return³. The DFAT report states:

Article 91 of the *Penal Code 1999* states that 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. Returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. In December 2016, a new Memorandum of Understanding (MOU) was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security, which provides a formal framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea'⁴.

58. In February 2014, over a period of about eight and a half days, the full names, gender, citizenship, date of birth, date when immigration detention began, the location of immigration detention, boat arrival details and the reason for being unlawful (for example illegal maritime arrival) of approximately 9,250 people were inadvertently published on the Immigration Department's website (the data breach). I accept that limited details about the first applicant—as outlined – were capable of being accessed on the website for a period of eight and a half days. However, even if the data breach had not occurred, and whether or not the first applicant's details were in fact accessed by the Vietnamese government/authorities, those details – apart from details about when and where the first applicant was detained – may have been otherwise evident to the Vietnamese authorities by the manner of his return to Vietnam.
59. During the SHEV interview the first applicant said he is worried he will be put in jail, tortured and beaten if he returned to Vietnam because he joined the Viet Tan. He left Vietnam and will be viewed as a traitor. He might be charged because he betrayed Vietnam. I have found the first applicant does not have a profile of any adverse interest and I am not satisfied he faces a real chance of any harm on the basis of seeking asylum and/or because of the data breach now or in the foreseeable future.
60. I accept there are credible reports of some returnees being held for a brief period upon their return to Vietnam for the purpose of being interviewed by the Ministry of Public Security (MPS) officials to confirm their identity where no documentation exists. Other cases involve individuals detained by authorities in order to obtain information relevant to the investigation of people smuggling operations⁵. DFAT assesses that long-term detention, investigation and

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

⁴ Ibid.

⁵ Ibid.

arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations. I accepted the first applicant was never involved in people smuggling.

61. The first applicant's SHEV application indicated that he has never been charged, convicted or wanted for an offence in Vietnam. I am not satisfied the first applicant would be at risk of serious harm as a consequence of this routine investigation now or in the foreseeable future.
62. Based on all the information before me, I am not satisfied that, having regard to the first applicant's profile he would face a real chance of persecution now or in the foreseeable future if he returned to Vietnam for any of the reasons claimed.

Refugee: conclusion

63. The applicants do not meet the requirements of the definition of refugee in s.5H(1). The applicants do not meet s.36(2)(a).

Complementary protection assessment

64. Under s.36(2)(aa) of the Act, 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

65. 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.
66. I accept that, on return to Vietnam, the first applicant will be subject to a series of administrative processes (as outlined above) and identified as a person who departed Vietnam illegally. I have found the first applicant is not a person of any interest to the Vietnamese authorities and, upon his return, I am not satisfied he faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Vietnamese authorities during this administrative process are intended to cause pain or suffering, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk the first applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Vietnam. Likewise, I do not accept that questioning and having a fine imposed upon the applicant for his illegal departure amounts to suffering significant harm within the meaning of s.5(1) and s.36(2A).
67. I did not accept the first and/or second applicants faced a real chance of any harm for any other reasons. The "real risk" test in the complementary protection provisions imposes the

same standard as the “real chance” test applicable to the assessment of “well-founded fear”.⁶ I am not satisfied that, having regard to the applicants profiles, that they will face a real risk of significant harm on their return to Vietnam for any other reasons.

68. I am satisfied that as a necessary and foreseeable consequence of the applicants being removed from Australia to Vietnam (the receiving country), there is not a real risk that they will suffer significant harm now or in the foreseeable future for any other reason.

Complementary protection: conclusion

69. 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 applicants will suffer significant harm. The applicants do not meet s.36(2)(aa).

Member of same family unit

1. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for 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 and a dependent child of the family head.
2. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that the applicants also do not meet the family unit criterion in either s.36(2)(b) or s.36(2)(c).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

⁶ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

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.