



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA19/06985

VIETNAM

IAA reference: IAA19/06987

VIETNAM

IAA reference: IAA19/06986

Date and time of decision: 18 September 2019 10:56:00

V Price, 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 applicants (the applicants) are a family group who claim to be citizens of Vietnam. The applicants are: the first applicant (IAA19/06985); his wife, the second applicant (IAA19/06986); and their child, the third applicant (IAA19/06987). On 28 August 2017 they lodged a joint application for a protection visa with the Department.
2. On 9 August 2019 a delegate of the Minister of the Department (the delegate) refused to grant the visas to the applicants.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
4. The applicants' representative provided a submission to the IAA dated 2 September 2019. To the extent this contained legal submissions and discussed matters and information which were before the delegate, this is not new information and I have considered it. However, the submission contained a substantial amount of country information which was not before the delegate, and which constitutes new information (the new country information). In addition, the following new information was also given to the IAA: [Social media] posts (the [Social media] material); photographs of the first applicant attending protests here in Australia (the photographs); and a copy of an online newspaper article regarding the treatment of returned asylum seekers (the article).

New country information and the article

5. I accept that the new country information is from authoritative sources, that the article is about returnees to Vietnam, and that the applicants' were no longer represented by the time of the protection visa interview and did not provide a post-interview submission. However, the applicants' were represented at the time of lodging the protection visa application and had the opportunity to, and did, provide written submissions and supporting material (which included some country information). The new country information is dated between late 2014 and early 2018 and the article is dated October 2018. However, there is ample information, also from authoritative sources, covering this period as well as more recent reports in the material before me. This material does not add to that information. The representative has not provided reasons as to why there are exceptional circumstances to justify considering this material, and having regard to all the circumstances, nor can I identify any. I am not satisfied there are exceptional circumstances to justify considering the new country information or the article for s.473DD(a) of the Act. I must not consider that material.

[Social media] material and photographs

6. I accept that the [Social media] material and the photographs evidence the applicant's participation in demonstrations against the Vietnamese government here in Australia in 2018. It is not clear on the material to whom the [Social media] pages belong: one page appears to have the name of the second applicant and contain a post from the 'Viet Tan' however, it has not been translated and I cannot be satisfied as to its contents. The first and second applicants have not claimed to have been members of the Viet Tan and the [Social media] page does not evidence any such membership and I note the second applicant claimed she has not attended

any protests in Australia. I cannot be satisfied that the [Social media] posts are open to the public (including the Vietnamese authorities) such that they indicate a real chance or risk of harm to the applicants. Moreover, the first applicant's attendance at these events was accepted by the delegate and I also accept he participated in protests in Australia. This material does not indicate he had a profile other than that claimed before the delegate, and does not otherwise add to or alter the evidence already before me. Overall, the [Social media] material and the new photographs do not assist my assessment of the applicant's claims. I am not satisfied there are exceptional reasons to justify considering this new information for the purpose of s.473DD(a) of the Act. I must not consider it.

Other matters

7. The applicants' representative submitted that: they were limited in their response; could not address their clients' impecunity; and invited the IAA to allow an opportunity to provide additional information. Generally the IAA is to conduct its review on the material provided by the Department, without obtaining new information from the applicant. There is no right to a hearing and no statutory right for an applicant to present his or her case on review. Nor is there any obligation on the IAA to conduct an interview. The IAA has discretion under s.473DC of the Act to obtain new information from the applicant but can only consider new information then obtained subject to s.473DD of the Act.
8. In this case I do not accept that the representative was limited in their ability to make submissions as claimed: rather an extensive submission and new information was given to the IAA and they clearly had the opportunity to address any matters related to the applicants' claimed impecunity within that submission. That they chose not to do so does not in my view impose an obligation on the IAA to either allow an opportunity to provide additional submissions or to get new information from the applicants. Matters generally relating to the applicants' claimed economic position were raised as part of the protection visa application, including in written submissions and at the protection visa interview, and I note that the representative has not identified any specific new additional information they wish to provide, or that they wish the IAA to obtain. In all the circumstances, I am satisfied that I have enough material before me to make a decision in this matter, and am not satisfied that I need to obtain further information from the applicants in this case.
9. The referred material included a report issued by Victoria Police in 2015. This appeared to be report of a burglary made by the first applicant. It is not relevant to my assessment of the applicants' protection visa claims and I have not considered this further. In addition, the material given to the IAA by the secretary includes a news article dated [November] 2016 which appears to have been in given in evidence by the applicants' at the protection visa interview. This article is in Vietnamese, no English translation has been provided and as such I cannot be satisfied as to the contents of this article or the relevance it bears on the applicants' claims. I cannot place any weight on this article and have not considered it further. As noted above, I consider I have sufficient independent information in the material before me upon which to assess the applicants' claims. I do not need to get information from the applicants in relation to this article.
10. The material given to the IAA also included the biodata and arrival interviews conducted with the first and second applicants. It is not clear whether this material was before the Delegate at the time of making the decision, and therefore whether it is new information. In the event that it does constitute new information, given it contains information relating to the personal circumstances of the first and second applicants provided shortly after their arrival in Australia I am satisfied there are exceptional circumstances to justify considering it for s.473DD(a) of the

Act. In the written submissions accompanying their protection visa application, the first and second applicants explained that to the extent of any inconsistencies, the decision-maker should rely on their evidence in the protection visa application. I have not adversely relied on the material contained in either the biodata or arrival interviews and I have determined I do not need to obtain new information in relation to that material.

Applicants' claims for protection

11. The applicants all claim to be of Kinh ethnicity and to be adherents of the Catholic faith. The claims of the first and second applicant were set out in written statements accompanying their protection visa applications. There were no express claims made in relation to the third applicant. However, claims relating to the third applicant arise from those of the first and second applicant and have been considered where relevant below.
12. The claims of the first and second applicants can be summarised as follows:
 - They are from Nghe An in Vietnam. They were married in September 2011, their marriage was registered in March 2012 and they had their first [child] in [year].
 - In July 2012, the first and second applicants attended the demonstration against the Vietnamese government at the Catholic Church in [Location] , Nghe An. The first applicant's father was also at the demonstration. The first and second applicants were hit during the commotion and the first applicant's father was beaten and sustained a broken arm. The first and second applicants were arrested and taken to the police station at [Location] where they were interrogated and released later that night.
 - [In mid-]July 2012 the first and second applicants were summonsed to report to the police [two days later]. They attended the police station where they held for about four hours, questioned and warned not to attend mass or participate in further church activities.
 - The first applicant's father was also summonsed by the police on numerous occasions. He ceased his activities as a member of the church committee and prayed at home. The first and second applicant continued to attend church but believed they were being monitored by police in plain clothes. They made plans to leave Vietnam.
 - They received a second police summons in January 2013 but did not report as directed. Rather, they left the country by boat in February 2013, leaving their [child] with their family. After their arrival in Australia, the first applicant's father advised the police had been searching for them. Their priest, Father [A] was arrested [in] May 2017 for his work as a human rights defender and for protesting against the Formosa disaster.
13. They claimed they will be arrested, beaten and imprisoned on return to Vietnam due to: their Catholic faith; political opinion against the government; as they resisted the police and fought back; they disregarded orders not to attend mass; and they failed to report to the authorities when summonsed. They also claimed that: the authorities will refuse to register them; they will not be granted documents enabling them to subsist; they will be denied basic rights; and that they will struggle to subsist on return as their family mortgaged their home so they could flee Vietnam.
14. The first and second applicants claimed some of their personal information was inadvertently released on the Department website, and claimed to fear harm as failed asylum seekers and as a result of their illegal departure from Vietnam.

15. At the protection visa interview the first and second applicant claimed to fear harm as a result of the first applicant's attendance at various protests in Australia. The first applicant also gave evidence that the government had confiscated land from his family. I note that the biodata and arrival interviews did not contain additional claims beyond those set out above.

Refugee assessment

Well-founded fear of persecution

16. 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.

Country of reference, background and nationality.

17. I accept on the documentary and oral evidence before me that the first and secondary applicants are nationals of Vietnam and are of Kinh ethnicity. The third applicant was born in Australia in [year], however, the first and second applicants have stated that [s/he] is a citizen of Vietnam, and I accept this is the case. The first and second applicants resided in Nghe An province, they have family who continue to reside there, including their [other child], who is about [age] years old, and I find this is the area to which they would return.
18. The applicants have claimed to be adherents of the Catholic faith. At the interview the first and second applicants provided detailed evidence, in a manner suggestive of lived experience, of their belief in and practice of Catholicism in Vietnam and in Australia. I accept that: the first second and third applicants are Catholic; the first and second applicants practised this religion in Vietnam; the applicants have continued to practice this faith in Australia.

Assessment of claims

19. The applicants claimed that they came to the adverse attention of the authorities in July 2012 when they were present at the incident in [Location]. However, for the following reasons taken cumulatively, I do not accept that the first applicant, the second applicant, or the first applicant's father were present at [Location] [in early] July 2012 as claimed.
20. The applicants' evidence regarding the event at [Location] was inconsistent with independent information from contemporaneous news articles relating to the event, including one provided

by the applicants with their protection visa application (Independent Catholic News July 2012; Asia News July 2012; and Democratic Voice of Vietnam July 2012), in the following respects:

- the applicants claimed there was a protest [in early] July 2012, with the first applicant expressly stating that they travelled to [Location] along with many other Catholics with the intention of participating in the protest in support of religious freedom. In contrast, independent information is that there was no planned protest on this day, rather the local parishioners and local priest were attacked by Vietnamese authorities and thugs during their regular Sunday Mass, and widespread demonstrations in support occurred in the days and weeks following the [early] July incident;
 - the second applicant stated it was the priest from their own village who encouraged their attendance at [Location] and who travelled there to conduct the Mass [in early] July 2012, which contrasts with information that it was the local priest from [Location] who conducted the Mass;
 - the first and second applicants stated their arrest occurred at noon, indicating the attack against the Mass was early in the day, however news reports place the incident in the evening of [early] July 2012; and
 - both the first and second applicants asserted that the Mass was conducted at a house church, the home of one of the local parishioners, whereas the independent news articles describe the incident as occurring at the local Chapel.
21. In submissions to the IAA it was contended that the applicants' description of the venue as a house church was a mistranslation of the oral evidence by the interpreter. This assertion is not supported by the repeated evidence of both the first and second applicants that a local parishioner had donated their home for the service. In particular, the first applicant stated it was a big house where one of the residents lived and the owner allowed them to pray there, and the second applicant claimed the location of the church service moved between people's homes and that there were religious statues in the venue on the day (including one of the Virgin Mary which infamously got broken) because the locals had bought them to the house. Their evidence indicates the event occurred in a house church which as noted, contrasts with the information that it was a Chapel. Moreover, and in any event, as noted above the evidence that it occurred in a house church is not the only concern with their description of the events. There is no suggestion of broader issues with the interpretation during the interview such that their other evidence has been misunderstood and I am not satisfied this accounts for the other issues I have identified. The discrepancies between their accounts and that provided in the independent information leads me to conclude that they were not at the event as claimed.
22. There are also other concerns with the evidence of the first and second applicants' in relation to these events, which contribute to my conclusion they were not at [Location] as claimed. Specifically:
- The second applicant's evidence that she did not know they were going to [Location] for the purpose of attending a protest is inconsistent with the first applicant's statements they went there intending to participate in a demonstration;
 - In their written statements the first and second applicants claimed that the second applicant was hit in the face and eye during the commotion and the first applicant was hit in the back with a baton. In contrast, during the interview the first applicant stated that he joined the fight but nothing really happened and the second applicant was ok. The second applicant stated she was scratched but otherwise ok and made no mention of any injury to the first applicant;

- The first and second applicants both claimed they were twice summonsed to attend the police station following the event. The first summons was issued about ten days after the incident. In their respective written statements, the first and second applicants both stated they attended the police station in response to the first summons. In contrast, they both claimed at the interview that they did not attend the police station as requested, stating they were afraid to do so; and
 - In their respective written statements it was contended that the first applicant's father was summoned to the police station many times after [Location]. In contrast, both the first and second applicants stated during the interview that his father did not receive any such summons.
23. In submissions to the IAA it was claimed that, due to stress, the first applicant conflated his experience of the arrest at [Location] and the first summons in his written statement. While I accept the visa application process can be stressful, ultimately I do not accept this explanation accounts for the differences in the evidence. Not only does it not account for the fact the second applicant also gave this evidence in her written statement and at interview, but two separate incidents are discussed in detail, with the first and second applicants referencing different police stations and different dates to that of [Location]. Copies of the first summons for the first and second applicants were provided to the Department. However, these documents do not overcome the identified concerns discussed above and I place no weight on them as corroborative evidence either of their attendance at [Location] or as evidence they were wanted by the authorities for participating in that event.
24. It was also claimed to the IAA (differently to the evidence at interview) that the first applicant's father did receive a summons but the first applicant felt it was inappropriate to raise this during the interview because he lacked evidence and that the police did not actively pursue his father due to his ill health. I do not accept this explanation. Despite the claimed lack of supporting evidence, this matter was nonetheless included in the applicants' written statements, and given the importance of this matter to their protection claims, I consider it implausible it would not also be raised during the interview where this was discussed at length. Further, this assertion does not overcome that the second applicant also indicated the first applicant's father did not receive any summons. Nor does his father's ill health account for the differences in their claims in respect of whether or not he received a summons.
25. On the totality of the claims and evidence before me, I am not satisfied that the first applicant, the second applicant, or the first applicant's father attended the Mass at [Location] [in early] July 2012, or that they ever attended any protest in relation to the events at [Location] or any other protests in support of Catholics. Nor am I satisfied that they were ever summonsed to attend the local police station due to their participation in that or any other event, that they were subject to any monitoring or that the first applicant's father was forced to cease his activities with the Church. I am not satisfied that the first and second applicants had an adverse profile with the government or the authorities for any reason associated with the past practise of their Catholic religion, their presence at [Location], or any other reason, and nor am I satisfied that the authorities searched for them after their departure from the country. I am not satisfied the first, second or third applicants face a real chance of any harm on return to Vietnam now or in the reasonably foreseeable future for any reason associated with the claimed attendance of the first and second applicant at [Location] in 2012.
26. At the interview the first applicant stated that the government had in the past confiscated farm land from his family in order to build a factory. Having regard to information from the Australian Department of Foreign Affairs and Trade (DFAT) 2017 that the government does acquire land for the purpose of manufacturing and mining, I accept this occurred as claimed.

The first applicant did not contend that he or his family members faced any adverse harm from the authorities or anyone as a result of this event and the applicants have not claimed they will face any harm for this reason on return to Vietnam. The first applicant's family continued to work and have a home after the acquisition of their land and his mother continues to reside in Vietnam and raises their [child]. Any chance that their land will be acquired in the future is purely speculative and I am not satisfied on the evidence that there is a real chance of this occurring. I am not satisfied that the first, second or third applicants face a real chance of any harm on return to Vietnam now or in the reasonably foreseeable future for any reason associated with the past or future acquisition of their land.

27. The Vietnamese Constitution enshrines rights to freedom of belief and religion and states that all people have the right to follow any or no religion (DFAT 2017; and United States Department of State (USDOS) May 2018). It also enshrines the rights to freedom of speech, assembly, association and demonstration. However, in practice these rights are conditional, with the government maintaining a strong atheist stance, and remaining intolerant of open political expression against the Communist Party of Vietnam (CPV), the government or its policies (DFAT 2017; USDOS May 2018; USDOS April 2018; Human Rights Watch (HRW) 2019; US Commission on International Religious Freedom (USCIRF) 2018; Bertelsmann Stiftung's Transformation Index (BTI) 2018; and Freedom House (FH) 2018). There are penalties under the Penal Code for practices that, in the government's view, undermine peace, national independence and unity and independent information from these sources indicate that these laws are routinely applied to curb political dissent, and to limit religious freedom, particularly in relation to unregistered organisations and unregistered church groups in ethnic minority communities, due to their real or perceived political activism.
28. DFAT advised in 2017 that the situation for Catholics across Vietnam is improving, with Roman Catholics accounting for approximately 7 per cent of the population and this religion gaining full government recognition and registration. In Nghe An province specifically, pro-government groups reportedly demonstrated against Catholics on several occasions in 2017, however, the reports do not disclose any instances of harm to the parishioners. DFAT and USDOS (May 2018) have reported periodic instances of harassment, intimidation of Catholics and forcible closures of house churches in Nghe An, some of which involved assault against priests and parishioners and damage to church property. However, these do not appear to occur at a level of regularity which indicates there is a real chance of harm for the Catholic community and overall, DFAT reports the situation has improved in Nghe An province with the increased strength of the Catholic community and leadership and a reported increase in the registration of churches. There are also reports of so called 'Red Flag' pro-government militants harassing Catholics, including in Nghe An, though to date they have primarily harmed high profile figures such as priests who have been openly critical of the government on various issues, including the Formosa environmental disaster (USCIRF 2018). DFAT (2017) notes concerns in relation to unregistered church groups in ethnic minority communities (which does not include those of Kinh ethnicity such as the applicants) and has advised that serious incidents of violence are related to other activities such as protesting against land confiscation and anti-government activities. Overall, I conclude that the independent information does not indicate that Catholics, including from Nghe An, face a real chance of future harm solely on the basis of their religion.
29. In relation to such protests and to political dissent more broadly, DFAT advised in 2017 that those at high risk of being subject to intrusive surveillance, detention, arrest and prosecution are individuals who are known to authorities as active organisers or leaders of political opposition. This includes prominent political, religious and human rights activists, as well as high profile bloggers and former political prisoners of conscience. This is broadly supported by

reports from HRW (2019), USCRIF (2018) and USDOS (May 2018). In contrast, DFAT advises that low-level protesters and supporters may be injured in crowd disbursement, may feel intimidated by police and, in some cases, may be detained and released the same day. However the information does not suggest this happens to all low-level supporters, or that it occurs at a level which rises to a real chance.

30. Information from DFAT 2017 is that Facebook was sporadically blocked in 2016, most notably during the protests over Formosa, however, overall blogs and social media platforms are widely available in Vietnam. Facebook and Instagram are popular amongst citizens as a means of sharing information and organising public events, and it only high-level bloggers who have had their accounts suspended or who have faced adverse attention from the authorities (DFAT 2017: USDOS April 2018). This is supported by the 2018 arrest and prosecution of four bloggers who used Facebook to incite others to protest (HRW 2019). HRW advised in their 2019 report that a new cyber security law, due to come into effect in January 2019, requires service providers to remove offending content within 24 hours of receiving a request from the Ministry of Public Security or the Ministry of Information and Communications and required internet companies to store data locally, verify user information, and disclose user data to authorities without a court order. These laws have been criticised for threatening the right to privacy and it is feared they could further facilitate suppression of online dissent or activism. However, the effects of this law are as yet unclear and it does not appear to alter the information before me that, to date, it is high-level bloggers who have had their accounts suspended or who have faced adverse attention from the authorities.
31. The first and second applicants have claimed that in May 2017, the police arrested their priest, Father [A], due to his political activism. However, a news article relating to these events, provided by the applicants, does not support this claim (Prisoners of Conscience May 2017). Firstly, it indicates that the priest was from a different parish to that identified by the applicants' as their parish, which raises doubts he was their parish priest. Secondly, the article states that the authorities arrested a high-profile blogger and political activist who was travelling in the same car as the priest. The priest did not appear to have been harmed in the incident. I am not satisfied that the first and second applicant's priest was arrested as claimed, and nor am I satisfied that this incident in any way evidences a future real chance of harm to the applicants on return to Vietnam.
32. In this case, I accept the applicants are Catholic and that they will continue to follow this faith on return to Vietnam. On their evidence the first and second applicant did not attend a house church in the past. I find that on return all the applicants will practise their faith in the same manner as the first and second applicant did in the past, and I am not satisfied that they will attend a house church in the future. Their evidence did not disclose that they experienced any past harm in the course of their regular church attendance and activities or that they otherwise faced adverse attention or harm from the authorities or anyone else due to their Catholic faith. The applicants are not members of an ethnic minority and the above information indicates an overall improvement in the situation for Catholics, including in Nghe An and does not indicate Catholics face a real chance of harm. Having regard to their particular circumstances and the country information, I consider that the applicants can continue to practice their faith on return to Vietnam in the reasonably foreseeable future and I am not satisfied they face a real chance of harm in doing so.
33. I am not satisfied that the first or second applicant were otherwise discriminated against in the past due to their religion: the first applicant ceased his education in year [number] following which he was steadily employed in farming and in the [work sector] in Vietnam; and the second applicant completed year [number] of high school, undertook a [subject] course, and

gave evidence that she was employed on the farm and assisted her husband in the [work sector]. I have considered that the first applicant's father took out a loan and mortgaged the home to facilitate their travel to Australia and their evidence that their families have limited financial means. However, I also note that the first and second applicants have been running their own business in Australia since 2017 and I am not satisfied that the first or second applicants will be unable to find accommodation or employment on return to Vietnam for any reason, including due to their religion. Overall, I am not satisfied that the applicants face a real chance of harm on return to Vietnam now or in the reasonably foreseeable future for any reason associated with their Catholic faith, including as Catholics from Nghe An province.

34. I accept that the first and second applicants have resided in Australia since 2013, that the third applicant was born here, and that all of the applicants have embraced Australia's culture during that time. I accept that the first and second applicants hold views in support of freedom of expression and religion, that they strongly follow their Catholic faith, and that they hold views opposed to the Vietnamese government. I have rejected that the first and second applicant attended any protests at [Location] or otherwise in Vietnam. The second applicant stated and I accept that she did not attend any protests in Australia. Noting she has not attended protests in Vietnam or in Australia when she had the opportunity to do so, I consider she will not have any interest in doing so on return to Vietnam. I am not satisfied that she will attend protests of any kind on return to Vietnam now or in the reasonably foreseeable future. I am not satisfied that the first, second or third applicants face a real chance of any harm for any reason associated with the political activity or opinions of the second applicant on return to Vietnam now or in the reasonably foreseeable future.
35. I accept that in 2017 and 2018 the first applicant attended several political protests against the Vietnamese government here in Australia. The evidence does not indicate that his attendance at these events is known to the Vietnamese authorities or that there is real chance it will become so in the reasonably foreseeable future. In any event, his evidence does not indicate he was an organiser or leader of any of these events, and nor does his activity here indicate he is a high-profile blogger or activist. I find his participation in these activities and is, at best, that of a low-level supporter. I am not satisfied that he, or the second or third applicants, face a real chance of any harm on return to Vietnam due to the first applicant's political activity in Australia. I accept that the first applicant will continue to engage in political activity in Vietnam. However, having regard to his activities in Australia, I am not satisfied that he will become a leader or organiser of such activities; rather I find he would continue to participate at the same low-level at which he is currently engaged. I find that at most, he will have a profile as a low-level protester or supporter, that he will not be a high profile blogger or activist, and having regard to the above country information and his particular profile discussed above, including his Catholic religion, that he is from Nghe An, and his activities in Australia, I am not satisfied that he will face a real chance of harm in the process of engaging in any future political activity in Vietnam or that he will otherwise have a profile that will attract adverse attention from the authorities or anyone else on return. On the totality of the evidence before me, I am not satisfied that the first, second or third applicants face a real chance of harm now or in the reasonably foreseeable future for any reason associated with the first applicant's political opinion or any future political activity he undertakes on return to Vietnam.
36. I accept that the first and second applicant's departed Vietnam illegally. I also accept that some of the first and second applicant's personal information was inadvertently released on the Department website. The information released included their names, dates of birth, nationality, gender and that they were in detention. It did not include details relating to their protection claims. The evidence before me does not indicate that the disclosure of this information of itself will result in a real chance of harm to the applicants on return to Vietnam.

Nonetheless, I accept that the applicants will be identified as failed asylum seekers on their entry into Vietnam due to the manner in which the first and second applicant's departed and the manner in which they will all be returned.

37. DFAT (2017) advises that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under the Penal Code. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. People are returned to Vietnam on the understanding that they will not face charges as a result of their having made asylum applications. DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum. DFAT advises that some individuals were subjected to long-term detention, investigation and arrests on return from Australia, however this was not due to their status as failed asylum seekers, but rather because they committed criminal offences, such as people smuggling (DFAT 2017). The information does not support that returnees who have had a prolonged absence from Vietnam and/or a long period of residence in Australia are harmed. Indeed DFAT advises that returnees have received assistance from Vietnamese provincial authorities and the International Organisation for Migration to reintegrate to their communities.
38. In this case, I have not accepted that the first or second applicants had an adverse profile for any reason on departing Vietnam. They are not members of an ethnic minority, and noting my findings above, there is nothing else in their particular circumstances to suggest they will otherwise have an adverse profile which would result in a real chance of being harmed on return. I am not satisfied that the first, second or third applicants face a real chance of harm on return to Vietnam now or in the reasonably foreseeable future for their prolonged absence from Vietnam, their residence in Australia, or for any reason associated with seeking asylum in Australia.
39. DFAT (2017) advises that Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon of between VND2 million and VND50 million depending on the circumstances of their departure. Notwithstanding these fines, DFAT understands that people who have paid money to organisers of people smuggling operations, such as the first and second applicants, are not subject to such fines. Individuals who paid money to organisers of people smuggling operations are viewed as victims of criminal activity, rather than as criminals, rather than as criminals facing the penalties allowed in the law for illegally departing Vietnam. Some returnees can be briefly detained and interviewed to confirm their identity, but long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations. As noted above, DFAT understands this to be the case in relation to several individuals who were on board vessels returned to Vietnam in 2016. The information from DFAT does not indicate that returnees are subject to any harm during the brief period of detention and while being interviewed.
40. I am not satisfied on the evidence before me that the first or second applicants would be considered people smugglers on return to Vietnam. They did not have an adverse profile on departure from Vietnam and having regard to their particular profile and circumstances discussed above, I am not satisfied they have a profile which would suggest they would be treated differently on return. On the evidence before me, I am not satisfied that the first or second applicants will be placed in long term detention, be imprisoned, investigated or arrested on return to Vietnam. As the first and second applicants departed the country illegally, I accept that they may be briefly detained and interviewed on return. However, considering their particular profile and circumstances, I am not satisfied that this of itself rises

to the level of serious harm as contemplated by the Act, and nor am I satisfied they will face any harm during that brief period of detention and investigation.

41. As noted above, DFAT advised in 2017 that people who are the victims of people smuggling operations are not subject to fines for their illegal departure, in these circumstances I am not satisfied that they will be issued a fine on return. However, even if they are, the first and second applicants have attained skills working in Vietnam and in Australia, including running their own business here since 2017. Even taking into account their claims that their home in Vietnam was subject to a mortgage and that their family have limited financial circumstances, I am not satisfied on the totality of the evidence that they would be unable to pay any fine issued to them. In all the circumstances, I am not satisfied that a brief period of detention, being interviewed on arrival in Vietnam and being issued a small fine constitutes serious harm or that the first or second applicant would face serious harm during this process. I am not satisfied that the first and second applicants face a real chance of serious harm for any reason associated with their illegal departure from Vietnam now or in the reasonably foreseeable future. The third applicant was born in Australia and did not depart Vietnam illegally and would not [her/him]self be subject to the terms of the Penal Code, and I am not satisfied that [she/he] faces a real chance of any harm as a result of the illegal departure of the first and second applicants on return to Vietnam now or in the reasonably foreseeable future.
42. Moreover and in any event, I also find that all persons who depart Vietnam illegally are subject to the terms of the Penal Code. The law is therefore not discriminatory on its terms and or in its application, and I find it is a law of general application. A generally applicable law will not ordinarily constitute persecution because the application of such a law does not amount to discrimination. The information before me does not support that the law is selectively enforced or that it is applied in a discriminatory manner. Accordingly, even having regard to the first and second applicants' particular profile, I find that any investigation and punishment for their illegal departure would be the result of a law of general application and does not amount to persecution for the purpose of ss.5H(1) and 5J(1) of the Act.
43. I accept that the first and second applicants may have been removed from their household register given their absence from the country. However, information from DFAT (2017) and the United Kingdom's Praxis Community Projects (2017) is that it is possible to re-apply for registration and that assistance is provided to returnees from the local authorities to do so. I am not satisfied on the evidence that they will not have the documentation necessary to obtain their registration. Moreover, having regard to their particular profiles as discussed above, I am not satisfied that they will be prevented from regaining their registration, or from registering the third applicant for any reason. I am not satisfied that the applicants will be undocumented or unable to obtain household registration on return. I am not satisfied they will be unable to access basic services or subsist or that they otherwise face a real chance of harm on return to Vietnam now or in the reasonably foreseeable future because they are undocumented and/or will not have household registration.
44. I have taken into account that the applicants have resided in Australia for a long time and have embraced Australia's culture and values. I have also taken into account that the third applicant was born in Australia and attends [education] here. I accept it will be an adjustment for the applicants to return to Vietnam. However, the first and second applicant's resided there prior to coming to Australia and they have families who continue to reside in the country and can assist them to reintegrate into the community. Education in Vietnam is compulsory, and though some fees exist for textbooks and uniforms, it is theoretically tuition-free and universal until aged 14 (DFAT 2017). While in some cases access to facilities is a concern, I note that both the first and second applicants attended school in the past and the evidence does not indicate

that the third applicant will be unable to access education on return. I have taken into account the claimed financial situation of their family. However, as noted the first and second applicants had steady employment in Vietnam in the past and they have run their own business in Australia since 2017. In all the circumstances I am not satisfied that: they will be unable to pay any education related fees for the third applicant; they will be unable to find employment and accommodation on return to Vietnam; they will be unable to subsist; or that the applicants otherwise face a real chance of harm on return to Vietnam now or in the reasonably foreseeable future for any reason associated with their long-term residence in Australia, their absence from Vietnam, or any other reason claimed.

45. On all the totality of the evidence before me, including the independent information and the applicants' particular circumstances and accepted claims taken individually and cumulatively, I am not satisfied that the applicants face real chance of serious harm or persecution due to their illegal departure from the Vietnam. Nor am I satisfied that they otherwise face a real chance of harm on return to Vietnam now or in the reasonably foreseeable future for any of the reasons claimed. They do not have a well-founded fear of persecution.

Refugee: conclusion

46. The applicants meet 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

47. 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

48. 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.

49. I have accepted that the first and second applicants departed Vietnam illegally. However, for the reasons set out above, I do not accept that they would be treated as people smugglers on return to Vietnam, or otherwise have any adverse profile on return to Vietnam. I am not satisfied that the first or second applicants will be placed in long-term detention, be imprisoned, investigated or arrested due to their illegal departure or for any other reason. I accept that the first and second applicants may face a brief period of detention and an interview on arrival in Vietnam. Having regard to independent information above and their manner of departure, I am not satisfied they will be fined for their illegal departure. However,

in the event that they are, it will be a small fine. I find that being briefly detained, interviewed and possibly subject to a small fine, does not amount to significant harm for the purpose of s.36(2A) of the Act. It would not amount to the death penalty, an arbitrary deprivation of life or torture, and on the evidence before me, including the first and second applicants' particular profile and circumstances discussed above, I am not satisfied that a brief period of detention, questioning, or the imposition of a small fine, would involve pain or suffering that is cruel or inhuman in nature, or involve severe pain or suffering, or that it would be intended to cause extreme humiliation. I am not satisfied on the evidence before me, discussed above, that the first and second applicants would be unable to pay any small fine issued to them. The third applicant was born in Australia and did not depart Vietnam illegally and I am not satisfied [s/he] will be subject to the provisions of the Penal Code as set out above or that [s/he] faces a real risk of significant harm due to the illegal departure of the first and second applicants. I am not satisfied on the evidence before me, that the first, second or third applicants face a real risk of significant harm for the purpose of s.36(2)(aa) for any reason associated with the illegal departure of the first and second applicants.

50. On all the totality of the evidence before me, including the independent information and the applicants' particular profile, circumstances and accepted claims taken individually and cumulatively, I have otherwise found that they do not face a real chance of harm on return to Vietnam for any of the reasons claimed. As 'real chance' and 'real risk' involve the same standard (*MIAC v SZQRB* (2013) 210 FCR 505), I similarly find for the same reasons and on the same evidence set out above, that they do not face a real risk of harm for the purpose of s.36(2)(aa).
51. I am not satisfied that the first, second or third applicants face a real risk of significant harm in Vietnam for the purpose of s.36(2)(aa) of the Act for the reasons claimed.

Complementary protection: conclusion

52. 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

53. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include a spouse of the family head and a dependent child of the family head.
54. As none of the applicants meets the definition of refugee or the complementary protection criterion, it follows that they 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.

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.