



**Australian Government**  
**Immigration Assessment Authority**

**Decision and Reasons**

**Referred application**

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VIETNAM  
IAA reference: IAA20/08558

VIETNAM  
IAA reference: IAA20/08556

VIETNAM  
IAA reference: IAA20/08557

VIETNAM  
IAA reference: IAA20/08560

VIETNAM  
IAA reference: IAA20/08559

Date and time of decision: 3 August 2020 14:20:00  
J Maclean, Reviewer

**Decision**

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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

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### Visa application

1. The referred applicants (the applicants) claim to be Vietnamese citizens. Applicant 1, 2, 3 and 4 arrived in Australia as unauthorised maritime arrivals [in] June 2013, and Applicant 5 was born in Australia (IAA20/08558, IAA20/08556, IAA20/08560, IAA20/08559, and IAA20/08557 respectively). Applicants 1 and 2 are a husband and wife who both make claims for protection. Applicants 3, 4 and 5 are their children, who make no claims of their own, but their parents make claims on their behalf.
2. On 21 August 2017 an application for Safe Haven Enterprise Visas (SHEVs) was lodged in relation to all applicants. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visas on 3 July 2020 on the basis that Applicants 1 and 2 are not people in respect of whom Australia has protection obligations, and Applicants 3, 4 and 5 because they do not meet the member of the same family unit criteria.

### Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the Migration Act 1958 (the Act)(the review material).
4. As background, it is noted that the applicants had the assistance of a migration agent and lawyer to prepare their SHEV application and associated statutory declarations. Applicant 1 and 2 attended the SHEV interview by telephone on 29 June 2020, and a representative [attended] with them. At the start of the interview the delegate advised both applicants that the purpose of the interview was for them to provide more information in support of their protection visa application, and referred to an information sheet which had been provided to the applicants along with the invitation to attend the SHEV interview, titled 'Important information about your Protection visa interview', in English and Vietnamese. The applicants were asked if they had read and understood the document, and Applicant 1 said he had only read it a little bit, but that his lawyer had explained it to him. Copies of the information sheet, in Vietnamese and English, are included in the review material. The document outlines the purpose of the interview, and specifies the extreme importance of presenting all claims for protection during the interview, and providing all information in support, and that there may not be another opportunity to raise new claims if the application is refused. The delegate also warned the applicants of the importance of telling the truth and providing the Department with complete and accurate claims as early as possible, and noted that if the application was refused there may not be another chance to provide information to support the claims, and that a decision may be made without further contact with them. After the introductory portion of the interview the delegate asked Applicant 1 to take the phone off speaker, and Applicant 1 and then Applicant 2 were separately interviewed. The applicants were given a number of opportunities during the SHEV interview to raise their claims and provide their evidence, including asking Applicant 1 what he feared would happen to him if he returned to Vietnam, and asking Applicant 2 what are the reasons she applied for protection, and if there were any other reason she cannot return to Vietnam. Before giving the applicants the opportunity to speak with their representative the delegate suggested they 'take this time to make sure we have covered everything you wish to talk about'. After a short break they were given the opportunity to provide further information about their application, including both Applicant 1 and 2, and their representative being asked if there was anything further they wished to say or add, and being informed that any additional information provided to the department before a decision is made on the applicant would be considered.

5. On 24 July 2020 the IAA received a submission on behalf of the applicants, prepared by a lawyer/registered migration agent from the same firm as the representative who had attended the SHEV interview with Applicant 1 and 2. To the extent the submission reiterates the applicants' claims, responds to the delegate's findings, or refers to case law, I consider they are argument rather than new information, and I have had regard to them in making this decision.
6. The submission refers to the delegate's decision, which notes an inconsistency between Applicant 1's written claims and his evidence at the SHEV interview about whether his family had been questioned by the police about his whereabouts, and on which the delegate 'placed considerable weight'. The writer suggests they have examined the written transcript of the interview provided by the agent who attended the interview, and who speaks Vietnamese. Where the delegate asked 'From the incident in 2007 to 2013, did anything else happen to you?' to which Applicant 1 responded 'No', the agent has recorded a side note 'feel interpreter mis-interpreted this question'. I note at the start of the SHEV interview the applicants were asked if they understood the interpreter, and Applicant 1 responded 'Yes'. They were also asked if they had any objections to the interpreter being used for the interview, and Applicant 1 responded 'No'. Before Applicant 1 was asked the above question, regarding whether anything happened to him from 2007 to 2013, he was also asked 'After this incident [in 2007] did anything happen to you?', and 'Did anything happen to any of your family members?' and he responded 'No' to both questions. It is not apparent to me the agent took issue with the interpreter's wording during the interview, and despite the agent being asked if there was anything she would like to add, no submissions were made at the conclusion of the interview, nor were any written submissions received prior to the delegate making the decision, including regarding the interpreter. I also note that on 22 July 2020 the IAA provided the applicants' representatives with documents by administrative release outside of the Freedom of Information Act (FOI Act), including the recording of the SHEV interview, however no further clarification has been provided to support the translation was incorrect, or to suggest an alternative translation. Both applicants provided appropriate and cogent responses to the questions posed through the interpreter, and I am not satisfied the use of the particular interpreter impacted on the applicants' ability to put forward their claims for protection, or the accuracy of their evidence.
7. Under the heading 'new information', it is submitted that 'dramatic and far reaching changes' have occurred in Vietnam, 'even in the short period since July 2020 due to the spread of the Coronavirus/COVID-19 pandemic on a daily basis to many countries including Vietnam'. The submission goes on to state that the specific effects on each country's economy, health and social structures vary; however no country information is provided regarding the specific impact in Vietnam, or at all. No claims regarding COVID-19 were raised by the applicants or their representative during the SHEV interview on 29 June 2020, nor did the delegate consider COVID-19 in the decision. It is unclear exactly what the applicants' fears regarding COVID-19 are, however as no such claims were before the delegate, I am satisfied this is new information. The submission asserts that the 'new information' could not have been provided prior to the delegate's decision because it post-dates the delegate's decision, and is evolving on a daily basis, and that the information is credible and relevant personal information directly bearing on consideration of the applicants' claims.
8. It is also submitted that a 're-interview' by the IAA may be necessary to contextualise the claims for protection in light of the new information (regarding COVID-19), and that it is already apparent that there are negative health and economic impacts in Vietnam, particularly on poor people like the applicants, and noting such reassessment is particularly relevant because the family group includes three small children. Except in some limited circumstances set out in the Act, the IAA must conduct its review without accepting or requesting new information or interviewing the applicant. While the IAA has a discretion to get any information not before the Minister which it

considers relevant, it does not have a duty to get, request or accept new information: s.473DC(2). Other than as noted above, the submission does not identify any particular information the applicants wish the IAA to obtain that could not have been provided in writing, or specify how such information might satisfy the requirements of s.473DD. In the circumstances set out above, I am satisfied Applicant 1 and 2 had a meaningful opportunity to present their own and their childrens' claims and address the matters in issue in this review, including at the SHEV interview, which they attended with the assistance of a representative from a firm of immigration lawyers. I have also considered whether the IAA should get new information on this issue, however I am not satisfied it is required. In all the circumstances, I have decided not to invite the applicants to an interview or to provide further information, and to proceed to a decision on the basis of the information before me.

9. I note various warnings were given to Applicant 1 and 2 during the SHEV interview regarding raising all claims for protection, and providing evidence to support those claims, that they were represented by a firm of immigration lawyers at the time of the SHEV interview, a representative from that firm attended the SHEV interview with them, that the same firm also represents them before the IAA, and the extremely vague nature of any claims surrounding COVID-19. It is not apparent to me how such general information regarding the pandemic could be regarded as 'personal information', no explanation has been provided as to when the applicants became aware of the effect of COVID-19 in Vietnam, when any associated fears arose, nor has any information been provided to support this information could not have been provided before the delegate's decision. Applicant 1 and 2 indicated during the SHEV interview they remain in regular contact with various relatives in Vietnam, but have not suggested any relative has been impacted by COVID-19. In any event, I consider it is entirely speculative as to what the circumstances are likely to be in Vietnam at the time of their arrival there, which is likely to be several months from now. Even taking into account that conditions in Vietnam regarding the pandemic may have continued to evolve since the delegate's decision, and the short timeframe between that interview and the delegate making the decision, I consider if the applicants genuinely had fears relating to COVID-19 in Vietnam, they had ample opportunity to raise the claims before the delegate made the decision, and the fact they were not raised leads me to believe the claims are not credible. In all the circumstances, I am not satisfied there are exceptional circumstances to justify considering this new information.
10. The submission refers to three country information reports, which were not before the delegate, and are new information. Portions from the documents are extracted in the submission. The first report is the Human Rights Watch World Report 2019, dated 17 January 2019, and which has been provided in relation to the treatment of Catholics in Vietnam, in particular the restriction on religious practice through legislation, registration and surveillance, and the banning of some religious activities, and regarding Vietnam's human rights record worsening in 2018. The second report is cited as 'Freedom House Freedom on the Net 2018', and has been provided in relation to Applicant 1's desire to live in a country with freedom of expression and that respects human rights. Of note, the extracted portion refers to online content manipulation being a high priority for the authorities, and internet freedom in Vietnam being poised to worsen with the implementation of new cybersecurity law passed in June 2018, however it is not apparent to me Applicant 1 or 2 ever indicated they had posted material online in Vietnam or Australia, or that they intended to do so if returned to Vietnam. The third report is a UNHCR document, dated 28 April 2004, regarding religion-based refugee claims and the importance of the motivation of the persecutor. Of note, there was other more recent information in the review material that dealt with these issues. Contrary to the IAA Practice Direction for Applicants, Representatives and Authorised Recipients (1 May 2020), a copy of which was provided to the applicants when the IAA advised them of the referral to the IAA, copies of the documents were not provided. Although a hyperlink to the second document was provided in the submission, the Practice Direction specifies

that hyperlinks to publicly available documents are not acceptable. The submission was prepared with the assistance of an experienced firm of lawyers and migration agents, who should have been aware of IAA Practice Direction, and in the circumstances described, I have decided not to accept this new information. Even if I did accept the information, other than the submissions referred to above relating to the pandemic, no meaningful attempt has been made to address the requirement of s.473DD of the Act in relation to the new information, and I would not be satisfied s.473DD(b) is met in respect of these country information reports, or that there are exceptional circumstances to justify considering the information.

### **Applicants' claims for protection**

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11. Along with the SHEV application Applicant 1 and 2 have provided statutory declarations, dated 17 August 2017 (the 2017 declarations), making claims for protection in relation to themselves and their children. The review materials also contain statutory declarations from Applicant 1 and 2, dated 26 June 2014 (the 2014 declarations).

12. Applicant 1's claims can be summarised as follows:

- He is a Vietnamese citizen, of Kinh ethnicity and Catholic religion.
- He fears being arrested, beaten and imprisoned by Vietnamese authorities because of his involvement in an incident in 2007, when there was a dispute over confiscation of family land and he resisted the orders of soldiers, as a result of his political opinion against the government, for participating in anti-communist activities against the Vietnamese government in Australia, and for being a failed asylum seeker.
- He also fears Vietnamese authorities will cause difficulties for himself and his family, such as refusing to register them or to grant them documents to allow them to work, or for his children to go to school.

13. Applicant 2's claims can be summarised as follows:

- She is a Vietnamese citizen, of Kinh ethnicity and Catholic religion.
- She fears if her family were returned to Vietnam she and/or her husband would be arrested, beaten and imprisoned by Vietnamese authorities because of their actual or imputed political opinion against the government, and for being a failed asylum seekers, and that her children would not be cared for if their parents were imprisoned. She has heard of people in prison having their assets seized, and she fears that will happen to her family.
- As a result of her husband's problems with the authorities she fears authorities will cause difficulties for her family, such as refusing to register them, or refusing to grant them basic rights and documents to allow them to work or the children to go to school.

### **Refugee assessment**

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14. 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

15. 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.

### *Identity and background*

16. The applicants claim to be Vietnamese citizens. Applicant 1, 2, 3 and 4 have provided documentary evidence to support that claim, and there is no issue regarding their identities. Applicant 5 was born in Australia and has provided documentary evidence of that. The SHEV application indicates he is also a Vietnamese citizen. I am satisfied the applicants are Vietnamese citizens, and I find Vietnam is the receiving country for all applicants.

17. I accept Applicant 1’s broadly consistent evidence regarding his early life in Vietnam and his family. He was born in Ha Tinh Province in [year], where he lived with his family and attended primary school for [number] years. He worked with his family in a [business] until 1994, after which he moved with his family to Vung Tau Province, where they started farming. His father died in an accident in 2005, however his mother, [and siblings] remain in Vietnam living in the same village in Vung Tau Province, and most of them continue to work in farming on their own farms.

18. I also accept Applicant 2’s broadly consistent evidence regarding her early life in Vietnam and her family. She was born in Ha Tinh Province in [year], where she lived with her family and completed [number] years of primary school. In 2001 her family moved to Vung Tau Province, and from that time she helped on the family farm. Her parents, [and siblings] remain in Vietnam living in the same area, and work in farming on family land.

19. Applicant 1 and 2 have consistently claimed they were married in April 2010, and that they have three [children], the first two born in Vietnam in [year] and [year], and the third born in [year] in Australia. They have provided documentary evidence to support the claims, and I accept that evidence.

20. Applicant 1 and 2 have been consistent in claiming to be of Kinh ethnicity and Catholic religion. Copies of their Vietnamese identity cards, and English translations, have been provided, and which also record them to be of the Kinh ethnic group and Catholic religion. The applicant’s have also provided a copy of the family Household Registration booklet (*ho khau*), and English translation, and which reports Applicants 1, 2, 3 and 4 to be Kinh and Catholic or Christian. I am satisfied all applicants are of Kinh ethnicity and Catholic religion.

## Events in Vietnam

21. Applicant 1 and 2 have been broadly consistent in describing an incident in 2007 when Applicant 1's family land was forcibly seized by Vietnamese authorities, mentioning it at their Entry interviews, in their 2014 and 2017 declarations, and during the SHEV interview. The incident occurred in April 2007, when about 200 armed soldiers forcibly seized a large portion of land without paying compensation, including land belonging to Applicant 1's family and many other surrounding farms. Applicant 1 claims he and a number of other farmers confronted the soldiers in an attempt to get the land back, but they were attacked. Although he tried to run away from the soldiers he was not quick enough and suffered severe injuries [which] has resulted in permanent scarring. He said the other people who worked on the farms helped carry him home, and he did not go to hospital because he feared he would be arrested, and his family cared for him at home, with the help of a local man who knew first aid and stitched him up. At the SHEV interview he said it took one or two months for him to recover. After this he claims to have lived in hiding for many years, relocating to Ho Chi Minh City so the soldiers could not find him, working doing odd [Occupation 1] jobs, and occasionally travelling back to his village to visit his family, but did so on Sundays or at night when there fewer police. In his 2017 declaration he claims he did not have any official records so the authorities could not trace him, for example he did not use a bank account. Although Applicant 1 indicated in his 2017 declaration that during this time his family were questioned by the police about his whereabouts, and his family said they did not know, this is inconsistent with his evidence during the SHEV interview when he was asked 'Did anyone come to the house to look for him? He said no one came, and he just hid inside his house. He was also asked if anything happened to himself or his family members after the incident, and he said 'No', and when asked if anything happened to him from the incident in 2007 until June 2013 when he left Vietnam, he also said 'No'. Similarly, Applicant 2 was asked is she experienced any issues in Vietnam, and whether anyone came looking for her husband at their home, and she responded 'No' to both questions.
22. Country information reports that by law all land in Vietnam is formally owned by the State, which issues land use rights to individuals or organisations but retains the right to acquire it compulsorily at any time.<sup>1</sup> The US Department of State Vietnam Country Report on Human Rights Practices 2019 notes that arbitrary arrest and detention, particularly for political activists and individuals protesting land seizures or other injustices, remained a serious problem. During that year there were reports of clashes between local residents and authorities at land expropriation sites, and authorities arrested and convicted multiple land rights protesters on charges of 'resisting persons on duty' and 'causing public disorder'.<sup>2</sup> Taking into account the applicant's evidence in the context of the country information, I can accept the incident in 2007 occurred, that he and other farmers clashed with authorities, and he was injured as claimed. However, for reasons described below, I do not accept he went into hiding after the incident, that he was of ongoing interest to authorities as a result of the incident, that all his family land was appropriated, or that was the reason he and his family left Vietnam.
23. Firstly, Applicant 1 was badly injured during the incident, and had to be assisted home. I consider if authorities wanted to apprehend him and prosecute him for his actions they would have done so at the time of the incident, or during his one to two month convalescence at the family home he had lived at since 1994, and where I consider he would have easily been located and apprehended by authorities if he had been of interest to them. Secondly, during the roughly six years he purports to have been in hiding Applicant 1 got married and had two children, and engaged with Vietnamese authorities on numerous occasions to obtain official documentation:

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<sup>1</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

<sup>2</sup> US Department of State, 'Country Reports on Human Rights Practices for 2019 – Vietnam', 11 March 2020, 20200312104733

including a marriage certificate in April 2010; birth certificates for the children of the marriage, issued in [year] and [year]; the family's *ho khau* showing the document was issued in January [year], with Applicant 1 shown as the householder, and the document was updated after the birth of children in [year] and [year]; a Vietnamese Identity Card for Applicant 1 was issued in September 2011 (during his Entry interview Applicant 1 said he requested a replacement identity card because the original was damaged by water and was returned to Police); and to obtain genuine Vietnamese passports in preparation for the journey to Australia. In addition, Applicant 2 indicated in her 2017 declaration that Applicant 1 regularly travelled home from Ho Chi Minh City, but he would only visit on weekends for a few days. I consider these actions are not indicative of a person living in hiding, or trying to avoid official records or detection by the authorities, and although I can accept Applicant 1 may have regularly travelled to Ho Chi Minh City for work, I am satisfied he did so for economic reasons, rather than because authorities were searching for him.

24. Thirdly, in his 2017 declaration Applicant 1 refers to two of his friends (brothers TR and TH) who had been in hiding in Vietnam, being arrested in 2011 for assaulting soldiers in 2007. He states that the police obtained warrants for their arrest and finally located them, and TR was imprisoned for one and a half years, and TH for two years. He claims he became even more cautious and reduced the number of times he travelled back to his village after this. At the SHEV interview Applicant 1 referred to TR and TH being physically assaulted by authorities when they came to help him and, although they did not resist as hard as Applicant 1 did, they were arrested in August 2007 and sentenced to up to two years in jail for obstructing an order from authorities. The applicant's evidence on this issue appeared exaggerated, indicating he was the one who resisted the hardest and would be even more severely punished, and was unconvincing. By the applicant's account there were about 200 soldiers present, but he, TR and TH all managed to escape, despite the applicant being badly injured and TR and TH coming to his assistance. In the circumstances described I consider had TR and TH been of interest to authorities they would have easily been apprehended at the time of the incident. In addition, I consider Applicant 1 should have been able to provide a roughly consistent indication of when these people were arrested, and the large discrepancy in the date of the purported arrest of TR and TH between the 2017 declaration and that given during the SHEV interview, leads me to believe he has fabricated this claim. I do not accept TR and TH were arrested and jailed as claimed, however I can accept they were present during the 2007 incident and assisted Applicant 1.
25. Fourthly, I have had regard to the Entry interviews attended by Applicant 1 and 2. Those interviews were conducted in two parts, part one held on 17 July 2013 for Applicant 1, and 25 June 2013 for Applicant 2, and part 2 for both applicants held on 12 August 2013. I have listened to those interviews, and note that at the commencement of part 1 the interviewer told the applicants they were expected to give true and correct answers to the questions asked, and they were asked if they would do that, and both responded 'yes'. The interviewer went on to note that if the information given at any future interview is different to that provided at that interview it could raise doubts about the reliability of what had been said. When asked why he left Vietnam Applicant 1 referred to getting married and not having land to live on, and said he heard from people he was working with on a construction site about trips going to Australia, so he just decided to come along, but makes no reference during either part of the Entry interview to being in hiding. In addition, when asked about his address and employment history in Vietnam he refers to living and working doing farming in the family business in Vung Tau Province from 1994 until 2013, and specifically stated he did that work until the day he left for Australia. Although Applicant 2 refers to the confiscation of land, she also makes no mention of her husband being in hiding. I consider the failure to mention this is significant. The SHEV application refers to Applicant 1 working in Vung Tau Province farming from the time of his marriage in April 2010 until 2013, and also to him working as [an] [Occupation 1] 'at various addresses when requested throughout Ho Chi Minh City' from 2007 until 2013.



26. I have taken into account that in their 2017 declarations Applicant 1 and 2 indicate that if there are inconsistencies between information in their SHEV application and their Entry interview records the information in the application form is more accurate. I am also aware of the caution that needs to be exercised when relying on interviews such as the Entry interviews attended by the applicants, the purpose of which is not for assessment of protection claims. However, considering all the information before me, although I can accept Applicant 1 may have done some [Occupation 1] work in Ho Chi Minh City, I am satisfied he also continued to do farming work in Vung Tau Province, where his *ho khai* was registered, after the incident and until he left for Australia, which is not indicative of a person in hiding or fearful of arrest. I consider if Applicant 1 had been of interest to authorities because of the incident in 2007 they had ample opportunity to apprehend him, and I am not satisfied Applicant 1 was in hiding for that or any reason, or that Applicant 1 was of interest to authorities as claimed. I also note that during the Entry interview Applicant 1 said his brothers all lived in the same village or area, and that his father bought land in the same area and divided it up and gave it to them, and at the SHEV interview he said his brothers continue to work in farming, but that they purchased that land themselves. Considering all the evidence, I am not satisfied all Applicant 1's family land was confiscated, but rather that only a portion of the land was subject to the 2007 appropriation, and his brothers were able to continue farming the remaining portion(s).
27. During his Entry interview Applicant 1 indicated that other than the incident in 2007 he did not engage in activities or protests. I am satisfied Applicant 1 did not participate in any other activities in Vietnam that could be considered political in nature.
28. With regard to practising their religion in Vietnam, in his 2017 declaration Applicant 1 refers to travelling to Nghe An Province to [work] and being required to register [with] authorities to do so. He claims that when they looked at their national identity cards and saw they were Catholics they made insulting remarks and were reluctant to issue [them] licenses. During the SHEV interview Applicant 1 and 2 were asked about their religion, and in particular if they had been discriminated against or mistreated because of their religion. Applicant 1 said he and his family had been discriminated against when living in Ha Tinh Province, and when they travelled to Nghe An Province to engage in [specified] work they sometimes attended church there, and the police required them to pay a 'tax' to do so. He could not remember how many times this had happened, and confirmed he had not been there since he was a teenager. He stated that he had not experienced discrimination since moving to his home town in Vung Tau Province in 1994, and that the majority of people there are Catholic. He said he practised his religion there in the same way he does in Australia, going to church each Sunday to pray and worship. When Applicant 2 was asked if she had been discriminated against or mistreated in Vietnam because of her religion, she said 'No', and said that in Australia she attends church each Sunday.
29. I can accept Applicant 1, or his family members, may have experienced discrimination in the past in Vietnam, in the form of insults, difficulty obtaining [licenses], and being required to make payments to local authorities on a number of occasions when they attended church in Nghe An Province. However, it would appear the last time this occurred was prior to the family moving to Vung Tau Province in 1994, and I am not satisfied this occurred frequently or recently. I also accept the applicants have continued to practise the Catholic religion whilst in Australia, and they may wish to do so on return to Vietnam, and it is likely they would attend church on a weekly basis.

#### *Activities in Australia*

30. In his 2017 declaration Applicant 1 refers to participating in events organised by the Vietnamese community after arriving in Australia. He notes that on one occasion he signed a petition by 'a Vietnamese community organisation, Viet Tan', seeking democracy and freedom for people in

Vietnam, and the petition was sent to the authorities in Vietnam. During the SHEV application Applicant 1 and 2 were asked if they were members of any group, organisation or political party. Applicant 2 said she was not, however Applicant 1 said he was not in any group in Vietnam, but in Australia he joined Viet Tan, and whenever they have activities he joins in. Immediately after this, when asked when he joined the group, he said he was not an official member of the Viet Tan party, but his friends are members, and they invite him to go along with them, for example 'when they have a protest against the government... in my local area... my family just join them'. When questioned by the delegate about his level of involvement, Applicant 1 said he is not heavily involved with activity, he only attended one protest in [Suburb 1], and if they have a collection he contributes to help them, and he has donated five or six times amounts of about \$20 to \$30 when they say they need money to help the prisoners who suffer injustice, and when he does so his name is recorded in a book with how much he donated, and he signs the book. When asked about the 'protest' he attended Applicant 1 said it was not a protest, but a flag was displayed and members gathered together and had a sign and he went to show his support and have a photo taken, however he could not remember when this occurred. Apart from that event he said he had not been involved with any activities organised by Viet Tan, and he is not a member of any other groups in Australia or Vietnam.

31. Applicant 1's evidence about involvement with Viet Tan events was vague, providing no details about when the event occurred where he had his photograph taken, what the sign said at that event, when he signed the petition, who the petition was sent to, or when he made the claimed donations. He also did not identify the friends he claims are members of Viet Tan, and no supporting evidence has been provided in regard to these claims. By his own evidence he was 'not heavily involved' with political activities. Nevertheless, I can accept he may have friends who are involved with Viet Tan, and that he, and possibly his family, may have attended an event organised by Viet Tan, that he signed a petition that may have been sent to Vietnamese authorities, and he donated small sums of money to Viet Tan on about six occasions. In his 2017 declaration Applicant 1 states that after the incident in 2007 he developed 'a deeper hatred for the communist regime and government', and during the SHEV interview both he and Applicant 2 expressed some anti-government sentiments, indicating the authorities oppressed the people. I can accept Applicant 1 and 2 may hold some anti-government opinions, however considering the limited and extremely low level of involvement they have had with any activities in Australia that could be considered political in nature, where they are free to express their opinions and engage in such activities, I am not satisfied they hold strong political opinions, or that they have any intention or interest in being politically active or outspoken on return to Vietnam. I consider the reason they would not do so is because they do not have a genuine interest in the activity, rather than out of any fear regarding the consequences. I have also considered whether the applicants engaged in the activities in Australia solely to strengthen the visa application, however, given Applicant 1 said his friends had invited him to attend, I consider it likely the attendance at events was at least partly to engage with other Vietnamese people, that is for social reasons.

#### *Future harm*

32. Applicant 1 claims he will be targeted by the Vietnamese government as a result of his political activities in Vietnam, including the confrontation with authorities in 2007, and because of his political activities in Australia. Both Applicant 1 and 2 claims they will be imputed with an opinion against the government and be at risk on return to Vietnam.
33. The Vietnamese Constitution establishes the Communist Party of Vietnam (CPV) as the only legal political party in the country, and the CPV tightly controls political discourse, and there are very few formal avenues for political participation for non-members. Opposition political parties are typically based outside of Vietnam to avoid harassment, arrest and detention. The Vietnam

Reform Revolutionary Party (known as Viet Tan) is a US-based opposition group with an active branch in Australia, and which advocates for democracy in Vietnam. It is considered a terrorist organisation by the Vietnam government, and have been accused of carrying out activities aimed at overthrowing the government. There are credible recent reports of the Vietnamese government targeting those who are outspoken and critical of the Vietnamese government and the CPV, and some political activists have experienced problems on return to Vietnam. International observers report that arbitrary arrest and detention has been commonly employed against political and religious activists and individuals protesting land seizures. DFAT reports that since late 2017 there has been a significant rise in instances in which authorities have arrested and charged high-profile activists under the national security provisions, and that many of those arrested have received lengthy sentences after highly publicised trials, including some having affiliations with Viet Tan. DFAT assesses that activists who are known to authorities as active organisers of protests, or who openly criticise the state, face a high risk of official sanction, which may include surveillance, harassment, detention, assault, travel bans, arrest and prosecution. The risk is higher for those engaged in areas judged politically sensitive, or who have well-established links with outlawed political organisations. Such activists may not be able to access legal representation, and are unlikely to receive a fair trial. DFAT assesses that low-level protesters against the government, and their supporters, face a moderate risk of harm from authorities, which may include arrest and being subject to violence.<sup>3</sup> Although the recent reports by DFAT are concerning, I am satisfied they relate to high-profile activists, including those protesting for workers rights, anti-corruption, land rights, human rights and environmental activists. DFAT's assessment is supported by the UK Home Office, who indicated it is more likely organisers of demonstrations will receive harsher sentences than participants to be made example of, and that the authorities are not afraid of individual activists but they are most wary of people making associations or organising themselves into a political party.<sup>4</sup>

34. Overall, I accept there are serious risks for those who engage in protests against the state, or who are politically active or outspoken. However, I consider it unlikely Vietnamese authorities would be aware of the activities Applicant 1 and his family members participated in whilst in Australia, and even if they were I am not satisfied any of them would be identified as Viet Tan members, or that they would be imputed with having any significant links to Viet Tan, or that they would be considered to be activists or dissidents or of having a political opinion against the government as a result of the low-level activities in Australia, or as a result of Applicant 1's involvement with the 2007 incident in Vietnam, including if these activities are considered together. Of note, I am not satisfied Applicant 1 was of interest to authorities as a result of his involvement in the 2007 incident, or that he was considered a political activist at that time, and I am satisfied the involvement of the applicants in activities in Australia would not give rise to an adverse interest of the Vietnamese authorities on return, or heighten his or his family's profile. I am not satisfied any of the applicants would face a real chance of any harm due to any actual or imputed political opinion, as a result of their participation in the claimed activities, or for any other reason relating to their profile, including for practising Catholicism, which is discussed further below.
35. With regard to practising their religion on return to Vietnam, Catholics constituted over 7 percent of Vietnam's population in 2019, and they reside in most districts, provinces and cities of Vietnam. The Catholic Church is one of the 43 religious organisations from 16 religious traditions that are recognised by the Vietnamese government. In-country sources report that Catholics are generally able to practise freely at registered churches, particularly in areas with larger Catholic populations. DFAT assesses that Catholics who belong to registered churches and are not politically active face

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<sup>3</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

<sup>4</sup> UK Home Office, 'Report of a Home Office fact-finding mission to Vietnam - Conducted between 23 February and 1st March 2019', 9 September 2019, 20190917095808

a low risk of official harassment. Catholic adherents who are perceived to challenge the authority or interests of the CPV and its policies, particularly through political activism, face a moderate risk of harassment from authorities or their proxies, which may include arrest or violence. Catholics belonging to house churches are likely to come under surveillance by authorities.<sup>5</sup>

36. A new '*Law on Belief and Religion (2018)*' came into effect in January 2018, which nominally obliges the government to protect religious freedom, gives Vietnamese religious organisations the right to legal personhood, and has eased some operational bureaucracy for registered religious organisations, reducing considerably the waiting period for applications. The new law also requires all religious groups to register with the Government Committee for Religious Affairs and to report on routine religious activities, including festivals and conferences. The implementing regulations, which came into force in June 2018, impose fines on organisations deemed to 'abuse religion to infringe upon the interests of the state or engage in fabrication or slander'. Human rights organisations have raised concerns that these provisions are overly vague, and potentially enable authorities to arbitrarily punish religious groups. Civil society organisations report that some official religious groups have found it more difficult to obtain government approval to conduct routine activities since the new Law on Belief and Religion came into effect. For example, in January 2018 authorities in Quynh Ngoc Province cited the new law to declare a Catholic Mass illegal because the priest had not registered the meeting. By criminalising activities not officially approved in advance, the new law has had a particularly deleterious impact on independent groups that are not officially recognised religious organisations.<sup>6</sup>
37. The United States Commission on International Religious Freedom (USCIRF) 2019 and 2020 Annual Reports refer to Vietnam as one of several countries of concern throughout 2018 and 2019 regarding freedom of religion or belief. The 2019 report indicated a negative trend in religious freedom conditions, with the 2020 report indicating religious freedom conditions in 2019 had generally trended the same as the previous year. The reports indicate the government continues to crackdown on peaceful religious leaders, religious freedom advocates, and other critics.<sup>7</sup> However, the UK Home Office reports the current approach in Vietnam is to allow space for religious worship, but retain control through registration and oversight, and that organisations and individuals that adhere to this, register and steer clear of politics are allowed to operate relatively unhindered whilst unregistered groups and individuals that become involved in politics, local activism and/or support local grievances are monitored and may be suppressed.<sup>8</sup>
38. Although I have accepted Applicant 1 and/or his family may have been discriminated against in Nghe An Province because of their religion on a number of occasions over 25 years ago, I am not satisfied he or Applicant 2 were otherwise prevented from practising their religion in Vietnam, including attending church. I have accepted the applicants attend a Catholic church in Australia, and that it is likely they would attend church on a weekly basis if returned to Vietnam. I am aware there have been recent credible reports of harassment of dissidents in Vietnam, including Catholics,<sup>9</sup> however taking into account the country information before me, and the applicants' evidence overall, including that there is a large Catholic community in their hometown and they did not suggest people there had been recently harassed or of interest to authorities because of

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<sup>5</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

<sup>6</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

<sup>7</sup> USCIRF, 'USCIRF Annual Report 2019', 29 April 2019, 20190508143726; USCIRF, 'USCIRF Annual Report 2020', 28 April 2020, 20200429103634

<sup>8</sup> UK Home Office, 'Report of a Home Office fact-finding mission to Vietnam - Conducted between 23 February and 1st March 2019', 9 September 2019, 20190917095808

<sup>9</sup> US Department of State, 'Vietnam 2018 International Religious Freedom Report', 21 June 2019, 20190625113215; USCIRF, 'USCIRF Annual Report 2019', 29 April 2019, 20190508143726; USCIRF, 'USCIRF Annual Report 2020', 28 April 2020, 20200429103634

their religious practices, or that they have been unable to practice their faith; that the applicants have not claimed the church they previously attended was not a registered church, or that they would attend an unregistered church on return, and having not accepted they would participate in activities such that they would be perceived as dissidents, activists, or as having an political opinion against the government, I am satisfied the applicants would be able to continue to practise their religion in the same manner they have done previously in Vietnam and Australia, and there is no more than a remote chance the applicants would be of interest or experience official harassment for being Catholics, or that they would suffer any harm as a result of practising their Catholic faith, including taking into account the prior low-level involvement in activities of a political nature in Vietnam and Australia.

#### *Data breach*

39. In their 2014 declarations Applicant 1 and 2 refer to being in immigration detention on 31 January 2014, and being affected by the unauthorised access to their personal information (the data breach). They claim as a result of the data breach Vietnamese authorities will know they left the country illegally to seek asylum, and increases the risk of harm on return to Vietnam. Applicant 1's 2014 declaration notes that since being told he was 'screened out', meaning he was identified as a person who did not engage Australia's protection obligations, the Vietnamese police visited a friend of his who they had previously arrested and jailed, asking him if he knows where Applicant 1 is. Notably, Applicant 1 did not refer to this incident in his 2017 declaration or during the SHEV interview, and no information has been provided about the identity of the person, where he was when police approached him, or regarding exactly when and how Applicant 1 found out the information, or the reason police would suspect that person would have information about the applicant. In her 2014 declaration Applicant 2 claims her mother was visited after the data breach, and in his 2014 declaration Applicant 1 also claims that in about April 2014 Vietnamese police contacted his grandmother and mother-in-law asking about his family's whereabouts, and that he believes this coincides with the data breach. In their 2017 declarations both Applicant 1 and 2 refer to the police coming to Applicant 2's parent's home in September and December 2014 and asking where the applicants had gone, but make no mention of the earlier claimed visit or visits referred to in their 2014 declarations. It is not apparent to me why Vietnamese authorities would be prompted to make enquiries about the applicants whereabouts after discovering they were in Australia, and taking into account the discrepancies noted above between the statements, the failure to mention the purported visits during the SHEV interview, and the lack of any further visits in the following five years, I am not satisfied Vietnamese authorities visited and made the purported enquiries.
40. The review materials include copies of letters sent to Applicants 1 and 2, dated 12 March 2014, advising that in February 2014 a routine report released on the department's website unintentionally enabled access to some of their personal information for a short period of time. The information included their name, date of birth, nationality, gender, details about their detention (when, where and the reason), and if they had family members in detention, but did not disclose any information about their protection claims. I accept Applicant 1, 2, 3 and 4 were in immigration detention on 31 January 2014 and were affected by the data breach, and it is possible the information noted above was accessed, including by Vietnamese authorities. I consider the information would reveal no more than that they were in immigration detention in Australia, and possibly (by inference) that they had applied for asylum in Australia, which is likely to be apparent in any case as a result of the manner of his return to Vietnam, and which for reasons discussed below, I do not accept will give rise to a real chance of harm. I am otherwise not satisfied the applicants faces a real chance of any harm on return to Vietnam as a result of the data breach, or that the applicants are refugees *sur place* for that reason.

### *Failed asylum seekers returning to Vietnam*

41. The applicants claim to fear harm as failed asylum seekers who departed Vietnam illegally to travel to Australia, and who would be forcibly returned to Vietnam. At the SHEV interviews Applicant 1 and 2 said they would be charged with treason and imprisoned because they escaped from Vietnam.
42. Applicant 1 and 2 have provided broadly consistent evidence regarding the family travelling by bus to [Country 1] and then on to [Country 2]. The 2017 declarations indicate they flew from [Country 2] to [Country 3] using their passports, and from there left for Australia by boat. In the SHEV application, in response to the question 'Did this applicant leave their home country legally?' the response of 'No' was provided for Applicant 1, 2, 3 and 4. With regard to their arrival to Australia they indicate they arrived as unauthorised maritime arrivals in June 2013. At the SHEV interview the delegate asked Applicant 1 if he entered [Country 1] legally, and whether he had a passport, and he said 'not legally', that he had a passport, but that he was just sitting on the bus and got past [Country 1]. Applicant 1 and 2 consistently referred to having Vietnamese passports in their names at the time they departed Vietnam, and that they no longer have those passports in their possession, and I accept that evidence. On the information before me I am not satisfied the applicants used their passports when departing Vietnam, and I can accept they may have left Vietnam illegally.
43. DFAT reports that the Constitution of Vietnam provides for freedom of movement, however there are penalties for Vietnamese nationals who depart the country unlawfully. 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is a criminal offence under the Vietnamese Penal Code, which can result in imprisonment. However, DFAT is unaware of any cases where these provisions have been used against failed asylum seekers returned from Australia. Returns to Vietnam are usually done on the understanding that the individuals in question will not face charges as a result of making an application for protection. In-country sources report that all individuals in people smuggling operations, whether as organisers or travellers, are typically held by authorities for questioning to determine their involvement in operations, and any returnee with travel document concerns are questioned at interview rooms at airports. DFAT understands that would-be migrants who have employed the services of people smugglers typically only face an administrative fine relating to their illegal departure. DFAT understands authorities occasionally question returnees from Australia upon their arrival in Vietnam, the interview process generally taking between one to two hours, and focuses on obtaining information about the facilitation of any illegal movement on their part. DFAT is not aware of any cases in which returnees from Australia have been held overnight for this purpose. DFAT assesses that the government typically views persons who paid money to organisers of people smuggling operations as victims of criminal activity rather than as criminals, and long-term detention, investigation, and arrest is generally conducted only in relation to those suspected of involvement in organising people-smuggling operations, and reporting and monitoring is confined to returned political activists, and not those who have only sought asylum in another country.<sup>10</sup>
44. I accept the Vietnamese government may be aware the applicants sought asylum in Australia several years ago, as a result of the manner of their return to the country, and also possibly because of the data breach. I acknowledge there are risks for political or religious activists and dissidents, and I consider that would extend to returnees with such profiles. I have not accepted Applicant 1 or 2 were of interest to Vietnamese authorities at the time they departed as a result of any political opinion or that they would be considered activists or dissidents. I am also not satisfied Vietnamese authorities would be aware of Applicant 1's claimed involvement with

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<sup>10</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

activities in Australia that could be considered political in nature. In the unlikely event Applicant 1 was linked to the activities in Australia, I am satisfied authorities would assess his involvement as low-level, and I am not satisfied Applicant 1 or 2, or their children, would be deemed to have a profile that would lead the authorities to take an adverse interest in them, either on arrival or subsequently in the community.

45. In submissions to the IAA it is contended that Applicant 1 would be imputed with a political opinion in conflict with Vietnamese authorities for seeking asylum. The information before me does not indicate returnees are viewed suspiciously by the Vietnamese government simply for making asylum applications or for having spent time in Australia, and I reject the contention. I accept in making a claim for asylum it might be assumed the applicant or applicants made complaints about the Vietnamese government. However, given Vietnamese authorities have not been, and will not be, made aware of the applicants' specific claims for protection, and the country information referred to above, I am not satisfied these applicants, would be at risk of harm for having made an application for asylum in Australia.
46. There is no information before me to suggest Applicant 1, 2, 3 or 4 were other than persons who paid money to a people smuggler to depart Vietnam, and I do not accept they would be considered to have been involved in people smuggling operations, such that they would face any additional charges or penalties. I accept on return to Vietnam Applicant 1 and 2 may be interviewed at the airport for up to two hours. Given the young age of Applicant 3, 4 and 5 I am not satisfied they would be interviewed, and I consider they will be able to remain with their parents during their interviews. I accept Applicant 1, and 2 may receive fines for having departed illegally. Given the minimum age for criminal liability in Vietnam is 14 years of age, I consider it unlikely Applicant 3 and 4 would be fined for their illegal departure. I am not satisfied any of the applicants have a profile such that there is any chance they would be detained for a longer period of time, that they would face any additional penalty, or that they would be recalled for further questioning. There is no information before me any of the applicants have any particular vulnerability such that they would suffer harm as a result of being interviewed, even taking into account the young age of the children, and I am not satisfied they would be unable to pay any fines that may be issued to them. I am not satisfied being interviewed on arrival in Vietnam, or any small administrative fine that may be issued, amounts to serious harm for these applicants.
47. I acknowledge the country information indicates that detainees may be subjected to torture and human rights violations in Vietnam.<sup>11</sup> However, those reports relate to abuse of suspects during arrest, interrogation and detention in pre-trial circumstances, and torture and physical abuse of political prisoners and activists, rather than the circumstances the applicants would face on return to Vietnam. In any event, I am not satisfied any of the applicants have a profile such that they would be of adverse interest to Vietnamese authorities, or be arrested or detained for any reason, and be at risk of mistreatment during detention.
48. Applicant 1 and 2 expressed fears regarding their children being uncared for if their parents were to be imprisoned. They also suggested the family would be denied registration and documentation to allowed them to work and for the children to attend school. For reasons described above, I am not satisfied Applicant 1 and 2 have a profile such that they would be imprisoned on return to Vietnam, or in the reasonably foreseeable future, for any actual or imputed political opinion, or for any reason related to their religion, such that they would be separated from the children.
49. With regard to being denied registration, country information indicates the system and policies for household registration (*Ho khau*) was established by the 2006 Law on Residence, and provides

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<sup>11</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

for temporary and permanent residence. *Ho khau* registration is initially obtained through the registration of a person's birth with the village or provincial administrators. The registration system is used by officials to determine the levels of services provided to villages and provinces, linking a person's right to access government healthcare, education and other services to their place of residence. It is also essential for obtaining employment with the government or in state-owned enterprises, and while health care facilities can be accessed anywhere in Vietnam in emergency cases, public facilities may turn away non-life-threatening cases where the person is not properly registered. DFAT also indicates that returnees, including failed asylum seekers, typically face a range of difficulties upon return, which include unemployment or underemployment, and challenges accessing social services, particularly in cases where household registration has ceased. However, it also states that citizens can request the issuance or reissuance of a household registration book, a certificate of temporary residence or other residential papers from the local authorities. The household registration booklet will be abolished in 2020, and replaced with a new online database, removing some previously time consuming administrative procedures.<sup>12</sup> The delegate also referred to country information indicating the removal of names from the household register for Vietnamese nationals who have been abroad for more than six months, and regarding the process for nationals returning from abroad reapplying for permanent residency and receiving household registration, which indicates that to register for residence in a centrally-administered city the person must submit an application for residency to the local police, provide the required documents, and allow 15 days for processing.<sup>13</sup>

50. As noted above, Applicant 1 obtained a *ho khau* for his family in 2011, with him being the householder. That document includes a record of his marriage to Applicant 2, and was updated with the birth of each of the two children born in Vietnam. Given Applicant 1, 2, 3 and 4 have been outside Vietnam since 2013, I can accept it is possible their names may have been removed from the *ho khau*, or that their registration has ceased. I am not satisfied Applicant 1 or 2 would be seen as political dissidents or activists on return, or that the family would be denied registration for that reason, or because they left Vietnam and sought asylum in Australia. I accept the applicants may have limited access to some services until they obtain registration. During the SHEV interview Applicant 2 said she had her own house in Vietnam that family members helped her buy, and that is where she lived with her husband, and that is the address on the *ho khau*. Applicant 1 and 2 have numerous family members who have continued living in Vung Tao Province, including in the same village where the applicants' family home is located. It is not apparent to me the family home has been sold, and even if it had been, I consider the applicants will return to live in the same village they did previously, and will have the support of the family members who reside nearby. Taking into account the country information, I am satisfied the applicants will be able to re-establish their *ho khau* registration in a short period of time, and they will not otherwise be disadvantaged by a lack of registration, or at risk of harm for that reason.
51. Having regard to all the information before me, including the applicants' particular circumstances, and taking into account the country information before me regarding the current situation in Vietnam, I am not satisfied if they return to Vietnam, now or in the reasonably foreseeable future, there is a real chance they will face serious harm from Vietnamese authorities for any reason, including arising from their illegal departure, their Catholic religion, because information was released in the data breach, for being failed asylum seekers returning from Australia, or for any actual or imputed political opinion. I am also not satisfied that any of the treatment I have accepted they may experience on return amounts to serious harm when considered cumulatively.

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<sup>12</sup> DFAT, 'DFAT Country Information Report Vietnam', 13 December 2019, 20191213145121

<sup>13</sup> UK Government, 'Returning to Vietnam', 01 January 2017, CISED50AD157; DFAT Country of Origin Information Section (COIS), 'Vietnam: VNM42545 – Household Registration – Returnees – Criminal Records', 05 August 2013, CRAD81550530



## Refugee: conclusion

52. 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

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53. 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

54. 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.

55. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are in turn defined in s.5(1) of the Act.

56. I have accepted the applicants may be subject to administrative processes on return to Vietnam, including Applicant 1 and 2 being interviewed at the airport for one to two hours, and being fined for their illegal departure. I am not satisfied this constitutes significant harm as defined, for these applicants. There is no evidence to suggest the applicants faces a real risk of the death penalty for any reason, or will be arbitrarily deprived of their life or tortured during or as a result of the process, or that there is an intention to inflict pain or suffering, severe pain or suffering, or cause extreme humiliation, such that it can be said they will face a real risk of cruel or inhumane treatment or punishment or degrading treatment or punishment.

57. I am otherwise not satisfied there is a real chance the applicants will suffer harm on return to Vietnam, now or in the reasonably foreseeable future, including for any actual or imputed political opinion, for any reason relating to religion, as failed asylum seekers returning from Australia, or because of the data breach. As a 'real chance' equates to a 'real risk', I am also not satisfied there is a real risk of any harm, including significant harm, for the same reasons.

58. Considering the claims individually or cumulatively I am not satisfied the applicants face a real risk of significant harm in Vietnam for the purposes of s.36(2)(aa).

### **Complementary protection: conclusion**

59. 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**

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60. 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 and dependent children of the family head, Applicant 1 in this case.

61. 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**

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

## Applicable law

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### ***Migration Act 1958***

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

In this Act, unless the contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly

...

***cruel or inhuman treatment or punishment*** means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***degrading treatment or punishment*** means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

***receiving country***, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

***torture*** means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
  - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
  - (c) for the purpose of intimidating or coercing the person or a third person; or
  - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
  - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

#### **5H Meaning of refugee**

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

- (a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
- (b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

...

### 5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.  
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.  
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
  - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
  - (b) conceal an innate or immutable characteristic of the person; or
  - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
    - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;
    - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
    - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
    - (iv) conceal a physical, psychological or intellectual disability;
    - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
    - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
  - (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
  - (b) the persecution must involve serious harm to the person; and
  - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of **serious harm** for the purposes of that paragraph:
  - (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a **well-founded fear of persecution** for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

### 5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
  - (i) the first person has ever experienced; or

- (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

#### **5L Membership of a particular social group other than family**

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
  - (i) the characteristic is an innate or immutable characteristic;
  - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
  - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

#### **5LA Effective protection measures**

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
  - (a) protection against persecution could be provided to the person by:
    - (i) the relevant State; or
    - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
  - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
  - (a) the person can access the protection; and
  - (b) the protection is durable; and
  - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

...

#### **36 Protection visas – criteria provided for by this Act**

...

- (2) A criterion for a protection visa is that the applicant for the visa is:
  - (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or
  - (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or
  - (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (a); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant; or
  - (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
    - (i) is mentioned in paragraph (aa); and
    - (ii) holds a protection visa of the same class as that applied for by the applicant.
- (2A) A non-citizen will suffer **significant harm** if:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.

- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
  - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
  - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...

#### *Protection obligations*

- (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, subsection (3) does not apply in relation to a country in respect of which:
- (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
- (a) the country will return the non-citizen to another country; and
  - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
- (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
  - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

#### *Determining nationality*

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.