



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

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA21/10186

Date and time of decision: 19 January 2022 10:36:00

J Bishop, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be national of Vietnam and identifies as a Catholic. He is now [age] years old and he arrived in Australia via a boat [in] March 2013.
2. On 1 October 2021 the applicant lodged an application for a Safe Haven Enterprise Visa (SHEV). On 7 December 2021 a delegate of the Minister for Immigration (the delegate) refused the applicant's visa. The delegate determined the applicant did not have a profile of interest and did not face a real chance of serious harm or a real risk of significant harm now or in the reasonably foreseeable future in Vietnam.
3. The applicant's representative submitted he is not an unauthorised maritime arrivals or fast track applicant because he is a person subject to the court decision DBB16. The information before me is the Australian authorities rescued the boat the applicant was travelling on and he was taken to Christmas Island. I do not accept the submission and find the applicant is a fast track applicant.

### Information before the IAA

4. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act) (the review material). No further information was provided to the IAA by the applicant.
5. I have obtained the report on Vietnam by the Department of Foreign Affairs and Trade (DFAT) published on 11 January 2022.<sup>1</sup> The new DFAT report is the most recent DFAT report about conditions in Vietnam. The delegate relied on the DFAT report published on 13 December 2019 and I am satisfied there are exceptional circumstances to justify considering this new information.

### Applicant's claims for protection

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6. The applicant claims to fear harm in Vietnam because of his:
  - Actual and/or imputed political opinion; participation in a protest in 2012 and political activities in Australia;
  - Religion; catholic
  - Returning as a failed asylum seeker; and
  - Personal information being published on a website.

### Factual findings

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7. The applicant provided a copy of his Vietnamese birth certificate and its English translation, a copy of his Vietnamese passport bio-page and a copy of his Vietnamese national identity card. I accept the applicant is who he claims to be and is a Vietnamese citizen. I find the receiving country is Vietnam.

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<sup>1</sup> DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 11 January 2022

8. The applicant claims to be a Catholic and I accept that claim.
9. The applicant claims to have left Vietnam on a genuine passport issued in his own name via the airport without difficulties in 2013. I accept that claim.
10. The applicant claims that towards the end of 2013, Vietnamese immigration officials came to the Australia detention centre and interviewed some Vietnamese detainees about whether they should go back to Vietnam or be deported. After the interviews many detainees were deported for unknown reasons. Some of them were arrested and jailed upon their return to Vietnam. The applicant feared being deported and, [in] 2014, escaped detention. The applicant was subsequently arrested and returned to detention [in] 2019 where he remains. Regardless of his reasons, I accept the applicant escaped detention in 2014 and was returned to detention in 2019 where he remains. The applicant escaping detention, living unlawfully in the Australian community for about five years and then being returned to Australian detention has no relevance when assessing his claims for protection. I place no weight on this information.
11. I accept some of the applicant's personal details were capable of being accessed in February 2014 (the data breach).
12. The applicant said he worked in his family's rice paddies in Vietnam and worked in [Country 1] on a working visa from 2008 to 2011. While living in Australia, he has [worked]. I accept those claims.
13. The applicant said he is now married to an Australian citizen and he and his wife have an Australian citizen son. His wife has [other] children who are both Australian citizens. The applicant provided documentation to support his claims of being married and having a son who is an Australian citizen. I accept those claims.
14. The applicant has provided numerous pieces of information and submissions related to his relationship with his wife and their need for one another. During the SHEV interview the delegate explained the information related to his relationship was not relevant to the assessment of his protection claims. As outlined above, I have accepted the applicant is married and has a son with his wife. The genuineness or characteristics of their relationship is not relevant to whether the applicant meets the criteria to be granted a protection visa.
15. The applicant's representative submitted that holding a SHEV visa is equivalent to being an Australian citizen and a broader reading of clause 790.211(1) would allow the applicant to be granted a SHEV visa because he is a member of the same family unit. It was submitted that the applicant needs protection because he is a family member of Australian citizens. I do not accept holding a SHEV visa is equivalent to being an Australian citizen. I do not accept the applicant can be granted a SHEV visa because he is a member of his current family.
16. The applicant's representative submitted the applicant has resided long enough in Australia to be granted protection. I do not accept that submission.

*Involvement in a protest in 2012*

17. The applicant's statutory declaration dated 20 August 2019 (2019 statutory declaration) states that where he lived in Nghe An province in Vietnam, a court had convicted four prisoners who were members of the Catholic church in May 2012. The applicant participated in a peaceful protest against the Court and the Vietnamese police for the unlawful arrest and conviction of the four people. During the protest, the applicant claims he was involved in a violent conflict with the Nghe An province government and the Vietnamese police. "As a result" he received an

'order notice' from the local police and government regarding his protest. He refused to go to the police office. "As a result" the local government issued him with a notice stating he was guilty of disrupting public order and disobedience against officials on duty. The applicant, fearing for his safety, "went abroad secretly" to seek protection.

18. The applicant repeated his claim of being involved in a protest in 2012 during his SHEV interview. He told the delegate he didn't know the four people, but he is a Catholic and went to support them. The delegate asked the applicant to tell her about the violent conflict he had with the police and the applicant responded they were holding banners and flags and there were some fireworks. The Vietnamese police tried to make them go away and snatched their banners. The applicant said he fought back when the police tried to snatch his banner and a bayonet was used. He was injured and still has a scar. He was taken to the police station and asked for a statement. He was then sent a warning.
19. The delegate put to the applicant that his written statement said he refused to go to the police station, and he responded they were taken, he made a statement and was released the same day. The following day he was sent a summons. The applicant said the paperwork told him to go to a place and, when he went there, he was asked what he did. He was told they would meet him on a regular basis and investigate his offences of social conduct, social order, and participation in the party. When the delegate asked if he was ever investigated, the applicant responded he was called once a week and asked about his involvement in the party. He then fled the area.
20. The applicant's written evidence was he participated in a peaceful protest, he was issued with an order notice, he refused to attend the police office and 'as a result' he was found guilty of disrupting public order and disobedience against officials on duty. However, his oral evidence was he was taken to the police station and asked for a statement. He was released the same day and then sent a summons to attend a 'place' and answer questions. He was then called once a week until he fled the area. The applicant has given inconsistent evidence about his involvement with the Vietnamese police/Vietnamese authorities because of his participation in a protest. I find it implausible that if the applicant did attend for questioning after the protest, he would fail to mention those details in his written statement. I also find it implausible that if the applicant was sent a notice that he was found guilty of offences as claimed, he would fail to mention those details in his oral evidence. I find the inconsistencies in the applicant's evidence significant, and this raises doubts about whether his evidence is reliable.
21. The applicant has given inconsistent evidence and, despite his claimed problems starting in May 2012, his SHEV application indicates he remained at the same address and didn't leave Vietnam until [February] 2013. Based on all the evidence before me, I am not satisfied the applicant attended a peaceful protest in May 2012 as claimed.
22. Even if I accepted the applicant did attend one peaceful protest in 2012, I am not satisfied the applicant had a violent conflict with the Vietnamese police, that he was ever sent a summons or order notice, or any official paperwork related to his protest participation, that he ever attended the Vietnamese police station or office for questioning or that he ever came to the adverse attention of the Vietnamese authorities/police because of that participation. And, as outlined below, I was not satisfied the applicant had to flee the area.
23. The applicant claims he went abroad secretly in his written statement. However, during his SHEV interview he confirmed he left Vietnam legally on his genuine Vietnamese passport via the airport. The Vietnamese authorities often confiscate passports and/or refuse to issue passports or exit permission to people the Vietnamese government considers a threat to its national

interest. This includes high profile political activists, government critics, critical journalists, and some religious leaders.<sup>2</sup> And, the Vietnamese government continues to use foreign travel bans preventing individuals from travelling overseas. These bans can extend to the person's family members.<sup>3</sup>

24. If the Vietnamese government had found the applicant guilty of disrupting public order and disobedience against officials on duty and/or was actively investigating the applicant for offences as claimed, I find it implausible he would have been able to leave Vietnam without difficulties on a genuine passport as claimed. I do not accept the applicant went abroad secretly and I am not satisfied the applicant had to flee the area as claimed. Based on all the evidence before me, I am not satisfied the applicant was of any adverse interest to the Vietnamese authorities when he left Vietnam. This is consistent with my findings as outlined above regarding his participation in a peaceful protest in 2012.

*Involvement in political activities in Australia*

25. The applicant's statutory declaration claims that after he escaped detention in 2014, he joined religious and political activities in the community. He joined the protests for the Fall of Saigon on 30 April 1975 in front of the Vietnamese Consulate in [City 1]. He joined protests about religious conflict in Vietnam, about abductions and arrests of political prisoners in Vietnam and about allowing Chinese investors opening economic zones in Vietnam. The applicant claims that he follows, joins, shares, and comments on posts of Vietnamese activists fighting for freedom and equality on his [social media] account. The applicant claims he has participated in the Viet Tan organisation in [City 1].
26. During the SHEV interview the applicant said when he left the detention centre he got a [social media] account and shared articles about the Vietnamese communists. He participated in demonstrations in Australia and questioned whether someone had live streamed his participation and captured an image of him with the South Vietnamese flag. He said people caught holding the South Vietnamese flag will be arrested and put in prison. The delegate asked the applicant when he first participated in a protest and he responded he participated in all of them in 2014, 2015 and 2016. When the delegate asked if he protested after 2016 he responded that he thought the photographs he showed the delegate were from 2017 or 2018. He repeated the claim that he had participated in all protests. When the delegate asked the applicant the number of protests he attended in 2014 he responded he participated in the biggest demonstration organised in April. When the delegate asked if he had attended other protests in 2014 he responded he couldn't remember the number. When the delegate asked the applicant if he had participated in protests other than the memorial protests held in April he responded that he did. He protested in front of the Vietnamese embassy about Chinese people hiring land in Vietnam and he protested about Vietnamese musicians from the communist regime performing in Australia. The applicant said he was just a participant and never organised the protests. When the delegate asked the applicant if he was ever a member of the Viet Tan in Australia he responded that he wasn't. When the delegate asked the applicant if he was ever a member of the Viet Tan in Vietnam he responded that he wasn't. He said he was not involved in political groups in Vietnam. He just supported these people, he joined in the demonstration and he was bashed up and investigated about whether he was in the party.

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<sup>2</sup> DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 13 December 2019; DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 11 January 2022

<sup>3</sup> DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 13 December 2019; DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 11 January 2022; US Department of State, 12 May 2021

27. The delegate put to the applicant that she was going to ask his representative to send her the photographs he had shown her over the video and the representative confirmed that he would. The applicant said he also had other photographs taken at different times.
28. In post-SHEV interview submissions, the applicant's representative provided the photographs shown during the SHEV interview. One photograph showed the applicant holding a small flag that depicted half [of another] flag and half the South Vietnam flag. People and the same flags are visible in the background in what appears to be a park. The photograph is not dated. The second photograph is of the applicant holding a large South Vietnam flag on his own in front of a building. He is holding what appears to be a piece of paper with Vietnamese writing on it. The picture is not dated but the applicant is wearing clothing that are different to the first photograph. There are no other people in the photograph.
29. Despite the applicant's claim to have participated in all the protests, the delegate noted he had supplied just two photographs to support that claim. And one of those photographs was of the applicant alone. Based on the evidence before me, I am prepared to accept the applicant has attended, at some point in time, one protest while he has been in Australia. I am not satisfied the applicant has participated in all the protests as claimed. Nor am I satisfied someone streamed the applicant attending a protest as claimed. I am not satisfied the applicant has participated in the Viet Tan organisation in [City 1] as claimed. I find the chances of the Vietnamese government ever becoming aware of the applicant's attendance at one protest in Australia to be remote.
30. The applicant told the delegate that he posts anti-Vietnamese government content on his public [social media] account. Since he has been in the detention centre he hasn't posted or shared his writings/articles on social media at all. He believes that is the reason there was a reduction in the amount of attention from the Vietnamese police towards his mother in Vietnam. However, that claim is inconsistent with the applicant's claim that the Vietnamese police have made recent visits to his mother's house asking about the applicant.
31. Post-SHEV interview, the applicant's representative submitted the applicant has deleted all the photographs and posts that could prejudice him when he was preparing to return to Vietnam in about April 2019. It was submitted that if the applicant didn't delete them, then the person who started the post has deleted them. It was submitted the applicant has not shared or posted anti-Vietnamese government posts since his current detention. Despite the applicant's submission that the applicant has not posted anti-Vietnamese government posts since his detention, his [social media] page appeared to indicate he had reposted some political content up until about December 2019. However, his last public political repost was around the end of May 2019.
32. The applicant's representative provided the login details of the applicant's [social media] account and a link to a page that including posts up to [February] 2019. The applicant's representative also provided 15 pages of reposts from the applicant's [social media] account indicating the Viet Tan and other organisations were responsible for the original posts.
33. The 15 pages of posts included public anti-Vietnamese government posts dated [on specified dates in] April [and] May 2019. There was another post in 2019 (the date was in Vietnamese) that was not public. The other public reposts were dated [in] October 2017, [and specified dates from] July 2018 [to] December 2018. The 15 pages included evidence of posts being deleted but it does not indicate when.
34. Most of the information on the applicant's [social media] account was in Vietnamese but I accept the applicant has reposted anti-Vietnamese posts originating from various organisations

including the Viet Tan. Some posts were simple reposts without the applicant adding comments and some posts were reposts with the applicant adding anti-Vietnamese government comments.

35. Under section 5J(6) of the Act any conduct engaged in by a person in Australia is to be disregarded unless he satisfies the Minister he engaged in the conduct otherwise than for the purpose of strengthening his claim to be a refugee. I have accepted the applicant attended one protest in Australia. And, although I accept there were anti-Vietnamese government [social media] reposts before May 2019, there appeared to be flurry of such reposts in May 2019 which was shortly before the applicant outlined, in his statutory declaration dated 20 August 2019, his fear of returning to Vietnam because of his political opinion. As outlined above and below, I have doubts about whether the applicant's evidence is reliable. Apart from one photograph of the applicant at a protest at some point in time (which could also have been a social event), there is no other corroborating evidence, for example other photographs or statements from people associated with activist organisations, to support the applicant's claim of being a genuine political activist. And the second photograph of the applicant standing alone in front of an unknown building on an unknown date for an unknown purpose could have easily been staged. Based on all the evidence before me, I am not satisfied the applicant reposted anti-Vietnamese government on his [social media] account otherwise than for the purposes of strengthening his claim to be a refugee. On that basis, I am not satisfied the applicant would continue to post anti-Vietnamese government content on his [social media] account if he returned to Vietnam. I am not satisfied the applicant is a genuine political activities. Nor am I satisfied the applicant would become involved in political activities if he returned to Vietnam.

*The Vietnamese authorities visiting the applicant's mother and/or relatives in Vietnam*

36. The applicant's 2019 statutory declaration states the Vietnamese government continue to give his family a difficult time. They sent orders to his family and were searching for him. They asked the applicant's family where he was, what he was doing and when he would be back.

37. On 29 October 2021 the applicant reported to his migration agent Vietnamese police had contacted his mother. The applicant's representative sent a memorandum to the Department stating the applicant had reported:

- On [a day in] October 2021 at about [time] the village head went to the applicant's mother and informed her she had to attend the [specified] police station to answer questions about the applicant. The applicant's mother attended the police station where there were three police officers. She was shown a photograph of the applicant and asked whether she was his mother and if the applicant was in Australia. His mother was asked what the applicant was doing in Australia, what he was doing with the passport he was issued, whether he was a member of any organisation or participating with any organisation, how the applicant contacted her and whether his mother had the applicant's mobile telephone number and [social media] account to give them. The applicant's mother told the police that she only knew her son was in Australia but didn't know what he was doing. She told them she didn't know if her son was in any organisations or what his activities were. She didn't use [social media] or have her son's [social media] account. The applicant's mother told the police that her son calls her, but she didn't have his mobile telephone number. The applicant's mother was then shown three photographs of the applicant at the Consulate General of Vietnam in [City 1]. His mother told the police that her eyes were not in focus, and she was unable to see who was in the photograph. The police told the applicant's mother that they would call her and see her again tomorrow.

- [The following day] the Vietnamese police called the applicant's mother. She attended the police station and was asked the same questions again.
38. During the applicant's SHEV interview, he said after he left Vietnam the police would go to his mother's house asking about him and harassing his family. He believes it was because he participated in the 2012 demonstration. The delegate asked the applicant when the Vietnamese police first came after he left Vietnam and he responded in about April 2013. He said it was about once every month or two after that. The delegate put to the applicant that he had been in Australia for eight years and asked him if the Vietnamese police have been coming to his family's home once a month/every two months since that time. He responded that at first his mother did go and answer questions but then his mother told them she didn't know what her son was doing overseas and asked them not to ask her. He said prior to coming in October 2021, the Vietnamese authorities visited his mother in December 2020. Before that visit, his mother didn't comply, and they didn't come. He repeated his claim of the Vietnamese police asking his mother questions about what he was doing in Australia, whether he had participated in organisations, being shown photographs of him demonstrating in [City 1] and being asked if that was her son. The applicant said his mother knew the photograph was of her son but said she couldn't see and didn't know. He told the delegate the Vietnamese police came to see his mother on [the day in] October 2021 and [a day in] November 2021. When the delegate asked why the Vietnamese police were coming and asking his mother questions, he responded that he didn't know.
39. The applicant's SHEV interview was conducted over the video, and he showed the delegate some photographs (as discussed above). The delegate asked if the photographs were taken on the same day, and he responded that they were (although I noted the applicant was wearing different clothing). He said the police, who were wearing police uniforms, showed his mother the photograph of him holding the flag. When the delegate put to the applicant that his statement said his mother was shown three photographs the applicant responded she was shown two of those photographs (attending a protest) and a portrait of him. The photographs were printed.
40. During the SHEV interview the delegate put to the applicant that he submitted a Vietnamese police clearance stating he had no previous offences or convictions as of [December] 2020 in Vietnam. The delegate put to the applicant that if he was able to obtain a Vietnamese police clearance in December 2020 then it seemed implausible the Vietnamese police would be coming to his mother's home in October 2021. The applicant responded that he didn't know or understand why his mother was called and shown photographs. His mother told the Vietnamese police that she wasn't sure it was her son and she was told that if she didn't sign the document to 'confirm' that it would be difficult for her son if he returned to Vietnam. The delegate asked the applicant why it would be difficult for him to return given he had a police clearance and he responded that is what his mother was told. The delegate asked the applicant what his mother was told and he responded his mother was asked whether he had participated in any party in Australia, what he was doing in Australia, what his telephone number was and whether he was involved in social media. He said his mother was shown the photographs and told to sign a document confirming it was her son and then, if her son returned to Vietnam, it would be difficult for him.
41. The delegate put to the applicant that it appeared implausible that the Vietnamese police visited his mother as claimed and asked if he could provide information to support his claim. The applicant responded that his mother doesn't use telephones to record the meetings and reiterated that the claim was genuine. Post-SHEV interview submissions stated that the applicant's mother and Ward leader are willing to provide the equivalent of a statutory declaration stating that the local Vietnamese police have had a recent interest in the applicant.



However, only the Vietnamese police are authorised to witness such documents in Vietnam and “they would not witness anything that is against them in these documents”. It was submitted that the applicant has no evidence to support his claim.

42. The applicant submitted post-SHEV interview that there are four levels of government in Vietnam: national, provincial, town and district. He submitted the Vietnamese police clearance was issued by the provincial government and they may have a different view to that of the town and district police.
43. The People’s Public Security Forces of Vietnam (PPSFV) is Vietnam’s main police and security force. The People’s Security Force is concerned with collecting intelligence to detect activities that damage national security. The People’s Police Force is responsible for social order, public safety and the more traditional police work; including criminal investigations, neighbourhood policing, traffic control, household registration, and identification cards. The PPSFV operates at national, provincial, district, and commune levels. I accept the applicant’s Vietnamese police clearance was issued by the Justice Department in the province where he was born and lived. However, there is no evidence before me to support the applicant’s claims that the town and district police ‘may’ have a ‘different view’. And, if the applicant had been found guilty of offences in 2012 as claimed, those offences should have been listed in his Vietnamese police clearance but were not.
44. If the applicant’s mother was told to sign a document confirming the person in the photograph was her son, I find it astounding he would fail to mention that significant detail to his migration agent. Alternatively, if he did mention that significant detail to his migration agent, I find it astounding that his migration agent would fail to include that details in his written memorandum to the Department. I find it even more implausible that if the applicant’s mother was told to sign a document, he would fail to mention that significant detail until the delegate put to him her concerns about the claim’s plausibility. Overall, I found the applicant’s evidence about when and how often the Vietnamese police came to his mother’s house, asking his mother questions, showing his mother photographs and telling his mother to sign a document confirming it was the applicant in the photographs unconvincing and I have doubts about whether the applicant’s evidence is reliable. Based on the evidence before me, I am not satisfied the Vietnamese police and/or Vietnamese authorities ever came to the applicant’s mother house, ever called/asked the applicant’s mother to come for questioning, ever asked the applicant’s mother questions about the applicant, ever showed the applicant’s mother photographs of the applicant or ever asked the applicant’s mother to sign a document confirming it was the applicant in the photographs.
45. During the SHEV interview, the applicant referred to the data breach in 2014 as a possible reason for the Vietnamese police recent contact with his mother in 2021. I have accepted some of the applicant’s personal details were disclosed for a short period of time in February 2014. However, as outlined above, I was not satisfied the Vietnamese police have had recent contact with his mother as claimed and I do not accept the claim.

### **Refugee assessment**

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46. 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**

47. 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.

48. I accept the applicant is a Catholic. DFAT reports that Catholics are generally able to practice freely at registered churches especially where there is a large Catholic population. Those Catholics who belong to a registered church and are not politically active face a low risk of official harassment. Those Catholics who challenge, or are perceived to challenge, the Vietnamese authorities, the interests of the Vietnamese Communist Party of Vietnam (CPV) and its policies face a moderate risk of harassment which could include arrest or violence. Those Catholics who belong to house churches are likely to be subject to surveillance from the Vietnamese authorities.<sup>4</sup> During the SHEV interview the delegate put to the applicant that there was no evidence Catholics who were not involved in high profile activities were targeted in Vietnam.

49. I was not satisfied there was a real chance the Vietnamese authorities are, or would ever become aware of, the applicant attending one protest in Australia and I have disregarded his conduct of reposting anti-Vietnamese under section 5(6) of the Act. And, even if I accepted the applicant attended one protest in Vietnam in 2012, I was not satisfied the applicant was of any adverse interest to the Vietnamese authorities and/or Vietnamese police when he left Vietnam in 2013. Nor am I satisfied he would attend protests, post anti-Vietnamese government content on social media and/or become involved in political activities if he returned to Vietnam. I am not satisfied the applicant being subjected to a low risk of official harassment and/or potential surveillance if he decided to belong to a house church could ever amount to serious harm. I am not satisfied the applicant faces a real chance of serious harm now or in the reasonably foreseeable future for potentially attending one protest in Vietnam, for attending one protest in Australia and/or for being a Catholic.

50. I accept the applicant had some of his personal details subjected to the data breach. In February 2014, for a short period of time, the full names, citizenship, date of birth, unauthorised maritime arrival and detention status of some individuals were inadvertently published on the

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<sup>4</sup> DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 13 December 2019; DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 11 January 2022

Department of Immigration and Citizenship's website. However, even if the data breach had not occurred, and whether or not the applicant's details were in fact accessed, those details – apart from details about when and where the applicant was detained - would have been otherwise evident to the Vietnamese authorities upon his return to Vietnam.

51. I accept the applicant will be returning to Vietnam as a failed asylum seeker and the Vietnamese authorities may know or infer he made a claim for asylum. Articles 120 and 121 of the Vietnamese Penal Code make it an offence for a person to illegally emigrate from Vietnam. However, the 2019 and 2022 DFAT reports state that they are unaware of any cases where these provisions have been used against failed asylum seekers. The DFAT reports state that returnees from Australia are sometimes questioned by the Vietnamese authorities for one to two hours but the focus of this questioning is on obtaining information about the person's illegal movements.<sup>5</sup>
52. The DFAT reports state that failed asylum seekers can face a range of difficulties related to unemployment, underemployment and challenges accessing social services, particularly when a person's household registration has ceased. The 2019 DFAT report indicated the household books were to be abolished in 2020 and replaced with an online database. This would remove time-consuming administrative procedures. The 2022 DFAT report, confirmed this had occurred.
53. I accept the applicant could be questioned for one to two hours on his return to Vietnam and he may be unable to access social services until he registers his residence in Vietnam.<sup>6</sup> The applicant has been working in Australia and has not claimed he cannot work in Vietnam. His mother has a house in Vietnam and the applicant remains in regular contact with her. I am not satisfied the applicant would be unable to support himself in Vietnam. Nor am I satisfied he would be unable to find accommodation. I am not satisfied being questioned for a short period of time at the airport and/or being unable to access social services until the applicant registered his residence in Vietnam amounts to serious harm in these circumstances. I am not satisfied the applicant faces a real chance of serious harm on the basis of being a returnee who sought asylum in Australia and who had some of his personal data breach now or in the reasonably foreseeable future in Vietnam.
54. I have considered the applicant's personal characteristics and circumstances against the country information before me. Taking into consideration those of his claims which I have accepted on a cumulative basis, I find that the applicant would not face a real chance of serious harm amounting to persecution, now or in the reasonably foreseeable future in Vietnam.

#### **Refugee: conclusion**

55. 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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56. 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

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<sup>5</sup> DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 13 December 2019; DFAT Country Information Report Vietnam', Department of Foreign Affairs and Trade, 11 January 2022

<sup>6</sup> Ibid

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**

57. 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.

58. 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.

### **Qualifications to the real risk threshold**

59. Section 36(2B) provides that there is taken not to be a real risk that a person will suffer significant harm in a country if:

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or
- the real risk is one faced by the population of the country generally and is not faced by the person personally.

60. Both the 2019 and 2022 DFAT reports indicate social media, and in particular [one social media], is a popular platform for expressing opinions. DFAT reports the Vietnamese government organisation "Force 47" has thousands of Vietnamese officials monitoring online activism and both reports assessed online activists faced a moderate risk of official discrimination in Vietnam. Both reports stated that low-level activists could be arrested. However, the 2022 DFAT report was more supportive of the applicant's claim. The 2022 DFAT report stated that low level users of little profile in Vietnam are sometimes subjected to fines, arrests and prison sentences. And DFAT is aware of one-off posters being identified and charged for spreading misinformation; in particular about the spread of COVID19. The 2022 DFAT report also stated that returnees who have used their time overseas to publicly oppose the Vietnamese government would be subjected to the same penalties as activists in Vietnam including surveillance, arrest, fines and/or imprisonment.

61. I have found that the applicant had reposted anti-Vietnamese government content on his [social media] account. I have found that the applicant made some individual anti-Vietnamese comments on some of his reposts. And I have found the applicant has made no public anti-Vietnamese government reposts since around May 2019 and no anti-government posts at all since around December 2019. In 2018 there were 52 million active [social media] accounts in

Vietnam and a population of 96 million.<sup>7</sup> However, in the first nine months of 2019 just 11 people were sentenced for criticising the Vietnamese government.<sup>8</sup> And Freedom House reported just 42 bloggers and activists in Vietnam were convicted in 2018.<sup>9</sup> There are reports of the Vietnamese authorities hacking into professional Vietnamese journalists accounts who are based overseas.<sup>10</sup>

62. The applicant was of no adverse interest when he left Vietnam and I was not satisfied the Vietnamese authorities and/or police were harassing his mother after he left as claimed. I found the chances of the Vietnamese authorities becoming aware of the applicant attending one protest in Australia remote. Given the number of [social media] accounts in Vietnam, the applicant's profile on departure and his low level online political activities in Australia, I find the chances of the Vietnamese government ever becoming aware of the applicant's anti-Vietnamese government posts remote. And, for the reasons outlined above, I was not satisfied the applicant would continue posting anti-Vietnamese government content on social media if he returned to Vietnam. Nor was I satisfied the applicant would become involved in political activities upon his return to Vietnam.
63. I accept that, on return to Vietnam, the applicant will be subject to a series of administrative processes which could include being questioned for a brief period. I also accepted that the applicant would be unable to access social services until he registered his residence in Vietnam. However, I am not satisfied that being subjected to administrative processes which could include questioning and/or not having access to social services for a brief period could ever amount to significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Vietnam. I am not satisfied the applicant would face a real risk of significant harm for these reasons.
64. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".<sup>11</sup> I accepted the applicant is a Catholic who would be returning to Vietnam as a failed asylum seeker who had his personal data breached. I accepted the applicant attended one protest in Australia, potentially attended one protest in Vietnam and posted anti-Vietnamese content on his [social media] account. However, I found the chances of the Vietnamese government becoming aware of the applicant's political activities in Australia remote. I was not satisfied the applicant would be unable to support himself on his return to Vietnam. Having regard to all the applicant's claims before me, I am not satisfied the applicant faces a real risk of significant harm now or in the reasonably foreseeable future in Vietnam for any of his claimed reasons – including past political activities, his religion, the data breach, being a failed asylum seeker.
65. Considering all of the applicant's claims for protection together, I am not satisfied he faces a real risk of significant harm for any of his claimed reasons now or in the reasonably foreseeable future in Vietnam.

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<sup>7</sup> Vietnam's New Cyber Law Could Hobble Foreign Investors and Limit Basic Freedoms, Centre for Strategic and International Studies (CSIS), 2 July 2018

<sup>8</sup> Vietnam: New Arrest for [social media] Postings, Human Rights Watch (HRW), 7 October 2019

<sup>9</sup> Freedom on the Net 2019 - Vietnam, Freedom House, 5 November 2019

<sup>10</sup> Ibid

<sup>11</sup> *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

**Complementary protection: conclusion**

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

**Decision**

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

## Applicable law

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

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

In this Act, unless the contrary intention appears:

...

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

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

...

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

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

but does not include an act or omission:

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

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

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

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

...

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

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
  - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
  - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
  - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

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

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

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

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



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

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

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

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

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

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

#### 5LA Effective protection measures

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

...

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

...

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

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

...

*Protection obligations*

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

*Determining nationality*

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