



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA17/02723

Date and time of decision: 5 March 2018 12:25:00

Denny Hughes, Reviewer

Decision

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 an referred applicant, or their relative or other dependant

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He applied for a protection visa [in] September 2016. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa [in] May 2017.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. The applicant's submission to the IAA contains the following documents:
 - A statutory declaration from the applicant, speaking to his existing claims and raising new claims.
 - A five-page submission from the representative, responding to the delegate's decision, and speaking to the applicant's existing claims and referring to his new claims.
 - A pdf document of screenshots from a [social media] account of a person named [Mr A, a name similar but distinct from the applicant's name].
 - Scans of three photos in a document entitled 'religious activity', and scans of two photos in a document entitled 'political activity'.
 - A compendium of country reports that predate and postdate the delegate's decision relating to the situation for Catholics, anti-government protestors, anti-Formosa activists, and the human rights and religious freedom situation in Vietnam, and two decisions of the Administrative Appeals Tribunal, Migration and Refugee Division from February 2017 and September 2016.
 - A letter of support from [a church] in [Australian State 1] dated [in] June 2017, speaking to the applicant's regular church attendance and participation in the church choir. A second email includes an undated letter from [Community Group 1] in [Australian Suburb 1] referring to the applicant's participation in that community and its political activities.
4. To the extent those submissions contain arguments responding to the delegate's decision and reassert claims and country information already before the delegate, I am satisfied this is not new information and I have had regard to those matters.
5. The submissions raise, for the first time, claims that the applicant fears harm from his political and religious activities in Australia. The submission also raises for the first time that in addition to the data breach, the presence of Vietnamese immigration officers (the A18 section) at the detention centre has added to the applicant's trauma and fears about what will happen to him if he is forced back to Vietnam. The submission contends that a recent crackdown on activists who fit the applicant's profile in Vietnam, and the impact of a denial of the opportunity to present evidence regarding his religious and political activity in Australia, are exceptional circumstances that justify the consideration of this new information. A range of new country information, including information that predates and postdates the delegate's decision, has been provided in support of those new claims.

6. The applicant has consistently claimed to be Catholic, but has not previously claimed to be politically active in relation to political or religious issues. The applicant did not raise any claims in his arrival interview to have been politically or religiously active in Vietnam.
7. In his protection visa application, dated [in] September 2016, the applicant's statement, and the representative's submission, there is no reference to the applicant's religious or political activities in Australia or, more significantly, that he feared harm on return to Vietnam for those reasons.
8. During the visa interview in March 2017, the applicant did state that he participates in community activities and attends the church, and he has met some people this way. However, he did not advance claims that he was politically active, or that he feared harm on return to Vietnam related to his involvement with community, political and religious activities in Australia. I consider these claims, and the supporting documentation, are new information.
9. The submissions to the IAA contend there are exceptional circumstances to consider the new claims and information. The first is that the interpreter erred in the visa interview, and the applicant was denied an opportunity to present evidence regarding his political and religious activities in Australia.
10. I have reviewed the hearing audio. At one point during the interview, there does appear to be confusion on the part of the interpreter about the word 'militant' when the delegate asks if the applicant has any such associations. The applicant responded that he did not and that he had only protested against the authorities/police in [Province 1] in relation to his work. I accept there may have been some confusion in relation to this question. However, the applicant was then asked if there was anything else he would like to say. The applicant was then given a break to consider his claims and the delegate's concerns. The applicant provided additional responses addressing her concerns, but did not raise any other claims. The representative was then given an opportunity to make additional submissions. He also spoke in response to the delegate's concerns, but did not raise any other claims or suggest claims remained unventilated. At the end of the oral submissions, the delegate again asked if there was anything else, and the representative indicated there was nothing else. The delegate then made clear that any additional information provided before the decision was made would be considered.
11. The applicant was encouraged at the start of the interview to indicate if he had any concerns with the interpreter (by raising his hand), however he did not indicate any concerns during the visa interview. The interview was not rushed. The delegate gave the applicant time to provide answers, and she did not prevent the applicant or the representative from raising concerns. The applicant was represented throughout this process, and he was given clear opportunities to raise his claims, as was his representative if he considered the applicant had been denied an opportunity, or failed to do so. Significantly, the delegate also indicated she would have regard to any post-interview submissions. However, no post-interview submissions were made in the approximately six-week period between the visa interview and the delegate's decision. I do not accept the submission that the applicant was denied an opportunity to present his case at the visa interview.
12. The applicant's supporting evidence of his religious and political activity is limited. His evidence of his religious involvement contains three photos. One of the photos appears to depict the applicant singing in a choir on an outdoor stage. No religious or political iconography is apparent. The other two photos appear to include the applicant among a group of people enjoying themselves. The photo is taken in what looks to be a backyard, next to a Christmas

tree and some decorations. No further context is provided. In addition to the photos, the applicant has provided a letter of support from his local church. It indicates that he has regularly attended the church since 2014, and that he is active in the choir.

13. The applicant's supporting evidence of political activity includes photos of his apparent attendance at a protest. There are two photos of the applicant at the protest, with a number of [signs]. A number of South Vietnam flags are displayed. One of those photos has also been posted on his [social media] account. It is not clear when or where this protest took place. However, one of the [social media] posts of this photo is from December 2016 – a date that predates the visa interview. I am satisfied the applicant attended this protest well before the visa interview. The same photo is then reposted [in] June 2017. I also note the [social media] evidence shows no signs of other obvious political activity. This is quite apart from the contention in the representative's submission to the IAA that the applicant regularly and frequently shares anti-government articles on social media.
14. The applicant has provided a letter of support from [a senior official] of [Community Group 1] in [Australian Suburb 1] referring to the applicant's participation in that community. I have concerns about the value of this letter. The letter is undated and refers to three other persons, in addition to the applicant, who are also applying for protection visas. It refers to their claims for asylum and states '[g]iven the size of [Community Group 1] in [Australian State 1], I do not know these young men personally, but I have conducted enquiries within the community and it has been confirmed to me that these men are all actively involved in the events held by [Community Group 1] in [Australian Suburb 1]'. It then states that the men have been involved in: an annual participation in events commemorating the downfall of Saigon on April 30; participation in the candle-light prayer for the Vung Ang area impacted by the Formosa toxic waste spill; and participation in a [demonstration] against the Vietnamese Government's handling of the Formosa toxic waste spill.
15. In terms of his political activities, the letter from [Community Group 1] in [Australian State 1] is made by a person who concedes he does not know the applicant personally, and is written in the context of a letter that is intended to apply to three other protection visa applicants, and speaks of them all collectively. It does not state who directly knows or supports the claims they are involved in that community. I consider this undermines the probative value of the information contained within the letter. No other supporting evidence has been provided to demonstrate the applicant has been more politically active than the one attendance depicted in the two photos.
16. Despite the limited nature of this evidence, the applicant is seeking to claim that he would be harmed for reasons of his religious and political activism. He claims his profile would be exacerbated by his asylum claims, and the fact he is from Nghe An, a province where a number of recent political and religious conflicts have occurred. The representative describes him as a Catholic political dissident and activist who opposes the Communist Government.¹
17. The new information before me at best indicates that (a) the applicant was attending church since 2014 and had been in the choir for at least some time; (b) that the applicant had been involved in the Vietnamese community; and (c) that he has attended one protest in 2016, several months before the visa interview. This is some way from the claim that the applicant is a Catholic political dissident and activist. Given the timing of his involvement with the church

¹ The submission incorrectly suggests the applicant advanced claims relating to his participation in Formosa protests, and suggests these were ostensibly accepted by the delegate. It does not appear that any such claims were advanced or considered by the delegate.

and the protest, it also raises the question of why these claims were not raised with the delegate, if they were genuine.

18. In addition to concerns with the interpreting and his ability to put forward his case, the second set of exceptional circumstances put forward by the applicant relate to shifts in the country information. The applicant claims the new information about his claims should be considered, based on a crackdown against dissidents that fit the applicant's profile, which occurred *after* the visa interview in March 2017. The submission contends the country information pertaining to these incidents could not have been provided prior to the decision.
19. The submission appears to contend that the risks, or the depth of the risks, to the applicant from his religious and political activism has become more apparent since the date of the visa interview. The information already before me clearly indicates the risks to political and religious activists in Vietnam. As a lifelong Catholic, I consider the applicant would have been well aware of the risks to Christians/Catholics, in particular for those involved with politically active religious churches or organisations in Vietnam. Similarly, the risks for political activists would have been known to the applicant, if not during his time in Vietnam, then certainly by the time he attended a protest in 2016. I do not accept that shifts in country information indicating a crackdown on political or religious activists is an exceptional circumstance, or that it explains his failure to raise these claims at an earlier point in this process.
20. In relation to the country information (and AAT decisions) that predate the delegate's decision, I am not satisfied this is credible personal information or that the information was not, and could not have been, provided to the Minister before the delegate made their decision. In terms of the country information and supporting documentation (the two letters) that postdate the delegate's decision, I accept the information was not, and could not have been, provided to the Minister before the delegate made their decision. In terms of the new information and claims that do not postdate the delegate's decision (e.g. photos, older [social media] records), I am satisfied this is, on its face, credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claims.
21. I consider the applicant was given myriad opportunities to raise his claims prior to the commencement of this review. I do not accept he was denied an opportunity to present his claims, whether at interview, in his application, or in post-interview submissions. I also do not accept recent crackdowns would have changed his perspective of his claims. Instead, I consider the risks to the religiously and politically active in Vietnam have been present for a long time. Had these claims been genuine and had the applicant genuinely feared harm for reasons of his activities in Australia, or any future activities on return to Vietnam, I consider the applicant would have been motivated to put these claims to the delegate. The applicant was represented throughout this process, and was advised on multiple occasions by the Department of the importance of providing true and complete claims as soon as possible. However, he did not raise those claims, even summarily. As discussed below, I am prepared to accept his oral evidence at the interview that he attends church and participates in the Vietnamese community. I am also prepared to accept that the Vietnamese authorities (including its immigration authorities) have or will determine that he has applied for asylum in Australia. Those aspects of the new information (that confirm his attendance at church and his ordinary involvement with the Vietnamese community, or knowledge of his asylum claims) do no more than corroborate matters I already accept based on his previous evidence. I find that what little potential corroboration there is of his new claims (the photos at a single protest that predated the visa interview, and a letter from the [senior official] of [Community Group 1] who does not know the applicant personally), are outweighed by my other concerns. His failure to

raise his claims to be a religious and political activist at any juncture prior to this review leads me to conclude the claims he has advanced are not credible or genuine. I am not satisfied that his claims to be a political and/or religious activist are credible personal information which was not previously known and, had it been known, may have affected the consideration of the applicant's claim. In terms of the new claims and information in the submissions, as well as the supporting country information and supporting documentation, I am not satisfied there are exceptional circumstances to justify consideration of any of the new information or claims advanced, and I have not considered the new information, documents or claims pursuant to s.473DD.

Applicant's claims for protection

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

- He was born in Nghe An Province. He is of the Kinh ethnicity and the Catholic faith.
- While he was living in [Province 1] and working as [Occupation 1], he was forced to undertake work for the Police [undertaking certain activities].
- The applicant protested against doing this other work because it was dangerous. This led to an argument with the authorities. He was arrested and charged with being disruptive in public. He was detained and subjected to interrogation and beatings. He was also accused of being anti-government.
- The applicant escaped from his detention. He returned home to Nghe An and organised to flee Vietnam a month later. He believed his family were being watched, and moved around constantly to avoid detection.
- He fears if he is returned to Vietnam he will be imprisoned indefinitely and subjected to ongoing torture.

Refugee assessment

23. 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

24. 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.
25. The applicant provided incorrect information about his name and date of birth prior to the arrival interview. That information was subsequently corrected by the applicant at the arrival interview in May 2013. The applicant stated that he was told by other people on the boat to provide incorrect information or he would be sent back to Vietnam by the Australian authorities.
26. A number of documents were provided. I accept that the licence and birth certificate provide support for his identity, and were accepted by the Department. The applicant has also provided a copy of his household register (*Sổ Hộ Khẩu*) and a translation. That document is consistent with his claims about his background, however I note that in the section marked (*Tôn Giáo*), pages one to five of that document appear to show some evidence of erasures and alterations, including on the page (five) that contains the applicant's biographical details. Without an expert assessment of those irregularities, I am prepared to accept this is a genuine document with non-fraudulent alterations. Nevertheless, the Department may wish to scrutinise this document further in the future if necessary.
27. While I have some concerns about the applicant's identity given he had provided incorrect evidence about his identity in the past, he has been consistent about his place of birth, ethnicity, religion and nationality. He spoke in Vietnamese throughout this process. I accept his revised evidence. I accept he is [name], a Vietnamese national, born [birth date].
28. The applicant claims to be [Occupation 1]. There is evidence of this in the visa application, and I accept his occupation as claimed. The applicant's claims turn principally on his work in [Province 1], prior to his departure from the country, and an incident with the local police/authorities, following a dispute over his role as [Occupation 1].
29. The applicant was asked during the arrival interview why he left Vietnam. He said that nothing had happened to him personally, but the work and pay in Vietnam was so little. He had travelled to Australia to work and support his family.
30. The applicant referred to this in his visa application statement. He said that his claims at the arrival interview were correct, but they did not form the sole basis of his claims for protection, and that his decision to travel by boat was not financially motivated. He claims there were reasons he did not expand on his claims. He states he was unstable mentally because of the trauma and suffering he faced in Vietnam, and in travelling to Australia. He states he was also told that interpreters in Australia were corrupt, and that they sent information back to the authorities in Vietnam. He was also frightened for his family's safety and wanted to protect them. He claimed he put them in danger and they were in suffering because of him.
31. In his written visa application, he claimed his issues arose because of the poor economic situation in Vietnam. He claimed that he was employed by the local police station as [Occupation 1]. He was required to pay his employer [an amount] in order to be provided the job. In addition to his standard [duties], his employer forced him to undertake quasi-police [tasks]. These tasks were dangerous. He attended the police station and complained that he did not wish to continue to put his life at risk. He claimed he was told if he did not like his job, he could leave. The applicant did not wish to carry on endangering his life, so he requested his

[money] be given back to him so he could find another job. He claims there was a heated argument, which escalated, and he was arrested and charged with being disruptive in public.

32. He claims he was imprisoned and beaten, and subjected to regular beatings and interrogation. He was interrogated about whether he was anti-government and why he was being so disruptive, and they were trying to find out if he was involved in anti-government activities. The applicant knew he was in danger, and when the night guard fell asleep, he broke out of his cell and escaped. He fled to his home village. His family then assisted him to collect the funds necessary to leave the country. He heard the local police were looking for him and had asked his colleagues about his whereabouts. He moved constantly to avoid detection. He believes his family are being watched.
33. At the visa interview, the applicant was asked about his family. He indicated he was in regular contact with them and his siblings were 'alright', but his mother gets sick often. He said his siblings all have their own families, and his mother stays with his [siblings]. Contrary to his earlier evidence, the applicant did not indicate that his mother or siblings were being watched, or that they were facing other hardship.
34. The applicant was asked about his past employment. The applicant indicated he had worked in different jobs, before he [began Occupation 1]. He was asked if he was employed by someone or self-employed. The applicant explained he had hired a space to [operate in]. He had to pay for having that space. The land belonged to the village/district of [Province 1]. He said that it started a year or two after he received his [qualification]. The applicant received his [qualification] in January 2011. When asked who [his clients were], he [said] mainly youth and (university) students. Before this, he was [in another occupation] in [Province 1], and was famous for his [work]. Many people wanted to [hire] him. This is inconsistent with his written evidence that indicated he was hired by a local police station as [Occupation 1].
35. The applicant explained that around a year after he started [Occupation 1], one of the [local officials], or 'big guys', in the town installed his [relative] to take over the applicant's [role]. Instead of [undertaking Occupation 1], the applicant was made to [undertake other tasks]. They told him to do this new [job], but he told them he did not want to do that job, and refused to do so. This is also inconsistent with his earlier evidence. The applicant previously said these were additional tasks he was made to do in addition to his standard [duties], not that his job was taken over by the [relative] of [a local official], and that he was forced do other work.
36. At the visa interview, the applicant was asked how he was made to do the other work. The applicant said he was told verbally that he had to do it, but his contract or agreement was to [undertake Occupation 1], not do other types of work. He also explained that the pay for this type of work was much lower. The applicant confirmed he never did the work, but that he protested and that is when he was arrested. That evidence is inconsistent with his written statement, which appears to indicate that he did undertake the other roles, but he 'did not wish to continue to put my life at risk' and no longer wanted to do that kind of work. The representative's submission in the visa application highlighted that the applicant had not answered the question relating to service in a police force/state sponsored militia. This was due to the fact that the applicant was forced to undertake [other] duties as part of his employment as [Occupation 1]. Given his exercise of these duties was not official or voluntary, the representative contended that this work could not be accurately be described as having 'served' in such a force. All of his previous evidence indicated he had undertaken the additional work. Even if that was a consequence of poor phrasing in the written statement, his oral evidence contradicts his written evidence that they told him he was free to leave if he did not

like the new role, or that the conflict and arrest arose out of his demands to recover his [money].

37. The applicant's evidence about the detention was broadly consistent. I did not find anything inherently problematic about that aspect account, or his ability to escape detention. However, I am concerned that he was unable to provide a clear timeline of how long he was detained, despite being asked by the delegate.
38. The applicant was asked to respond to the delegate's concerns about these claims near the end of the visa interview. I have had regard to those responses. The applicant contended in his submission to the IAA that the delegate focussed on small issues when concluding that he was not credible. The applicant explained that he had little experience in the interview context, and was nervous and anxious, and had difficulty providing a clear explanation of his claims. He also noted the data breach, and the impact of his detention. The representative also indicated in the submissions to the Department that a psychological assessment would be provided, but it does not appear that any opinion was provided. Nevertheless, I have weighed those submissions when considering his evidence.
39. I accept his clarification about the hiring of the space to [undertake his work], and that it is different from Australia, and that he had limited control over what he could do with that space. I also acknowledge the representative's submissions in the interview about inconsistencies in the applicant's evidence. Given the complexity and vagaries of Vietnamese authorities, particularly at the provincial and district levels, I accept that some discrepancies in the applicant's evidence may have been a consequence of language or bureaucratic grey areas – i.e. whether he leased a space in a government authority building, or police station, or somewhere else, or whether he broke out of a cell or an interview room. Those types of discrepancy are understandable.
40. However, there remain significant inconsistencies in his evidence. The first relates to the type of employment arrangement he had, in what context and to what clientele – i.e. whether he was employed as [Occupation 1] for the police station, or employed privately in his own space for university students. This is a clear inconsistency in his evidence. Had the applicant been working as [Occupation 1] at a police station, a reclassification of his duties as he claimed would make some sense. However, if the applicant had rented a private space and was [hired by] university students, as he claimed at the visa interview, a reclassification of his role to one that supports the police makes little sense.
41. The applicant was also inconsistent about whether he lost his role as [Occupation 1] to the [local official's relative], or whether the additional roles were supplementary to his [main] role. He was also not consistent between his written and oral evidence as to whether he in fact did this extra work or not. The applicant was also not consistent in his evidence about the reasons for his arrest and detention, i.e. whether it was due to his refusal to undertake the role asked of him, or because he demanded the return of his [money]. The applicant also had claimed in his written statement that his [family] were being watched, and that he was frightened for their safety, yet at the interview he did not indicate any such concerns. These are clear factual inconsistencies, and seriously undermine the credibility of his account.
42. I accept the submission that there is nothing inherently implausible about these claims, however credibility and consistency in his evidence were major factors in whether these claims could be accepted as genuine. Weighing everything before me, I am not satisfied that these claims are credible. I do not accept that he was involved in a conflict with the local police, [a local official], the authorities or any other person or group over his role as [Occupation 1], in

the context of his school or rented space, his refusal to undertake a different role, or a conflict over the payment of [an amount of money]. I do not accept he was arrested, interrogated, beaten and mistreated. I do not accept he was interrogated about or accused of anti-government activities. It follows that I do not accept he had to escape from detention or flee to his home area. I do not accept he was followed back to his home area, or that he and his family were being watched by the authorities. I also do not accept that any former colleagues were being watched. I do not accept that the applicant or any of his family members are of any interest, or any ongoing profile, to the police or local authorities in [Province 1], the government, or any other person or group connected with his former [school]. It follows that I find there is no real chance of the applicant being arrested, interrogated or otherwise seriously harmed for these reasons, or as a result of any actual or imputed profile or political opinion that he engaged in anti-government activities.

43. In terms of his other evidence, I accept his family lost their business in 2008, when the area was taken over by the government and a new [amenity] was built. The applicant's parents suffered minor injuries in a large protest that followed, and they were unable to reopen the [business]. Those claims are consistent with country information before me about the acquisition of land by the Vietnamese authorities, but there is no suggestion in his claims that the applicant himself faces any chance of being seriously harmed in connection with these events. Given the passing of his father, and the health of his mother, it also appears that his family would not pursue this matter further. I find the applicant faces no real chance of serious harm based on the acquisition of his family's [business] in 2008, any protests that followed, or on any other basis related to these events.

Claims related to religious or other profile

44. I accept the applicant is Catholic, and based on his oral evidence at the visa interview, I accept he attends church and is a part of the church and local Vietnamese community. I accept he would return to Vietnam and continue to attend church and be a member of the community.
45. He did not claimed to face any past harm or hardship based on his past religious practise in his oral or written evidence provided to the Department. I accept that certain unregistered churches, and persons involved with politically active religious organisations have been targetted by the Vietnamese authorities.² I am not satisfied the applicant is involved in any such church, nor am I satisfied he has been involved with politically active religious churches or organisations. It follows that I find he would not be politically or religiously active on return to the country, apart from regular attendance at his local church.
46. The country information before me does not indicate that he would be imputed with any adverse political or other profile simply from being a low level adherent of the Catholic Church and I am satisfied he would have no adverse profile, as has been the case for him in the past. I do not consider there is anything about his attendance at a Catholic church in Australia, or involvement with the local Vietnamese community, that would elevate his profile on return to the country, even in the unlikely event that this information was known to the authorities.
47. Having regard to all the circumstances, I am satisfied that the applicant would not face a real chance of being seriously harmed due to his religion, any actual or imputed political opinion from his faith, or any other related profile.

² DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212.

Claims related to time in Australia and illegal departure from Vietnam

48. On the basis of the delegate's decision, I accept the applicant's personal details were disclosed during a data breach of Departmental systems in 2014. While I find it remote, I am prepared to accept a possibility that the applicant's details were obtained by the Vietnamese authorities. I accept this may indicate he applied for asylum in Australia and/or that he was in immigration detention. Separate from the data breach, I consider the duration of his stay in Australia, his informal departure from Vietnam, and his lack of a travel document are also factors that may indicate he had sought asylum in Australia and/or that he was detained.
49. In terms of the data breach, there is no indication that any information about his substantive claims was released in 2014. In fact, the evidence before me does not indicate that the applicant had made substantive claims against the Vietnamese government or authorities, at the time of data breach, let alone that this type of data was accessible. I am satisfied he would have no additional adverse political or other profile from his personal claims for protection in Australia, and the information potentially obtained through the data breach. I have not accepted he has any other profile with the authorities.
50. On the basis of the applicant's consistent evidence, I accept he left Vietnam irregularly. I have considered the country information from DFAT about illegal departure from Vietnam, and I am satisfied he left the country in breach of Vietnamese law.³
51. I accept that penalties are in place for Vietnamese nationals that depart the country unlawfully, including those who leave the country without travel documents or false passports. Fines for departing without a travel document range between VND 2 Million and VND 10 Million (AUD 120 to 600). A fine of between VND 20 million and VND 50 million (AUD 1200 to 3000) is specified for leaving Vietnam using a false passport or equivalent.
52. The applicant contends the act of departing the country illegally (and applying for protection) would be seen as a political act, and that he would be seen as opposed to the government. I am satisfied the applicant has not been involved politically in the past, and I have not accepted his claims to have been in dispute with the Vietnamese authorities in [Province 1]. I am satisfied he does not have any past or current political or other profile. Information from DFAT indicates that 'fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence under Article 91 of the Vietnamese Penal Code. However, DFAT reports that it is unaware of any cases where this provision has been used against asylum seekers.
53. In terms of any profile on return, DFAT advice is that there is no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government for having done so, although those that have departed unlawfully may be briefly detained and fined for that departure. DFAT assesses that long-term detention, investigation and arrest is 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 that have only sought asylum in another country. DFAT assesses that persons who paid money to organisers of people smuggling operations are viewed by the government as victims of criminal activity rather than as criminals facing the penalties allowed in the law for departing Vietnam illegally.

³ DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212.

54. As noted above, I accept a possibility that his details were obtained by the Vietnamese security authorities and this may indicate he applied for protection in Australia and that he was in immigration detention. However, I have found he has no adverse profile and the information above indicates that persons who have sought asylum do not receive different treatment on return. I do not consider his low-level participation in the Catholic Church in Australia, or involvement in [Community Group 1] in [Australian State 1], would give rise to any actual or imputed political opinion or profile that would put him at risk on return. There is no suggestion he was involved in people smuggling. I am satisfied this would be the assessment of the applicant on his return to the country. Weighing all the information before me, I am satisfied he would not face a real chance of serious harm on the basis that he sought asylum, or that any additional profile or political opinion would be imputed to him that would put him at a real chance of being seriously harmed on his return to the country.
55. As the applicant left the country without a valid passport, I find he did so in breach of Vietnamese law. Based on the information before me, I accept he may be briefly detained and questioned, and be liable for a fine given his illegal departure. I accept the applicant is from a family of limited means, but I am also satisfied that he has been employed in Australia. There is no evidence before me that the applicant would be unable to pay any fine he may face for his illegal departure. The applicant is also an adult, and the information before me does not indicate he has any physical or other vulnerability that would preclude a short detention during processing at the airport. Considering all the circumstances, I am not satisfied that any fine or brief detention at the airport during processing would constitute serious harm. There is no claim or suggestion he was involved in people smuggling or that he used a false passport, and I find accordingly. For these reasons, I am satisfied he faces no real chance of any higher penalty, such as a higher fine or additional detention.
56. I accept there are credible reports of certain returnees being detained, jailed, beaten, and mistreated on return to the country, including dissidents, activists, people smugglers, and members of certain minority ethnic groups.⁴ In all the circumstances, I consider the applicant has a low profile, and I am satisfied there is no real chance of the applicant being detained, jailed, beaten, and mistreated or otherwise seriously harmed on return to the country, as a returnee, an asylum seeker, as a person who left the country illegally, or on the basis of his other profile, including his Catholic faith or his involvement with the local Vietnamese community, including in any cumulative sense..

Refugee: conclusion

57. Considering all the circumstances, I find there is no real chance of the applicant facing serious harm on the basis of his claims related to his work as [Occupation 1] in [Province 1], his religion, as a person who sought asylum in Australia, including as a person who had his personal information released in a breach of departmental systems, as a person that left Vietnam illegally, or on the basis of any related political opinion or profile.
58. The applicant does not meet the requirements of the definition of refugee in s.5H(1):. The applicant does not meet s.36(2)(a).

⁴ 19 ABC News (Australia), "Vietnam jails four asylum seekers over voyage to Australia despite 'no retribution' promise", 26 May 2016, CX6A26A6E16210; US Department of State, "Vietnam - Country Report on Human Rights Practices 2015", 13 April 2016, OGD95BE926333; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212.

Complementary protection assessment

59. 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

60. 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.

61. I have found above there is no real chance of the applicant being seriously harmed on the basis of his claims related to his work as [Occupation 1] in [Province 1], his religion, as a person who sought asylum in Australia, including as a person who had his personal information released in a breach of departmental system, as a person that left Vietnam illegally, or on the basis of any related political opinion or profile. On the same basis, and for the same reasons,⁵ I am also not satisfied there is a real risk the applicant will face significant harm upon return to Vietnam for these reasons.

Complementary protection: conclusion

62. 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

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

⁵ *MIAC v SZQRB* (2013) 210 FCR 505

Applicable law

Migration Act 1958

5 (1) Interpretation

...

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.