



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/04448

Date and time of decision: 17 May 2018 09:54:00

Alison Nesbitt, 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 a referred applicant, or their relative or other dependant.

Background to the review

Visa application

1. The referred applicant claims to be from Vietnam. In February 2017 he lodged an application for a Safe Haven Enterprise visa (SHEV).
2. On 26 February 2018, a delegate of the Minister for Home Affairs refused the application.

Information before the IAA

3. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act). No further information has been obtained or received.

Applicant's claims for protection

4. The applicant's claims can be summarised as follows:
 - He was born in [Village 1] in Hung Nguyen District in Nghe An Province.
 - He and his family are known to be active Catholics. He attended church every Sunday and on special occasions such as Easter and Christmas. He was a member of the church choir in his village.
 - After completing high school in [year], he moved to Ho Chi Minh City to further his studies.
 - In 2009 he visited his uncle, a Catholic priest, in Quang Binh Province. He and his uncle attended the opening of a temporary Catholic prayer hall or structure in [Town 1], in Quang Binh Province, in July 2009. The authorities said the structure had been erected without permission. A violent clash between police, gangsters associated with the police, and Catholic attendees occurred. He was beaten by police and gangsters before being rescued by members of the Catholic community.
 - He took a bus back to his family home in [Village 1] in Nghe An Province. The police came to his family home looking for him, but he was not there at the time. After a few days, he returned to Ho Chi Minh City. He heard that the police went to his home in [Village 1] looking for him on a number of occasions after he returned to Ho Chi Minh City.
 - He stayed in Ho Chi Minh City until he completed a diploma in 2011. Finding that he was unable to secure employment in his area of expertise in Ho Chi Minh City, he returned to his home in [Village 1] in Nghe An Province.
 - The police in [Village 1] did not find him when he returned because he stayed at his family home for only around a week before leaving to stay with a number of different relatives in villages around ten kilometres away. He moved between the homes of these relatives every week or two weeks to evade the police.
 - In December 2012, police from [Village 1] police station issued two summonses requiring him to attend the police station. They also issued a summons requiring his father to attend the station to discuss the applicant.
 - He decided to leave Vietnam and departed in April 2013.

- If he returns to Vietnam the Vietnamese police may arrest and imprison him because of his religious activities, in particular, his involvement in the [Town 1] incident.
- Vietnamese authorities may harm him if he returns to Vietnam because he will be seen as a traitor because he applied for protection in Australia, because he left Vietnam illegally, and /or because he has lived in Australia for a long time. The online publication of his personal details in 2014 a result of the data breach by the Department increases the chance that he will be harmed by the Vietnamese authorities.
- He is a member of the particular social group 'failed asylum seekers'.
- He has no valid identity card or family registration card. Without these documents it will not be possible for him relocate and pursue a career in his area of expertise in another location.
- He has medical [conditions].

Refugee assessment

5. 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

6. 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.
7. The applicant has consistently claimed to be a citizen of Vietnam. The delegate indicates that the Department assessed, and identified no concerns in relation to, the Vietnamese national identity card and Vietnamese driver's license provided by the applicant. He provided a copy of his Vietnamese birth certificate. He participated in the entry and SHEV interviews with the assistance of a Vietnamese language interpreter. His oral evidence during the SHEV interview in relation to a number of aspects of his life in Vietnam, including his education and religion, was detailed and credible. I accept that he is a Catholic citizen of Vietnam who has no right to enter and reside in any other country. I find that Vietnam is his receiving country.

8. I note that during the entry interview conducted shortly after his arrival in Australia, the applicant was asked whether there was any reason he could not be transferred to a regional processing country such as Nauru or Papua New Guinea. The applicant replied that he suffered from serious medical conditions [so] hoped he would not be sent to a place with harsh conditions. When asked about his reasons for choosing Australia, he indicated that he learned on the internet that Australia was a good country with a lot of work opportunities, and the medical technology was very advanced. He said he hoped that his medical condition could be treated too. He did not refer to his medical conditions when describing his reasons for leaving Vietnam during the entry interview. He did not mention any medical conditions, or any fears related to any medical conditions, in his SHEV application, or during the SHEV interview. There is no medical evidence before me regarding the applicant's medical conditions, or his need for any future medical treatment. On the evidence before me, I am not satisfied that there is a real chance of any harm to the applicant for any reason related to his need for medical treatment in Vietnam, now or in the foreseeable future.
9. The applicant claims to fear harm from Vietnamese authorities because of his religious activities in Vietnam. He has consistently stated that he is Catholic. During the SHEV interview, he indicated that he practised his Catholic faith in Vietnam by praying on a daily basis, regularly attending church, and participating in the village choir. I accept his claims in this regard. In his SHEV application, the applicant indicated that in Vietnam he was an active Catholic who took part in religious activities that were perceived as political opposition by Vietnamese authorities. He said he took part in protests against the government about the government's seizure of church property. The authorities wrongly believed him to be a ringleader in these activities. He said he had been detained and threatened with imprisonment. He indicated that he had been summoned by the police in relation to allegations that he had politically agitated against the state. He said that these summonses are still valid and will result in his arrest and detention if he returns to Vietnam. He referred to information he said he had provided in an earlier interview with officials from the (then) Department of Immigration and Border Protection. I note that his statements implied that he had been involved in multiple protests against the government, or other religious activities that were perceived as acts of political opposition by the government. He did not describe his involvement in any specific protest, act of religious or political activism, or other act that was perceived as political opposition, in his SHEV application.
10. During the SHEV interview, the applicant claimed that he had been involved in a clash between police and members of the Catholic community in [Town 1] in Quang Binh Province in 2009. He did not refer to any other involvement in religious activities or protests, other than his religious practice previously described. He indicated there was nothing else he wished to say in relation to his protection visa application at the end of the SHEV interview. The delegate advised the applicant that any additional information provided to the Department before a decision was made would be considered. The applicant did not provide any further information to the delegate before he made his decision.
11. The applicant claimed during the SHEV interview that in July 2009 he went to Quang Binh Province to visit an uncle who was a Catholic priest. He said it had been three years since he had seen his uncle. While in Quang Binh, he attended the opening of a temporary prayer structure in [Town 1] with his uncle. Police and gangsters arrived during the opening ceremony and said the structure had been built illegally. They harassed the attendees and asked the local priest to disperse the group attending the ceremony. The police and the community objected and said the land belonged to the church. The conflict escalated and the police and gangsters assaulted the Catholic attendees. He was caught up in the incident and was beaten before being rescued by members of the Catholic community. He lost his wallet, or his wallet was

taken, in this incident and the authorities were able to identify him as a participant through the contents of his wallet. Following the incident in [Town 1] in 2009, the local police in [Village 1] in Nghe An Province came to his family home on a number of occasions looking for him. In 2012 they issued two summonses to him and one to his father requiring that they attend the local police station.

12. The claim that police in the applicant's home village in Nghe An Province became aware of the applicant's participation in an event in Quang Binh Province, and sought to locate him for this reason over a period of three years, suggests a somewhat higher level of adverse interest in the applicant than might be expected given he had no involvement in the organisation of the event and was not a member of the local community which organised the event. While the applicant asserted in his SHEV application that he was wrongly perceived by the authorities to be a ringleader in "the sort of activity in which he was involved", he did not indicate in his SHEV application or during the SHEV interview that he was perceived to be a ringleader in the [Town 1] incident, or indicate why he was perceived to be a ringleader in any context. I note that the applicant indicated that the authorities accused his uncle, who he claims was a Catholic priest in Quang Binh Province, of being a leader or mastermind of this incident, yet he said his uncle had not been harmed, although people had said that secret police had been seen hanging around.
13. Some aspects of the applicant's evidence regarding his involvement in this event appeared to vary during the SHEV interview. For example, he initially indicated that he hit police and gangsters in self-defence after they hit him. He said they were very aggressive and he had to run away. After he fled the scene, he caught a bus to Nghe An Province. Later in the SHEV interview, the applicant said he did not hit the police. He said he was held and beaten by a number of police and gangsters before being rescued by members of the Catholic community. His rescuers took him to the nearby home of a member of the local Catholic community where they checked his wounds before helping him to catch a bus back to Nghe An Province. When the delegate put to the applicant that he had earlier indicated that he hit police, the applicant said he did not resist the police but others did so.
14. He indicated at an early point during the SHEV interview that after leaving Ho Chi Minh City in 2011, he returned to live in his home village in Nghe An province. He indicated that he was a member of the church choir in his village after his return from Ho Chi Minh City. He did not refer to any subsequent changes of address. This is consistent with the information provided by the applicant in his SHEV application and entry interview, which indicated that he resided in his home village in Nghe An province from September 2011 until his departure from Vietnam in April 2013. At a later point during the SHEV interview, the delegate put to the applicant that it was difficult to accept that he would have returned to his home village after leaving Ho Chi Minh City given his claim that local police had visited his family home looking for him on multiple occasions following the [Town 1] incident. The applicant indicated that when he first returned to his home village from Ho Chi Minh City, he was not aware that the police were looking for him and only became aware of this shortly after his return. I find it surprising that the applicant's family would not have told him that the police had visited his family home on a number of occasions looking for him, before his return to the village.
15. The applicant then said that he stayed only one week in his family home before leaving to spend the next approximately one year and four months moving between the homes of his uncles and cousins every week or two weeks in order to evade the police. This evidence is quite different to his earlier evidence that he remained resident in his home village in the period following his return from Ho Chi Minh City. Given the applicant clearly indicated in his SHEV application, entry interview, and earlier in the SHEV interview, that he lived in his home

village after his return from Ho Chi Minh City, I do not accept that he stayed only one week in his family home before moving from one relative's house to another during this period, instead, I find that he lived in his family home in [Village 1] following his return from Ho Chi Minh City in around September 2011 until his departure from Vietnam in early 2013.

16. The applicant provided copies of three documents purporting to be summonses issued by police in his village in the period [in] December 2012. Two of these documents are addressed to the applicant himself, while the third is addressed to the applicant's father. The two documents addressed to the applicant request the applicant to attend the police station to discuss matters related to himself, while the document addressed to the applicant's father requests that he attend the police station to discuss matters relating to the applicant. None of the documents includes any other information about the reasons the applicant and his father were asked to attend the police station. In his SHEV application, the applicant indicated that the summonses related to allegations that he had politically agitated against the state. As discussed, he did not mention the incident in [Town 1] in his SHEV application.
17. During the SHEV interview, the applicant indicated that the summonses related to his involvement in the [Town 1] incident in July 2009. It is difficult to understand why the police would have waited for almost three and a half years following the [Town 1] incident to issue these summonses. The applicant claimed that the issue of the summonses was triggered by his return to his hometown from Ho Chi Minh City in September 2011. When asked how the police came to find out in 2012 that he had returned from Ho Chi Minh City, the applicant said that there are a lot of secret police officers. I do not find this explanation particularly convincing given that the applicant claims that police in his home village visited his family home looking for him immediately following the [Town 1] incident in 2009 and on multiple occasions thereafter. Further, the applicant returned from Ho Chi Minh City in September 2011, while the summonses were not issued until December 2012, suggesting his 2011 return to Nghe An Province is unlikely to have been the trigger for the issue of these documents.
18. The issue of these documents so long after the [Town 1] incident raises some questions in my mind as to their authenticity. I note that DFAT indicates that document fraud is common in Vietnam.¹ Further, as the purported summonses do not indicate the reason the applicant and his father were asked to attend the police station, they are of limited value as evidence that the police held any adverse interest in the applicant because of his involvement in the [Town 1] incident, or any other protest or incident of religious activism. The existence of these documents does not outweigh the concerns I have in relation to the applicant's evidence regarding his involvement in the [Town 1] incident or other religious activism in Vietnam.
19. The record of the entry interview conducted some weeks after the applicant's arrival in Australia is before me. The record of this interview indicates that when asked about his reasons for leaving Vietnam, the applicant said that he was having difficulty finding steady employment in Vietnam. He said he was from a big family with many siblings and hoped to find work in Australia so that he could help his family. When asked what he thought would happen to him if he returned to Vietnam, the applicant said that he thought it would be very difficult for him and his family. He said he had difficulties back home and it was very hard. If he had to go back, he would be facing the same problems. As mentioned, when asked why he had chosen to come to Australia, he said that he had learned on the internet that Australia was a good country with a lot of work opportunities and the medical technology was very advanced. He said he hoped his medical conditions could be treated in Australia. The applicant stated that

¹ Department of Foreign Affairs and Trade (DFAT), "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597.

neither he, nor any members of his family, had been involved in any activities or protests against the government in Vietnam. He said that he had never been arrested or detained by the police or security organisations of Vietnam. He said that the police and security and intelligence organisations did not affect his day-to-day life in Vietnam. At the end of the entry interview he was asked whether there was anything else that he would like to say that had not been asked of him. He replied that he hoped that the Australian government would open the door for him as well as for other people so that they could live in the Australian community and start working.

20. During the SHEV interview, the delegate invited the applicant to comment on the inconsistency of the information he provided in the entry interview about his reasons for leaving Vietnam with the evidence he had provided in the SHEV interview. The applicant acknowledged that he said in the entry interview that he could not find a job in Vietnam. He said that he had also said that another reason was that there was no freedom for himself or other people in Vietnam. He didn't say anything (else) to the interviewing officer during the entry interview because he was concerned that the Australian government would share his information with the Vietnamese government. He claimed that he didn't know about how the Australian government worked at that time and this was why he did not tell the truth at that time. It is nevertheless difficult to understand why, if the applicant fled Vietnam in order to seek protection in Australia because of fears related to his religious activities, he would conceal from Australian authorities the basis for his claims for protection. I do not find the applicant's explanation for the differences between the information he provided in the entry interview and in later contexts particularly convincing. I note that his claim to have said during the entry interview that he came to Australia because there was no freedom in Vietnam tends to suggest that he was aware that the Australian Government operated differently to the government in Vietnam.
21. The issues discussed regarding the applicant's evidence about his involvement in the [Town 1] incident and subsequent events, and the variation in the applicant's statements regarding his reasons for leaving Vietnam, raise significant questions in my mind as to the veracity of the applicant's claims related to his involvement in the [Town 1] incident or any other protests or perceived religious activism in Vietnam. The delegate described the applicant's evidence regarding his involvement in the [Town 1] incident as coherent and detailed. While he did not have any information about the [Town 1] incident before him, having regard to country information indicating that there had been confrontations between Vietnamese police and Catholic congregations, he was willing to extend the benefit of the doubt to the applicant and to accept that he was involved in this incident. I have reached a different conclusion. While I am willing to accept that an incident in [Town 1] occurred in July 2009, I do not consider that the applicant's evidence regarding his involvement in this event was particularly detailed or coherent. Considering the evidence before me as a whole, I am not satisfied that the applicant was present during the [Town 1] incident in 2009. It follows that I do not accept that he, or any member of his family, was of any adverse interest to Vietnamese authorities for this reason. I am not satisfied that the applicant engaged in any other form of protest, religious activism, or perceived religious or political activism, in Vietnam, other than his participation in his village choir and his regular attendance of church. I do not accept that he was perceived by Vietnamese authorities to be a religious activist or to be opposed to the Vietnamese government for any reason. I find that he was of no adverse interest to Vietnamese authorities for any reason related to his Catholic faith, or for any other reason, at the time he left Vietnam.
22. DFAT reports that Roman Catholics constitute seven percent of Vietnam's total population (approximately 6.7 million people). Catholics are said to have a strong presence in Nghe An Province. Catholicism is one of 14 distinct religions that hold full government recognition and registration. According to DFAT, Catholics are able to practise freely at registered churches.

DFAT assesses that religious observance and practice only becomes an issue for Catholics in Vietnam when it is perceived to challenge the authority or interests of the Community Party of Vietnam and its policies.²

23. I have accepted that the applicant practised his Catholic faith in Vietnam by participating in his village choir, regularly attending the village church, and regularly praying at home. He claims, and I accept, that in Australia, he practises his Catholic faith by attending church regularly. He has not claimed that he has any wish or intention to practice his faith in any different way in future. He does not claim to have attended an unregistered church in Vietnam. On the evidence before me, I am not satisfied that there is a real chance of any harm to the applicant on his return to Vietnam from Vietnamese authorities, or any other group or person, for any reason related to his Catholic faith, now or in the foreseeable future.
24. The applicant claims Vietnamese authorities will consider him a traitor and may harm him if he returns to Vietnam because he applied for protection in Australia, because he has lived in Australia for a long time, and / or because he left Vietnam illegally. His details were made available online for a brief period as a result of the Department's 2014 inadvertent disclosure of the personal details of persons in immigration detention, or 'data breach'. This increases the chance that he will be harmed by Vietnamese authorities. He states that he is a member of the particular social group 'failed asylum seekers'.
25. On the basis of the delegate's decision, I accept that the applicant's personal details were inadvertently made available on line for a short period in 2014 as a result of the Department's data breach. While I consider the possibility to be remote, I accept that it is possible that his details were accessed by Vietnamese authorities. There is no indication that any information about the applicant's substantive claims was made available on line as a result of the data breach. I note that in December 2016, a Memorandum of Understanding providing a framework for the return of Vietnamese nationals 'with no legal right to enter or remain in Australia, including those intercepted at sea' was signed between the Australian Department of Immigration and Border Protection and Vietnam's Ministry of Public Security.³ I accept that Vietnamese authorities may be aware on the applicant's return to Vietnam that the applicant sought asylum in Australia.
26. Article 91 of the Vietnamese *Penal Code 1999* states that 'Fleeing abroad or defecting to stay overseas with a view to opposing the people's administration' is an offence. DFAT reports that it is unaware of any cases where this provision has been used against failed asylum seekers and advises that returns to Vietnam are usually undertaken on the understanding that returnees will not face charges as a result of their having made asylum applications.⁴ DFAT has no information to suggest that people known or believed to have sought asylum in other countries are mistreated by the Vietnamese Government on this basis on their return. DFAT is aware of recent returnees receiving assistance from Vietnamese provincial authorities and IOM to reintegrate to their communities.⁵
27. I have concluded that there is not a real chance that the applicant will be harmed by Vietnamese authorities on his return to Vietnam for any reason related to his Catholic faith. There is no credible evidence before me to suggest that the applicant would be of any adverse interest to Vietnamese authorities for any other reason on his return to Vietnam. On the evidence before me, I am not satisfied that there is a real chance of any harm to the applicant

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

from Vietnamese authorities on the basis that he will be returning to Vietnam having unsuccessfully applied for protection and lived in Australia for a number of years.

28. DFAT advises that Vietnamese nationals who depart the country unlawfully, including without travel documents, may be subject to a fine upon return. DFAT's understanding is that people who have paid money to organisers of people smuggling operations are not subject to fines for unlawful departure from Vietnam.⁶ According to DFAT, individuals who have paid money to organisers of people smuggling operations are viewed by the Vietnamese Government as victims of criminal activity (people smuggling), rather than as criminals facing the penalties for illegally departing Vietnam. While some returnees can be briefly detained and interviewed, DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people smuggling operations. In general, persons detained upon return to Vietnam are those suspected of organising/assisting with people smuggling activities.⁷ The applicant does not claim to have been involved in people smuggling, nor am I satisfied that he will be perceived to be involved in people smuggling.
29. In the entry interview, the applicant indicated that he left Vietnam by travelling by road to Laos. He did not indicate what exit and entry procedures, if any, he underwent in this journey. He indicated that he possessed a legally obtained passport in his own name, which he used to travel by air from Laos to [other countries]. In his SHEV application, he ticked a box on the form to indicate that he left Vietnam illegally, but did not complete the related question, which asked him to describe his manner of departure from Vietnam. He provided no other information about his manner of departure from Vietnam in his SHEV application. During the SHEV interview, he stated that he left Vietnam and entered Laos legally. He said that he used his Vietnamese passport to cross the border between Laos and Vietnam. On reaching the border with Laos, he said that the passports of all passengers in the car in which he was travelling were gathered and handed to officers at the checkpoint. After this, they were allowed to proceed through the checkpoint and into Laos. He thought a Vietnamese exit stamp was placed in his passport.
30. The delegate asked the applicant why he feared he would be harmed for leaving Vietnam illegally given he stated that he had left Vietnam legally. The applicant said that after the incident in [Town 1], he was wanted by the local police in his home village. He said that when he reached the border with Laos, he handed his money and passport to somebody in the car in which he was travelling. He speculated that this person may have bribed the checkpoint officers to allow them through the border of Vietnam. I have not accepted that the applicant was involved in the [Town 1] incident, or that he was of any adverse interest to Vietnamese authorities for any reason at the time he left Vietnam. Having considered the evidence before me, I am satisfied that the applicant left Vietnam legally, using his own Vietnamese passport, and will not be required to pay a fine for illegal departure on his return to Vietnam.
31. DFAT advises that there are credible reports of some returnees being held for a brief period upon their return for the purpose of interview by officials from the Ministry of Public Security to confirm their identity where no documentation exists.⁸ The applicant claimed in his SHEV application that he has no valid identity card or family registration card. However, I note that the delegate indicated that the applicant subsequently presented his original Vietnamese identity card and driver's licence. I note also that during the SHEV interview, the applicant said he has a certified copy of his household registration card. I am not satisfied that the applicant

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

will be held on his return to Vietnam in order to confirm his identity. However, in view of the information discussed, I accept that on his return to Vietnam, the applicant may nevertheless be briefly detained and interviewed by Vietnamese authorities. I am not satisfied that any brief period of detention for interview of the type discussed would amount to serious harm.

32. Having regard to the evidence before me, and to the applicant's individual circumstances and profile, I am not satisfied that there is a real chance of any other type of harm to the applicant in Vietnam, now or in the foreseeable future.

Refugee: conclusion

33. 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).

Complementary protection assessment

34. 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

35. 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.

36. I have accepted that the applicant may be briefly detained and interviewed on his return to Vietnam. I am not satisfied that any harm experienced as a result of any such treatment would constitute significant harm for the purposes of s.36(2A). I am not satisfied that there are substantial grounds for believing that there is a real risk that the applicant will suffer significant harm as a result of this treatment, should it occur, on his return to Vietnam.

37. I have concluded that there is not a real chance of any other harm to the applicant in Vietnam, having regard to his profile and circumstances. As 'real risk' and 'real chance' involve the application of the same standard,⁹ I am also not satisfied that the applicant would face a real risk of significant harm in Vietnam for these reasons, now or in the reasonably foreseeable future.

³⁰ *MIAC v SZQRB* (2013) 210 FCR 505.

Complementary protection: conclusion

38. 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.

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.