



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/04729

Date and time of decision: 29 May 2018 12:35:00

J Maclean, 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 arrived in Australia on 24 August 2013 and applied for a Safe Haven Enterprise Visa (SHEV) on 1 September 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 9 April 2018.

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. 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 the Quang Binh Province of Vietnam and is of Kinh ethnicity.
 - He left Vietnam because he did not want to live under an authoritarian and communist regime. The society in Vietnam is corrupt and authorities need to be bribed to get anywhere. He witnessed many people being threatened and beaten by the local authorities, which made him fear for his life. He wants to live in a democratic and civilized society.
 - Because he left the country illegally he will be classed as a counter revolutionary, and the punishment for this under the Vietnamese Criminal Code of 1991 is 3 to 12 months imprisonment. He fears he will be imprisoned on return to Vietnam and harassed by the police and the authorities for escaping the country.
 - He would not be able to relocate within the country because Vietnam has a national ID system which monitors movements and tracks where you go, and he would not be give permission to move. He cannot escape persecution from authorities as they will be able to find him wherever he goes.

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 provided a copy of his Vietnamese Driving Licence to support his identity. The delegate also referred to the Laissez-Passer issued by the Vietnamese authorities at the request of the Department of Home Affairs after the applicant initially requested removal from Australia to Vietnam. I accept on the documentary evidence, and the applicant's evidence during interview, that the applicant is a Vietnamese citizen and that he is of Kinh ethnicity. I am satisfied that Vietnam is the receiving country for the purposes of this assessment.
 8. I accept the applicant's consistent evidence that he was born in the Quang Binh Province of Vietnam. In his SHEV application and at the SHEV interview the applicant indicated he always resided in the Quang Binh when in Vietnam, and that his parents and [siblings] continue to live in that province, and I accept that is the case.
 9. At the SHEV interview the applicant advised he had not previously disclosed he had been in [Country 1] from 2007 or 2008, for four years. He entered [Country 1] legally using a Vietnamese passport, and had a working visa that was organised by an agent. Whilst he was in [Country 1] he was arrested and imprisoned for two years on a charge relating to [an offence] at the house he was residing at. The applicant maintains he did not do anything wrong, and it was the friend he was living with who was involved in [the offence]. He was deported to Vietnam after release from prison. The delegate asked why the applicant did not provide this information at an earlier stage, and the applicant indicated he was scared when he first arrived in Australia and did not want to speak about it. I accept the applicant may have been apprehensive to disclose his criminal conviction when he first arrived in Australia. I also accept the applicant's evidence regarding the time spent overseas, his criminal conviction, imprisonment and deportation. The applicant did not indicate he suffered any discrimination, harassment or violence as a result of his previous conviction during the one and a half years he was in Vietnam after returning from [Country 1], nor did he claim to fear harm on return to Vietnam for that reason.
 10. At the SHEV interview the delegate asked the applicant about his religion. The delegate asked whether his family followed any particular faith, and the applicant said no. The applicant noted he does not have a religion and he did not attend any church services prior to his arrival in Australia. However, he went to church a couple of times with his friends [in detention], and also four or five times in [City 1] after release from immigration detention, the last time being six months before the interview, which was on 5 April 2018. He has not attended church more because he is not a Catholic or a follower, and he does not have time. The applicant did not claim to have suffered any harassment, discrimination or violence as a result of any religious beliefs while he was in Vietnam, nor did he claim to fear harm on return to Vietnam for that reason.

11. The written record of the Entry interview, performed in November 2014 reports the applicant to have said he left Vietnam because he did not want to live under a communist and authoritarian regime where the strong bully the weak, and that he wants to live in a democratic and civilized society. In response to the question of whether police and security or intelligence organisations impacted his day-to-day life the applicant responded that the police or public security usually threatened people with law, and that makes him fear and he did not want to witness that any longer. When the delegate asked the applicant at the SHEV interview why he fears returning to Vietnam the applicant said it was because he left Vietnam illegally, and that because he left without permission and because of the tight security in Vietnam he will have a problem. He did not reiterate the concerns about living under a communist regime, noted at the Entry interview and in his statement of claims, nor did he provide any evidence that he had ever been subjected to any harm or discrimination in Vietnam.
12. The applicant claims that society in Vietnam is corrupt and that in order to get anywhere you have to bribe authorities, and that he does not wish to live under the communist regime. The applicant made general statements about bribes being paid to authorities, and witnessing people being threatened and beaten by local authorities in Vietnam, which he claims caused him to fear for his life. No evidence has been provided regarding any specific incident where the applicant suffered harm from authorities in Vietnam. The applicant has not indicated he was politically active or outspoken in Vietnam, or that he would be involved in such activities on return to Vietnam. Country information reports that Vietnam is one of the world's few remaining one-party communist states, and that the government maintains considerable control and restriction on overt political activism. There is evidence before me about harsh treatment of political and religious activists in Vietnam, and I accept that those who are outspoken and critical of the State, or who engage in anti-government activities may be at risk. There is also evidence that corruption remains a key area of concern for the Vietnamese population, as reported by DFAT in the 2015 Vietnam Country Information Report.¹ On the basis of the information before me, I accept the applicant may have faced challenges in Vietnam as a consequence of corruption. Country information supports that corruption is endemic within the Vietnamese authorities, at all levels, and impacts many ordinary Vietnamese citizens, not only those with a particular profile, such as political or religious activists. I am also prepared to accept the applicant holds low-level opinions against the Vietnamese government, however, I am not satisfied that he has any interest in expressing these opinions, or becoming involved in political activism, on his return to the country. I am not satisfied there is a real chance of the applicant being harmed on this basis on return to Vietnam, now or in the reasonably foreseeable future.
13. The delegate noted that the applicant was in immigration detention on 31 January 2014, when his personal information was released on the Department of Immigration's website, and considered whether the applicant would be at risk of harm on return to Vietnam as a result of the data breach.
14. I accept the applicant was affected by a data breach and some of his personal information was unintentionally made available on the Department's public website for a short period of time whilst the applicant was in Immigration detention. The information included the applicant's name, date of birth, nationality, and gender. No details regarding the applicant's contact details or any information about his protection claims was included in the information released. I consider the chance the Vietnamese government accessed the information is remote, and I am not satisfied the applicant faces a real chance of harm on this basis.

¹ Department of Foreign Affairs and Trade, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597; DFAT, "DFAT Vietnam Country Information Report August 2015", 31 August 2015, CISEC96CF13212

Nevertheless, I accept the applicant may well be identified as having sought asylum in Australia given the manner of his return to Vietnam.

15. At the SHEV interview the applicant indicated he departed Vietnam legally using his Vietnamese passport. He travelled firstly to [one country], then on to [a second country], and [a third country] and had tourist visas to enter those countries. He said his passport got wet whilst on the boat to Australia and he took it out to dry it and it was lost. I am willing to accept the applicant's account of his travel to Australia, and regarding his passport being lost. The claim, made in the SHEV application, that the applicant departed Vietnam illegally, is inconsistent with the evidence given at both the Arrival and SHEV interviews that he departed Vietnam legally using his Vietnamese passport, and I do not accept it.
16. 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 1999*. However, DFAT is unaware of any cases where this provision has been used against failed asylum seekers. Returns to Vietnam are usually done on the understanding that they will not face charges as a result of their having made asylum applications. DFAT has no information to suggest that people known or believed to have sought asylum in other countries receive different treatment from the government of Vietnam merely for having sought asylum. DFAT 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 who have only sought asylum in another country.² There is country information before me that some individuals have been imprisoned on return from Australia. However, the information suggests this was not because they were failed asylum seekers, but rather because they were known dissidents, activists, or members of ethnic minorities.³ I am not satisfied the applicant has such a profile.
17. I am not satisfied on the evidence before me that the applicant would face a real chance of harm on return to Vietnam as a returning asylum seeker.
18. I am not satisfied the applicant faces a real chance of persecution on return to Vietnam, now or in the reasonably foreseeable future.

Refugee: conclusion

19. 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

20. 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.

² DFAT, "DFAT Country Information Report Vietnam", 21 June 2017, CISED50AD4597

³ Campaign to Abolish Torture in Vietnam, "Vietnam. Torture and abuse of political and religious prisoners", 31 January 2014, CIS2F827D92389

Real risk of significant harm

21. 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.

22. I have found that the applicant does not face a real chance of any harm on the basis of any religion or political opinion, as a person who sought asylum in Australia, including as a person who had his personal information released in a breach of departmental systems, or for returning to Vietnam as a failed asylum seeker. For the same reasons, I am also not satisfied there is a real risk of any harm, including significant harm.

Complementary protection: conclusion

23. 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.