



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

**Decision and Reasons**

**Referred application**

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VIETNAM

IAA reference: IAA18/04829

Date and time of decision: 18 June 2018 12:43:00

L Hill, Reviewer

**Decision**

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

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

## Background to the review

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### Visa application

1. The referred applicant (the applicant) claims to be a citizen of Vietnam. He arrived in Australia in April 2013 and applied for a Temporary Protection Visa (protection visa) on 30 November 2017. A delegate of the Minister for Immigration and Border Protection (the delegate) refused to grant the visa on 26 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) (the review material).
3. No further information has been obtained or received.

### Applicant's claims for protection

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4. The applicant's claims can be summarised as follows:
  - The applicant is a citizen of Vietnam born in [Village 1], Hưng Nguyên District, in Nghệ An Province, Vietnam. The applicant is a practising Catholic.
  - The applicant left Vietnam because he feared being arrested and detained by the authorities on account of his involvement in various Catholic youth groups, activities and protests. Arising from his involvement in such groups, activities and protests he was arrested, interrogated and beaten and two summonses requesting him to attend the police station have been issued.
  - While held in immigration detention in Australia, the applicant was interviewed by a delegation of the Vietnamese government. His personal details were provided and he was asked why he had left Vietnam and was seeking asylum.
  - Since the applicant's release into the community in Australia, the applicant has also been actively involved in the Vietnamese Democratic community and Viet Tan group activities including fundraising activities in Australia. Two uniformed policemen have also attended his family home in Vietnam and interrogated and threatened his wife and parents.
  - The applicant fears he will be harmed by the Vietnamese authorities because he will be considered to be anti-Vietnamese government because of his past involvement in Catholic youth groups, activities and protests, interview with a delegation of the Vietnamese government, activities in Australia, the release of his personal information by the Department on the website in 2014 and return as an asylum seeker.

### Refugee assessment

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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. On 15 May 2013, approximately three weeks after his arrival in Australia, the applicant participated in an entry interview with the Department. The applicant provided the following personal particulars:

- His name was "TP" and he was born [in date] in [a] District, Hà Tĩnh Province. He has no identity documents.
- Between November 2012 and departure in February 2013 he lived in a boarding house in Saigon (Ho Chi Minh City). Prior to this he lived in various areas in Vietnam including in Hà Tĩnh, Đắk Nông, Ha Noi, Nghệ An Provinces.
- He is single with no children. His parents are deceased and have no siblings.
- He has a primary school level of education.
- He has previously been employed in the areas of farming and labouring.
- He departed Vietnam illegally by boat.

8. On 30 November 2017, the applicant lodged a protection visa application with the Department. On 1 March 2018, the applicant participated in a protection visa interview. In the application and interview the applicant provided the following personal particulars:

- His name is "PTH" and he was born [in date] in [Village 1], Hưng Nguyên District, Nghệ An Province.
- Between his birth and departure in April 2013 he lived in [Village 1], Hưng Nguyên District, Nghệ An Province.
- He is married and has [children]. His parents are alive and he has [siblings].
- He has a high school level of education and completed vocational education [in a number of areas].
- He has previously been employed in the areas of farming [and other industries].

- He departed Vietnam legally through the airport using a passport in his own name. He paid an agent to assist him to depart.
9. At the protection visa interview, the applicant was asked why he had provided an incorrect name and date of birth at his entry interview. He stated that at the time of his arrival he was worried and scared and had arrived in a new and strange country. He had been told not to tell the truth otherwise if he did he would be sent back to Vietnam.
  10. The applicant was asked whether he had lived and worked in Saigon in the months prior to his departure (as stated in his entry interview). He stated that he had not and had provided the incorrect employment details because he was scared. He stated it was only after he knew that Australia would protect him that he provided his correct details. He was asked why he had said he had worked in Saigon. He stated on arrival he had given the Department the name of his friend and he had used this "friend's situation" as his own. He stated at the time of his arrival he did know what to do. He was confused, worried and scared and avoided telling his real situation so he didn't have to be sent back to Vietnam.
  11. He was asked why he thought he would be sent back if he provided his own personal details to the Department. He stated he had participated in Catholic community activities including prayer vigils and protested against the suppression of freedom for the Catholic community by the government. Arising from his participation in these activities he was of interest to the police.
  12. In the submission to the Department, the representative reiterated the applicant's explanation that he had not provided his "real name" because he was told by the people smugglers that if he used his real name he would be easily identified by the Vietnamese government. It was further contended that the applicant has taken measures to provide his correct identity to the Department.
  13. The applicant has provided a number of identity documents in support of his identity as "PTH". He provided NAATI accredited English translations of a household booklet, secondary school certificate, marriage certificate, birth certificate, vocational certificates and high school graduation certificate. The secondary school, high school graduation and vocational certificates state that the originals bear photographs. However, the originals of these documents have not been provided.
  14. The applicant's evidence about his identity and personal background has significantly varied between his entry interview and his protection visa application and interview and when considered with the lack of any original identity documents particularly those documents which bear photographs, raises questions about the applicant's identity more broadly. Nevertheless, having regard to the applicant's language and the absence of information suggesting he is a national of any other country, I am satisfied that the applicant is a national of Vietnam.
  15. I accept the applicant is a Vietnamese national. Vietnam is the receiving country, for the purpose of this assessment.
  16. At the entry interview and in his protection visa application, he stated that he had departed Vietnam illegally by boat. However, in the protection visa application and interview he stated that he departed through the airport in Saigon using his own passport.
  17. At the conclusion of the protection visa interview, the delegate put to the applicant, along with other concerns, that his ability to depart Vietnam using his own passport may indicate that he

was not of interest to the Vietnamese authorities as claimed. The applicant responded that an agent had assisted him to do the paperwork and instructed him how to go through the airport. He further stated that "luck" had assisted him on his departure. In the submissions to the Department, his representative contended that rather "than divine intervention" it was more likely that the applicant's departure was made possible by the agent who had organised a payment of a monetary bribe.

18. The applicant's evidence regarding his departure from Vietnam has varied significantly between his entry interview and protection visa application and interview and when considered with the lack of any evidence substantiating that he has been issued with any type of travel document including a passport, raises questions about the applicant's credibility regarding this issue more broadly. Nonetheless, I have listened to the entry interview and protection visa interview and I consider the applicant's evidence regarding his departure from Vietnam at his entry interview to be more detailed and persuasive. He stated he had left Vietnam illegally by boat. I am satisfied the applicant did not depart on a travel document and left Vietnam by boat.
19. The applicant claimed that he decided to leave Vietnam because he feared being arrested and detained by the authorities on account of his involvement in various Catholic youth groups, activities and protests. Arising from his involvement in such groups, activities and protests he was arrested, interrogated and beaten and summonses have been issued in his name. He has been accused of being in the Viet Tan group and engaging in anti-government activities.
20. The applicant's evidence regarding his level of involvement in Catholic groups, activities and protests has evolved over time.
21. On 15 May 2013, approximately three weeks after his arrival in Australia, the applicant participated in an entry interview with the Department. I have listened to the recording of the entry interview. The applicant was asked why he had left Vietnam. In summary he stated that:
  - He had extreme hardship and didn't think he could survive sometimes.
  - He had no identity documents and was unable to apply for jobs.
  - He had come for a peaceful life where human rights are respected as in Vietnam he is nobody.
  - He was told that Australia is a developed country where his welfare would be more stable and he would benefit from protection.
22. He was asked if these were the primary reasons he had come to Australia, he stated "yes back home is a very hard society and gives no protection".
23. On 30 November 2017, the applicant lodged a protection visa application with the Department. At the protection visa interview, the applicant reiterated and provided clarifications to the substantive claims in his protection visa application. In summary the applicant claimed that:
  - In the past he was a member of the Catholic youth group and has always supported and been involved in Catholic activities in the Vinh diocese.
  - In early July 2012, he had gone to [a] church and had been suppressed by the government.

- In December 2012, 14 Catholics were accused of being members of the Viet Tan group and charged by the Vietnamese government. He was actively involved in protesting the release of the 14 Catholics and as a result he was of interest to the authorities.
- He knew some of the 14 Catholics who were arrested and became involved in activities requesting their release. The activities included organising and attending rallies where he would stand “up for the truth and rights” of the Catholic members and demand their release. He also visited the families of some the 14 Catholic members and attended their court hearings and prayer vigils.
- [In] November 2012, the authorities went to his home and searched it. He believes they did this because they wanted to find evidence so they could arrest him. The authorities took some information he had about human rights and papers about prayer vigils.
- [In] December 2012, the authorities issued a summons asking him to present to the police station [in] December 2012 for an interview.
- [In] December 2012, the applicant attended the police station. He was detained, questioned and physically assaulted him before being released. He believes he was released because the authorities had no clear evidence on which he could be charged.
- After his release, he returned to his normal activities including supporting the 14 Catholics by attending their court hearings. He did this even though he had been told by the authorities not to.
- [In] March 2013, the applicant along with other parishioners was preparing the church yard with plants when the authorities came and told them to stop. The authorities threatened the parishioners and told them they could not grow the plants without the payment of a bribe. A fight broke out and some parishioners were arrested.
- [In] March 2013, a group of Catholic students and youth spread leaflets to highlight the wrongdoings of the authorities. The leaflets demanded freedom of religion, democracy, justice and human rights and the release of the innocent parishioners. That night the applicant left his home village and travelled to Saigon.
- [In] March 2013, the authorities surrounded the applicant’s home to arrest him because they believed he had been involved in the spreading of the leaflets and anti-government information.
- [In] March 2013, the authorities issued a summons asked him to present to the police station for an interview.

24. The applicant has provided two summonses in support of these claims, and NAATI accredited English translations. The first summons is dated [in] December 2012. It states it is a “2<sup>nd</sup> time” summons. The applicant has not claimed that a summons was issued prior to this. Furthermore, it states that the applicant was to attend the “public security office” for an “interview in relation to the possession of a number of illegal documents”. I find this reason peculiar when considered against the applicant’s evidence that he believed he had been released because the authorities didn’t have any evidence. The second summons states it is a “1<sup>st</sup> time” summons. It states that the applicant was to attend the “public security office” for an “interview in relation to the distribution of political leaflets at [a] Church”. It is dated [in] March 2013. The applicant claims that [in] March 2013 the authorities had gone to his home to arrest him and I find it difficult to accept that had the applicant been of interest to the authorities as claimed they would wait more than 7 days before issuing a summons. Furthermore, the information before me indicates that document fraud is common in Vietnam. Having regard to all the evidence, I am not satisfied the summonses are genuine documents and I give these documents no weight.

25. The applicant's claims regarding his involvement in Catholic groups or activities were not mentioned at his entry interview. At the entry interview, he was specifically asked whether he was a member of any particular social or religious groups, he stated "no". He also was asked whether he had been arrested or detained by the police or security organisations, he stated "no". He made no mention of the search of his home by the authorities or his attendance at a police station. Nor did he make mention of the two summonses.
26. At the protection visa interview, the applicant was asked why he had not made mention of his claims regarding his involvement in Catholic groups and activities at his entry interview. He stated that he was worried about being sent back to Vietnam and he didn't know what Australia was like. I am not persuaded by this explanation. I have listened to the entry interview and I am not satisfied from the conduct of the interview that the applicant's responses were constrained on account of any worries or fears. The applicant was forthcoming with his responses to the questions asked. Furthermore, at the commencement of the entry interview, the applicant was clearly advised of the purpose of the interview and requested to provide true and correct answers to the questions asked because if the information he provided at any future interviews was different it could raise doubts about the reliability of what he has said. I am satisfied that the applicant was given the opportunity to provide these claims and had these claims had any credible basis he would have been provided them when asked at the entry interview. I am also satisfied that the applicant's claimed fears at the entry interview are no more than contrived explanations for not having disclosed these claims previously.
27. Furthermore, I find the applicant's explanation that it was not until after the entry interview that he felt he was able to reveal his identity and claims for protection because he knew Australia would protect him to be somewhat illogical given that he has yet to be found to engage Australia's protection obligations. I also find the applicant's evidence that he participated in pro-Catholic protests and activities because he "lives for the truth" to be incongruous given his evidence that he deliberately provided false information to the Department on his arrival in Australia, even after he was told at the entry interview to give true and correct answers to the questions asked.
28. Having regard to the evidence as a whole, including the significant evolution of the applicant's evidence and the applicant's evidence that he has in the past provided false information to the Department, I am not satisfied the applicant has been a truthful witness regarding these aspects of his claims. I do not accept the applicant was involved in any Catholic youth groups, activities and protests. I do not accept that arising from his involvement in any Catholic youth groups, activities and protests he was perceived by the authorities to be a part of the Viet tan group or anti-government and arrested, interrogated and beaten by the authorities. I do not accept summonses were sent to his family home requesting him to attend the police station.
29. The applicant has made no mention of any other claims of harm or interest in him by the authorities at the time when he departed Vietnam. I am satisfied that at the time of the applicant's departure from Vietnam in 2013 he was not of any interest to the Vietnamese authorities.
30. I accept the applicant is Catholic and that he has regularly attended mass and religious ceremonies since his birth in Vietnam. I accept the applicant would continue to practise his faith on return to Vietnam. The applicant's evidence regarding his religion has been one of the few consistent pieces of information provided throughout his interactions with the Department and is corroborated by the letter of the Vietnamese Catholic Community of [State 1] which states that he regularly attends mass.

31. In 2016, the US Department of State reported that the Vietnamese Constitution provides for freedom of belief and religion; however it also stated that the government maintains significant control over religious practice and permits restrictions on religious freedom in the interests of national security and social unity. In 2017, DFAT reported that some 7% of the Vietnamese population who declare their religion or belief are Catholic. The Catholic Church is a registered church in Vietnam, and is one of 14 distinct religions that hold full government recognition and registration. The situation for Catholics has continued to improve in recent years. DFAT observed that Catholics are able to practise freely at registered churches and assessed that religious observance and practice only becomes an issue when it is perceived to challenge the authority or interests of the Communist Party of Vietnam (CPV) and its policies.
32. Based on the country information before me, I am not satisfied the applicant's past and present activities as a practising Catholic would result in the Vietnamese authorities identifying him as a religious or political activist, or someone of interest. I accept the applicant would continue to be a regular member of the Catholic church and participate in services and religious celebrations on return to Vietnam. I am satisfied the applicant's level of participation, as a regular member of the Catholic church, would not be perceived by the State to be the acts of a religious activist, or otherwise viewed adversely. I am also satisfied the manner in which the applicant practises his Catholic faith does not involve him curtailing his religious practise or modifying his behaviour to avoid harm. I am not satisfied the applicant faces a real chance of harm as a practising Catholic on his return to Vietnam now or in the reasonably foreseeable future.
33. The applicant claims he will suffer harm on return to Vietnam because his personal details may have been released to a delegation of the Vietnamese government (the delegation) when they visited to interview Vietnamese citizens held in Immigration detention in Australia on 24 September 2013. In the representative's submission it was contended that the visit occurred in August 2013 and that the applicant was interviewed by the delegation and asked why he had left Vietnam and was seeking asylum.
34. There is no information before me to substantiate that the applicant was interviewed or that his personal details including his claims for protection have been provided to a delegation of the Vietnamese government. I do not accept the applicant was interviewed or that his personal details were provided to a delegation of the Vietnamese government.
35. The applicant claims that on return to Vietnam he will be considered to have been involved in anti-Vietnamese government activities because he has been actively involved in "Vietnamese Democratic community" and "activities involving the Viet Tan party" in Australia. He stated he believes that when he demonstrated at the Vietnamese consulate in [City 1] photographs would have been taken of him and he would be identifiable from these photographs on return. He also stated that as a result of his involvement in these activities in Australia on return he will be charged with offences under the Vietnamese Penal Code.
36. In the representative's submission it has been contended that since the applicant's release into the community in Australia he has been a regular participant in fundraising and public activities of the Viet Tan group and the Vietnamese Democratic Community in [State 1].
37. At the protection visa interview, the applicant was asked what anti-Vietnamese government activities he has been involved in since his arrival in Australia. He stated he has participated in the activities of the freedom and human rights groups in Australia including the Viet Tan and Dunchu (concept) groups. These groups speak out about any human rights and the unfairness and cruelty of the government to its people in Vietnam. He stated that the government

investigates people who participate in such activities and he fears that his association with such groups including his attendance at events raises his profile with the Vietnamese government on return. He stated on return the police will definitely say he is dangerous on the basis that he is perceived to be a member of such groups which are anti-government.

38. The applicant has provided photographs and two Facebook posts which depict his anti-Vietnamese government activities in Australia. The applicant is wearing different clothes in at least two of the photographs. The content of the photographs including the same signage, flags and the building in the background appear to resemble an anti-Vietnamese government demonstration. I accept that the applicant participated in two public anti-Vietnamese government demonstrations at the Vietnamese Consulate in [City 1] in Australia. I accept in one of the demonstration the applicant is holding the South Vietnamese flag and he is also wearing a jacket in the same colours of this flag. One of the Facebook posts includes a photograph of the applicant at one of the demonstrations however in the other post the photograph is obscured. I accept one of the photographs of the applicant at one demonstration was uploaded and included in a Facebook post.
39. Two other photographs appear to depict the applicant at an event assembling a sign and furniture. The background of the photographs indicates the event was held indoors. The file name for these photographs is "photos protest and assisting Viet Tan Fundraising". There is nothing in these two photographs which suggests that the event was associated with the Viet Tan group. However, one of the photographs depicts photographs of violence and Vietnamese people who appear to have been detained given that "free" is written below the photographs. I accept the applicant also attended one anti-Vietnamese government event which was held indoors.
40. The applicant has also provided a reference from [a member] of [a Vietnamese organisation] – [State 1] [Chapter]. It is dated [in] July 2017. It states that "our community has known political asylum seeker since his release from Detention Centre" through his "recent active involvement in various activities of the [Vietnamese organisation]". It does not provide any details of what the activities were or the extent of the applicant's involvement in such activities. It further states "I strongly support his visa application" and this suggests that its purpose is in support of the applicant's protection visa application. I also observe the reference commences with "without relations or prejudice". The contents of the reference is brief and vague and I am not satisfied it corroborates the applicant's claims regarding his anti-government activities in Australia, and I give it no weight.
41. Furthermore, none of the photographs or the reference corroborates the representative's submission that the applicant has been involved in any fundraising activities or any activities associated with the "Viet Tan party" in Australia. I also find it to be pure speculation that the Vietnamese government took photographs of the applicant while attending the two demonstrations at the Vietnamese Consulate in [City 1]. I do not accept the applicant has been involved in any Viet Tan group activities or any type of fundraising activities for any groups since his release into the community in Australia. I also do not accept the Vietnamese government took photographs of the applicant when he attended the two demonstrations at the Vietnamese Consulate in [City 1].
42. I also have serious concerns about the motivation for the applicant's attendance at the two demonstrations and one other event, the taking of photographs and the subsequent posting of one of these photographs on Facebook.

43. The applicant's evidence and the representative's submissions are that the applicant has been regularly attending fundraising and anti-government activities since his release into the community in Australia. However, the photographs are all undated and are devoid of any context including how long the applicant was at the demonstrations or event and what activities he undertook, apart from having his photograph taken. The photographs appear staged.
44. The file names for the photographs taken at the two demonstrations are "[applicant's name] Feb18 [City 1] Consulate" and "[applicant's name] [date]" and suggest that at least two years passed between the applicant's release from detention and his attendance at the two anti-government demonstrations. I also note that based on the file names the applicant's attendance at the demonstrations was after the date of the reference from [the Vietnamese organisation] and the letter from the Department inviting him to lodge a protection visa application.
45. Furthermore, the Facebook posts are undated. There is also no Facebook profile name indicating who posted the photographs. Nor is the Facebook post symbol visible which indicates whether the posts were public or private.
46. I have also considered the provision of these sur place claims and against my credibility findings regarding the applicant's claims of harm in Vietnam. The applicant's evidence is that he has in the past provided false information about his identity and personal background at his entry interview with the Department. I have also found the applicant has not been a credible witness in regards to his claims of his involvement in Catholic groups and activities in Vietnam and the attendance of the police at his family home since his departure from Vietnam.
47. Having regard to the information before me and which I have outlined above, I am not satisfied that the provision of the applicant's sur place claims was for any purpose otherwise than to strengthen his claims for protection. Therefore, in determining whether he has a well-founded fear of persecution, the applicant's anti-Vietnamese government conduct in Australia must be disregarded: s.5J(6) of the Act.
48. The applicant claimed that after the visit from the delegation of the Vietnamese government in September 2013, two uniformed policemen went to his family home and interrogated his wife and parents. He stated the policemen threatened his family because they had supported him leaving Vietnam and because he had participated in anti-government activities in Australia.
49. I have rejected the applicant's claims regarding his involvement in Catholic groups and activities and that he was interviewed and his details provided to a delegation of the Vietnamese government. I do not accept that on these bases the applicant's family has been visited, interrogated and threatened by the authorities.
50. I have also found that the applicant was not of interest to the Vietnamese authorities or any groups or individuals when he departed Vietnam in 2013. As for his anti-government activities in Australia, as I am required to disregard these activities in determining whether he has a well-founded fear of persecution, I must also disregard any consequences that might flow from them.
51. I have also considered whether the inadvertent publication of the applicant's details on the Department of Immigration's website for a short period on 31 January 2014 may have led to the police visiting, interrogating and threatening his family. As discussed below, I have accepted that the applicant's details may have been accessed by the Vietnamese authorities

and that it may be inferred that he sought protection in Australia, however DFAT has stated it had no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government for having done so and I am not satisfied that on this basis the police have sought the applicant's whereabouts. More than 5 years have passed since the applicant's departure and there is no other credible evidence before me to suggest that the Vietnamese authorities would be more recently interested in seeking the applicant's whereabouts.

52. I am not satisfied that the applicant has been a truthful witness regarding these aspects of his claims. I do not accept that on the basis of the applicant's past and present circumstances (that I am permitted to consider) his family has been visited, interrogated and/or threatened by the authorities including the police since his departure from Vietnam. I am satisfied the applicant has contrived these claims to enhance his claims for protection.
53. Apart from the matters discussed above, the applicant claimed he would be harmed on return and considered to be anti-government because he would be returning after seeking asylum and the Department of Immigration's 'data breach'..
54. I have found the applicant left Vietnam unlawfully. I accept he has applied for asylum and would be returning to Vietnam after his asylum application has failed. Having regard to information in the review material, I accept that on 31 January 2014 some of the applicant's personal information was inadvertently published on the Department's website for a short period of time. This information included: the applicant's name; date of birth; nationality; gender; the reason for and location of his detention; and whether he had any family members in detention.
55. DFAT indicates that the Constitution of Vietnam provides for freedom of movement albeit there are penalties for Vietnamese nationals who depart the country unlawfully, including without travel documents. I have found that the applicant did not depart on a travel document and left Vietnam by boat. To depart in the way the applicant did would constitute a breach of Vietnamese law. DFAT advice is that if a person departs Vietnam unlawfully without a travel document, they may be subject to a fine upon return under Article 21 (regarding 'Violations of the regulations on exit, entry and transit') of the Decree on Sanctions against Administrative Violations in the Sector of Security and Social Order. Fines for departing without a travel document range between VND 2 Million and VND 10 Million (AUD \$120 to \$600).
56. I accept the applicant departed Vietnam in violation of Vietnamese law and he may be liable for a fine on that basis. 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 who have departed unlawfully may be briefly detained and fined for that departure.
57. DFAT indicates some returnees may be briefly detained and interviewed, but 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 or spent a prolonged period of time overseas. The reports suggests that people who have used people smugglers are seen as victims of crime, in contrast to the people smugglers, facilitators or people who aid in that crime.
58. The applicant has not claimed to have been involved in people smuggling, nor is there anything in the applicant's history or background that would suggest he would be seen as a people

smuggler or otherwise involved in the venture on his return to Vietnam. The applicant has not claimed and I am satisfied on the information before me that he would not be suspected of any such involvement on return.

59. I accept that because of the inadvertent release of the applicant's details on the Department of Immigration's website in January 2014 his details may have been accessed by the Vietnamese authorities and that it may be inferred that he sought protection in Australia. In 2017, DFAT reported 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 Penal Code 1999. However, DFAT also stated it had no information before it that persons who have sought asylum outside of Vietnam receive different treatment from the government for having done so.
60. In light of the information before me, I am not satisfied the applicant would face a real chance of serious harm because he sought asylum, or sought asylum unsuccessfully. There is no information before me to indicate that he would be imputed with an adverse opinion or profile by the Vietnamese authorities or that he would be considered to be anti-government on return as a result of the release of his details on the Department's website or that such factors would put him at risk of harm on return. I am not satisfied that as a returning asylum seeker who departed Vietnam unlawfully, his disclosure of his details on the Department's website the applicant faces a real chance of harm on these bases on return to Vietnam now or in the reasonably foreseeable future. Nor do I accept that on these bases he would be considered to be anti-government and harmed on return. Furthermore, in relation to the applicant's anti-government activities in Australia, as I am required to disregard these activities in determining whether he has a well-founded fear of persecution, I must also disregard any consequences that might flow from them.
61. I accept that the applicant may be fined under Vietnamese law because he left the country unlawfully and he may be briefly detained and questioned by Immigration officials and police on return. Having regard to the information before me, I am satisfied that the provisions and penalties under Vietnamese law are laws of general application that apply to all Vietnamese equally. The information before me does not indicate the law is discriminatory on its terms, nor is there any country information before me that indicates that the law is applied in a discriminatory manner or that it is selectively enforced.
62. I am satisfied that any process or penalty the applicant may face on return to Vietnam because of his unlawful departure or as a returning asylum seeker would not amount to persecution for the purposes of s.5J(1) and (4) of the Act.
63. I am not satisfied that the applicant faces a real chance of persecution on return as someone who departed Vietnam unlawfully, sought asylum and/or the disclosure of his details on the Department's website.

#### **Refugee: conclusion**

64. The applicant does not meet the requirements of the definition of refugee in s.5H(1) of the Act. The applicant does not meet s.36(2)(a) of the Act.

#### **Complementary protection assessment**

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65. 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**

66. 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.

67. I have considered whether there is a real risk of significant harm as a result of the applicant's attendance at two anti-Vietnamese government demonstrations and one anti-Vietnamese government event, and the posting of one of the photographs of him attending one of the demonstrations on Facebook.

68. Information before the delegate indicates that the government maintains considerable control and restriction on overt political activism in Vietnam, and there is harsh treatment of political and human rights activists in Vietnam. Political and human rights activists who are outspoken in their opposition of the government, the Communist Party of Vietnam ('CPV') and its policies are at high risk of attracting attention from authorities however the treatment from the authorities generally depends on the individual's level of involvement. DFAT assesses that individuals who are known to the authorities as active organisers or leaders of political opposition are at high risk of being subjected to surveillance, detention, arrest and prosecution.

69. I accept that there are credible risks to those who are outspoken and critical of the government and the CPV and that some political activists have experienced problems on returning to Vietnam. However, the information does not indicate that ordinary participants who have protested in the same way as many others in their community and whose activities would not be considered to be of the level of an outspoken activist or active organiser would be targeted or of adverse interest to the Vietnamese authorities or at risk of significant harm for those reasons.

70. I do not accept that the applicant's activities in Australia would bring him to the adverse attention of the Vietnamese authorities on return. Nor do I accept that arising from the applicant's activities in Australia his family has been visited, interrogated and threatened by the authorities. I have not accepted as credible that the applicant was involved in any Viet Tan group activities or any type of fundraising activities for any groups since his release into the community in Australia. The applicant's own evidence is he was a participant in the demonstration. At the two demonstrations in Australia he held a sign and a flag. At the event the applicant is assembling sign and furniture. The photographs are devoid of any context including how long the applicant was at the demonstrations or event and what activities he undertook, apart from having his photograph taken. The Facebook post is undated and it is unclear who posted it and whether it is a public post. I find the applicant's activities to be sporadic and low level in nature. I am not satisfied that the applicant's activities, in aggregate

with the country information, can be equated with that of an activist or active organiser or that he would be perceived as such by the Vietnamese authorities. I have also not accepted that the Vietnamese government took photographs of the applicant when he attended the two demonstrations at the Vietnamese Consulate in [City 1] and I consider the chance that the applicant has been identified by the Vietnamese authorities, from his attendance at the two demonstrations or one event or that his family has been visited as a result to be highly remote. Furthermore, for the reasons I have given earlier, I consider that the applicant's participation in these protests was for the purposes of enhancing his claims to protection rather than any genuine political beliefs. I am not satisfied he has any intention or desire to participate in any such activities on return. I am not satisfied that as a result of the applicant's attendance at two demonstration and one event and the Facebook post the applicant will face a real risk of any harm now or in the reasonably foreseeable future.

71. I accept that as the applicant left Vietnam unlawfully he may be briefly detained and questioned on arrival at the airport and may be fined for breaching Vietnamese law. However, I am not satisfied that being briefly detained, questioned, and fined, constitutes significant harm as defined. It does not amount to the death penalty, an arbitrary deprivation of life or torture. Further, on the information before me I am not satisfied it amounts to pain or suffering that may be described as cruel or inhuman in nature, severe pain or suffering or extreme humiliation, whether intentionally inflicted or otherwise. The country information does not indicate that there is an intention to inflict pain or suffering that is cruel or inhuman in nature, severe pain or suffering, or an intention to cause extreme humiliation. I have also found there is nothing in the applicant's profile which would result in him experiencing any long-term detention, investigation, arrest, reporting and monitoring or other harm that may amount to significant harm. I am not satisfied the applicant faces a real risk of significant harm on return to Vietnam on the basis of his unlawful departure.
72. I have otherwise found the applicant does not face a real chance of harm on the basis of his Catholic religion, the Department of Immigration's data breach or his status as returning asylum seeker now or in the reasonably foreseeable future. As 'real risk' involves the same standard as 'real chance', I am also not satisfied that the applicant faces a real risk of significant harm on these bases.

### **Complementary protection: conclusion**

73. 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) of the Act.

### **Decision**

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

## Applicable law

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

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

...

***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.