



Australian Government
Immigration Assessment Authority

Decision and Reasons

Referred application

VIETNAM

IAA reference: IAA18/04993

Date and time of decision: 14 June 2018 10:50:00

J Bishop, 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) is a [age] year old man that claims to be a national of Vietnam and identifies himself as a Buddhist Kinh. He arrived in Australia by boat [in] June 2013 and, on 31 May 2017, made an application for a Safe Haven Enterprise Visa (SHEV).
2. On 18 May 2018 a delegate of the Minister for Immigration and Border Protection (the delegate) refused the applicant's visa. The delegate was satisfied that the applicant had departed Vietnam illegally and would be returning as a failed asylum seeker. However, the delegate determined that the applicant does not have a profile of interest and does not face a real chance of serious harm or a real risk of significant harm now and in the foreseeable future in Vietnam.

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 other information was provided to the IAA.

Factual finding

4. I accept the applicant's claims that:
 - He was born in Vietnam and identifies as a Buddhist Kinh.
 - His wife and [children] continue to live in Vietnam. His wife [is self-employed] and supports herself and their children.
 - He worked as a farmer on his parents' land and as a casual worker for a [business] in Vietnam. He was struggling to find work and finding it difficult to survive.
 - He and his family did not experience any harm in Vietnam. He has never been detained, arrested or charged.
 - He has never been a member of a political party or group or involved in protests or demonstrations against the Vietnamese government in Vietnam or Australia. He has never spoken against the Vietnamese government.
 - He left Vietnam illegally via a boat and has paid off the loan he took out to pay for the journey.
 - He would be returning to Vietnam as a failed asylum seeker.
 - His data was breached by the Department of Immigration and Border Protection (DIBP).
5. In the applicant's Statutory Declaration dated 25 May 2017 he stated that he came to Australia because he would not have found enough work to feed his children in Vietnam. The applicant's wife and [children] remain in Vietnam and are supporting themselves. The applicant has not claimed and there is no credible evidence before me to indicate that he would be unable to

support himself and his family if he returned to Vietnam. I do not accept that the applicant would be unable to support himself and his family if he returned Vietnam.

6. During his arrival interview the applicant stated that he left Vietnam to work on a farm. He said that life is easier in Australia and he had no other reason to leave. He had been to Australia as a tourist and thought it was a very good country. I accept that the applicant left Vietnam to work in Australia.
7. During the SHEV interview the applicant said he had seen the police beating Catholics on two or three occasions. He hadn't paid attention to it because it was none of his business and he would walk in the other direction. The applicant's evidence about witnessing the police beat Catholics was vague. He did not explain how he knew the people being beaten were Catholics or provide details of when he witnessed these beatings or where he was. In the context of vague and general claims, I am not satisfied that the applicant witnessed the police beating Catholics on two or three occasions.
8. The applicant said that the Vietnamese police have come to his wife and asked about him on two occasions because he has escaped Vietnam. When the delegate asked when the police came the applicant responded that he didn't ask his wife. The applicant's claims about the police enquiring about him are vague and general. I find it implausible that if the police did attend his wife on two occasions and asked about the applicant, that he wouldn't have asked his wife for more details. I do not accept that the Vietnamese police have attended the applicant's wife and asked about the applicant.

Refugee assessment

9. 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

10. 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.

Departed illegally, data breach and returning as a failed asylum seekers

11. I accept that the applicant will be returning to Vietnam as a failed asylum seeker and, by the manner of his return, the Vietnamese authorities may know or infer that he made a claim for asylum. The applicant said that he fears returning to Vietnam because escaping the country is considered treason. He has heard from friends that he will be put in prison and beaten. However, if you bribe the police, you will be beaten less or not at all. During the SHEV interview the delegate put to the applicant that country information indicates he would not be put in prison for leaving the country illegally but fined between \$A120 and \$A600. The applicant responded that what Vietnam says happens is one thing and what Vietnam does is another.
12. The most recent DFAT report states that it has no information to suggest that people known or believed to have sought asylum in another country are mistreated by the Vietnamese government on their return¹. The DFAT report states:

Article 91 of the *Penal Code 1999* states that ‘Fleeing abroad or defecting to stay overseas with a view to opposing the people’s administration’ is an offence. 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. In December 2016, a new Memorandum of Understanding (MOU) was signed between the Australian Department of Immigration and Border Protection and Vietnam’s Ministry of Public Security, which provides a formal framework for the return of Vietnamese nationals ‘with no legal right to enter or remain in Australia, including those intercepted at sea’².
13. In February 2014, over a period of about eight and a half days, the full names, gender, citizenship, date of birth, date when immigration detention began, the location of immigration detention, boat arrival details and the reason for being unlawful (for example illegal maritime arrival) of approximately 9,250 people were inadvertently published on the DIBP’s website. I accept that limited details about the applicant – as outlined - were capable of being accessed on the DIBP’s website for a period of eight and a half days. However, even if the data breach had not occurred, those details – apart from details about when and where the applicant was detained - would have been otherwise evident to the Vietnamese authorities upon his return to Vietnam.
14. I accepted that the applicant departed Vietnam illegally. The most recent DFAT report states that those Vietnamese nationals that departed Vietnam unlawfully without travel documents may be subject to a fine. It states that:

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. A fine of between VND2 million and VND10 million (approximately AUD120-600) is specified for leaving Vietnam without a passport or equivalent, departing without undergoing official exit procedures, or departing using another person’s documents. A fine of between VND20 million and VND50 million (AUD1,200-3,000) is specified for leaving Vietnam using a false passport or equivalent.
15. The applicant has not claimed and there is no credible evidence before me to indicate that the applicant has ever left Vietnam using a false passport or travel document.

¹ DFAT, “Country Information Report Vietnam”, 21 June 2017, CISEDB50AD4597 at 5.21.

² Ibid. at 5.15.

16. I accept that there are credible reports of some returnees being held for a brief period upon their return to Vietnam for the purpose of being interviewed by the Ministry of Public Security (MPS) officials to confirm their identity where no documentation exists. Other cases involve individuals detained by authorities in order to obtain information relevant to the investigation of people smuggling operations³. DFAT assesses that long-term detention, investigation and arrest is conducted only in relation to those suspected of involvement in organising people-smuggling operations. The applicant has not claimed and there is no evidence before me to indicate that he was involved in organising or assisting with people smuggling activities. His SHEV application indicated that he has never been charged, convicted or wanted for an offence in Vietnam. I am satisfied that the applicant would not be at risk of serious harm as a consequence of this routine investigation. Likewise, I am not satisfied that the imposition of any fine would of itself constitute serious harm in this case and there is no credible information before me to indicate that the applicant would be unable to pay any fine. I am not satisfied that, having regard to the applicants' profile, he will face a real chance of any harm on his return to Vietnam because of the data breach, because he left Vietnam illegally and sought asylum in Australia or for any other reason.

Refugee: conclusion

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

Complementary protection assessment

18. 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

19. 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.

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

- it would be reasonable for the person to relocate to an area of the country where there would not be a real risk that the person will suffer significant harm
- the person could obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm, or

³ DFAT, "Country Information Report Vietnam", 21 June 2017, CISED50AD4597 at 5.21.

- the real risk is one faced by the population of the country generally and is not faced by the person personally.

Is there a real risk that the applicants will suffer significant harm?

21. I have considered the applicant's claims individually and cumulatively. I did not accept that the applicant would be unable to support himself and his family if he returned to Vietnam. I did not accept that the applicant faces a real chance of any harm if he returned to Vietnam because of the data breach and/or because he left the country illegally and sought asylum in Australia. The "real risk" test in the complementary protection provisions imposes the same standard as the "real chance" test applicable to the assessment of "well-founded fear".⁴
22. I accept that, on return to Vietnam, the applicant will be subject to a series of administrative processes (as outlined above) and identified as a person that departed Vietnam illegally. I have found that the applicant is not a person of interest to the Vietnamese authorities and, upon his return, I am not satisfied that the applicant faces a real risk of being arbitrarily deprived of his life; of facing the death penalty or of being subjected to torture. I am not satisfied that the acts or omissions of the Vietnamese authorities during this administrative process are intended to cause pain or suffering, severe pain or suffering or to cause extreme humiliation so as to amount to cruel, inhumane or degrading treatment/punishment. I am therefore not satisfied that there is a real risk that the applicant will suffer significant harm within the meaning of s.5(1) and s.36(2A) upon his return to Vietnam. Likewise I do not accept that having a fine imposed upon the applicant for his illegal departure amounts to suffering significant harm within the meaning of s.5(1) and s.36(2A).

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 applicants will suffer significant harm. The applicant does not meet s.36(2)(aa).

Decision

The IAA affirms the decision not to grant the referred applicants protection visas.

⁴ *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

Applicable law

Migration Act 1958

5 (1) Interpretation

In this Act, unless the contrary intention appears:

...

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

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

...

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

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
 - (c) that is not inconsistent with Article 7 of the Covenant; or
 - (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

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

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

...

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

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

...

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

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant; but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

5H Meaning of refugee

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

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

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

...

5J Meaning of well-founded fear of persecution

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

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

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

5K Membership of a particular social group consisting of family

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

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

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

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

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

5L Membership of a particular social group other than family

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

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

5LA Effective protection measures

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

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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.