

1601346 (Refugee) [2016] AATA 3826 (4 May 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1601346
COUNTRY OF REFERENCE:	Vietnam
MEMBER:	Nicole Burns
DATE:	4 May 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 04 May 2016 at 2:42pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] January 2016 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Vietnam, applied for the visa [in] December 2015. The delegate refused to grant the visa [in] January 2016.
3. The applicant appeared before the Tribunal on 26 February 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. She attended the Tribunal hearing.
5. The applicant – [an age] year old single male born in Quang Nam Province, Vietnam – seeks to invoke Australia's protection obligations on the basis of his sexual orientation.

CRITERIA FOR A PROTECTION VISA

6. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, he or she is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.
8. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
9. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
10. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of the visa if he or she is a non-citizen in Australia 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 being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

11. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and relevant country information assessments prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issues in this review are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in s.5J(1) and if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to his receiving country of Vietnam, there is a real risk he will suffer significant harm. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
13. Based on a copy of the applicant's passport on the Department file, the Tribunal is satisfied that the applicant is a national of Vietnam and has assessed his claims accordingly. It is stated that the applicant was born in Quang Nam Da Nang City, Vietnam and that he lived and worked in Ho Chi Minh City (HCMC) for a number of years preceding his initial departure from Vietnam to study in Australia, from 2007 to July 2010. On this basis the Tribunal finds that HCMC is the applicant's home area. It has been submitted that the applicant has no family support in places like HCMC, and his [Relative A], whom he used to live with there, will not accept nor support him in the future (because of his sexuality, discussed in more detail below). The Tribunal is willing to accept that is the case and the applicant will not have family support if he returns and lives in HCMC, for example. However the applicant is a highly educated [age] year old with skills and work experience and does not need family support to gain employment and live independently, as he has done in Australia in the past.
14. The applicant sets out his claims for protection in the visa application and a detailed eight page typed statement to the Department dated [in] December 2015. He also provided to the Department a copy of a NSW 'Relationship certificate' dated [in] March 2014 between the applicant and his then de facto partner (an Australian citizen).
15. In summary the applicant claims he is homosexual and fears serious harm from his father and members of the community as a homosexual on return to Vietnam. He claims he was not able to live openly as a gay man in Vietnam and left Vietnam because he is gay. He claims his father hit him when he told him he was gay during a visit home in 2013. He claims gay men face discrimination and are not accepted by the majority of society in Vietnam, and in some circumstances are physically assaulted. He claims there is no part of Vietnam where he could live openly as a gay man. Further, he claims the authorities would not help because they discriminate against gay men and consider parents disciplining their child as a family matter.

16. In separate written submissions¹ to the Department and Tribunal the representative argues that the applicant also fears that he will be forced to marry on return and his refusal to do so would place him at risk of further harm or persecution from his family.

Claims to be homosexual

17. The Tribunal accepts that the applicant is a homosexual. His oral evidence to the Tribunal on this matter was straightforward and spontaneous and consistent with his written claims to the Department. The Tribunal accepts that the applicant has had a number of relationships with men since he first came to Australia to study in 2010, and that he resided with his former partner in Sydney from December 2013 until their separation around mid-2014. The Tribunal has given some weight to the relationship certificate provided attesting to that fact.
18. It has been submitted that the applicant fears persecution on return to Vietnam on the basis of his membership of a particular social group of 'gay men in Vietnam'. The Tribunal accepts that 'gay men in Vietnam' meets the definition of a particular social group in s.5L of the Act because the characteristic of the group – i.e. homosexuality - is shared by each member of the group; the applicant shares that characteristic as a homosexual; the group is distinguishable from society on the basis of being homosexual; and the characteristic is not a fear of persecution.

Past experiences in Vietnam

19. The applicant told the Tribunal that he first realised he was gay in high school, when he was around [number] years old. However he did not have any sexual relationships with men at high school, or whilst at university. He said he met a couple of guys through a Vietnamese website for coffee whilst working in HCMC after university, but the meetings did not progress. When asked why not, the applicant said because he did not have the same 'aim' as the men (that is, not compatible); because there was a question as to whether or not each person liked the other party; and finally, family pressure from both sides in Vietnam makes it difficult for the relationship to go anywhere (he did not elaborate).
20. The applicant was asked at hearing if any of his friends – at high school or thereafter – knew he was gay in Vietnam. He said he was very careful, hid 'it' well and did not let anyone know. However in high school some friends suspected he was gay by his gestures and behaviour and speech. When asked if anything happened as a result, the applicant said once on his way home from school he was stopped by a group of students who hit him and threw stones at him when he ran away. He said some students constantly teased him and spread rumours because they did not like gays. He said he did not want to inform the teachers because he was afraid they would also treat him differently. At university the applicant said he continued to hide his sexuality. He said a friend of his at university was looked down upon and received verbal abuse from classmates because she was a lesbian. He said that although physical violence never resulted from these exchanges, he knew such verbal abusiveness adversely affected his friend's mental state.
21. In his written statement the applicant stated that he was afraid to act on his feelings at high school in case he would not be accepted, bullied and face discrimination.
22. In his oral evidence to the Tribunal the applicant said he told his parents he was gay during a visit home in early 2013 when he could no longer deflect their questions and pressure for him to marry and have children. During that visit his father told the applicant that he had found a friend's daughter for him to marry. Running out of excuses, the applicant said he confessed that he was gay and that he did not like girls. His father, who was sitting at the

¹ Dated [in] January 2016 and [in] February 2016

table in their family home at the time, picked up his glass and smashed it onto the ground, lunged at the applicant, hit him and verbally insulted him. He said he was sick and that he was not his son. His mother told him to leave, which he did. He spent one night with one of his brother's nearby then stayed at his [Relative A's] house in HCMC for a few days before returning to Australia. He rang his mother from Australia and she told him his father still could not accept him. Toward the end of 2013 the applicant said his mother called and said his father wanted to visit him in Australia. The applicant, thinking his father had come to understand him and wanted to come to Australia to apologise, sponsored him to visit Australia in October 2013. However his father stayed at a friend's house and the applicant only saw him on one occasion at a [product] shop in Sydney. During that meeting the applicant's father said he would give him a chance to become his son again if he agreed to return to Vietnam, marry and have children, so their surname could continue. The applicant told his father that he did not want to get married, that he was aware of his sexuality and that he had his own life. The applicant's father got angry and raised his voice then the applicant left. He rang the applicant one or two weeks later (whilst still in Australia) and the applicant reiterated that he had his life here. The applicant said that he has had no contact with him since.

23. The applicant said he deferred his studies (a master's degree) on return to Australia from his visit home to Vietnam in 2013 because his parents were no longer willing to pay his fees after he told them he was gay. The Tribunal notes in his written statement to the Department the applicant stated that he actually deferred his studies before his visit home to Vietnam in early 2013 after running out of money to pay his university fees after completing one semester only.
24. The applicant said he has been under pressure to marry from his parents for a long time. In his written statement he stated that after university his parents told him they were waiting for him to marry and have children to carry on the family line and thereafter they regularly asked him when he was to marry. At the Tribunal hearing the applicant said each time he used to speak to his parents there was talk about getting married, in particular from 2006 when he finished university. He said the situation worsened when he started working at the [business] in HCMC, from 2007. It made him stressed and upset and he did not know how to deal with it. When asked how his family would force him to marry on return, the applicant said if he does not agree they will hit him and find all negative ways to force him to marry (even after he has told them about his sexuality). Asked if he fears being hit by his father or other family members as well, the applicant replied that his father has the final decision so his brothers will side with him.
25. The applicant said he is pretty sure everyone in his family now knows he is gay. His sister was at home when he told his parents and his father reacted violently. He stayed with one of his brothers that night who sided with the applicant's father, telling the applicant that homosexuality is a disease. His brother and his wife blamed the applicant for embarrassing their family and making them lose face. Because of this the applicant has had no contact with his brother since. He has not spoken to his two other brothers either since then but from what his mother has told him he is sure they share the same views as his father. His mother also told him that [his Relative A] (whom the applicant used to live within HCMC) also took his father's side, after she told him about the matter.
26. The Tribunal accepts the applicant's evidence that he did not have any relationships with men in the past in Vietnam. It also accepts that he may have kept his sexuality hidden to some extent during high school and even at university. The Tribunal accepts that although the applicant was not open about his sexuality at high school some of the students suspected he was gay and teased him and on one occasion hit him and threw stones at him.

27. The Tribunal also accepts that the applicant's father verbally abused him and hit him once when he told him he was gay in early 2013. The Tribunal also accepts that the applicant's father verbally abused him again when he visited Australia in October 2013, and continued to exert pressure on him to marry.
28. The Tribunal also accepts that the applicant's siblings and [Relative A] know that he is homosexual and according to his mother, disapprove of his choice and side with his father (as does his mother). However the applicant has not claimed and the Tribunal does not accept that any of his siblings or [Relative A] or mother who know about his sexuality have ever threatened or attempted to harm him on this basis.

Well-founded fear of persecution in the future

29. Given these findings, the Tribunal has gone on to consider if the applicant faces a real chance of persecution on the basis of his membership of a particular social group of 'gay men in Vietnam' on return to his country from his family, community or the authorities, as submitted.
30. The Tribunal has first considered the submission that in the past the applicant has been unable to openly live as a gay man in Vietnam and has been forced to conceal his sexuality or face abuse, harassment or be ostracised by society and his community. It is submitted that being compelled to hide ones sexuality creates an 'intolerable predicament amounting to persecution.'² In his written statement to the Department the applicant stated that he has never been able to live as an openly gay man in Vietnam in the past and knows that he will not be able to do so in the future.
31. The Tribunal accepts that when the applicant was working in HCMC for four years prior to coming to Australia (living with his [Relative A]) he did not inform either his [Relative A] or work colleagues about his sexuality. However he did meet other gay men, introduced through an online dating service, and although nothing further eventuated, the applicant indicated that this was primarily because they were not particularly compatible (or that they did not connect, as he stated in his written statement to the Department). The Tribunal is of the view that the applicant was circumspect about his sexuality to work colleagues and family in the past in Vietnam, but does not accept that he was hiding his sexuality from everyone, given his willingness to meet other men through online dating. Given this the Tribunal is satisfied that the applicant will not seek to live discreetly on return to Vietnam. The representative submitted that the fact the applicant was able to chat with men online does not indicate that he was able to live openly as a gay man, rather it indicates that the only communication he was able to have with other men was hidden from public view. As well, she submitted that meeting with other men for a coffee cannot be said to constitute the applicant being able to live an openly gay life and may simply be construed to an observer as two friends meeting for coffee. It is further submitted that it is plausible that the applicant did not feel able to readily socialise during this time, fearing that his sexuality would be discovered.
32. Taking into account High Court authority³, the Tribunal agrees that the applicant should not be required to live discreetly, in order to avoid persecution and it has proceeded on the basis that it may become known in Vietnam that the applicant is homosexual, should he return, either from his own account or possibly through his family.

² Referring to *UNHCR Guideline's on International Protection No. 9 Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and; or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012

³ *Appellant S395/2002 v MIMA* (2003) 216 CLR 473 per McHugh and Kirby JJ at [40] and per Gummow and Hayne JJ at [80].

33. In her written submission to the Department the representative submits, among other things, that if the applicant returns to Vietnam he will be forced to marry against his will, he will be physically and psychologically mistreated, tortured and/or killed by his father and other family members. She submitted that his father's anger is compounded because the applicant is likely to be the only son that may be able to continue the family line. She submitted that the response of the applicant's family to his disclosure of his sexuality constitutes persecution, referring to UNHCR guidelines (referenced earlier) where family or community disapproval manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of honour, is clearly classed as persecution.
34. In his written statement to the Department the applicant stated that his family do not accept him being gay because they believe he has brought shame on them and they are from a conservative community that does not tolerate gay people. He stated that if people in his community know he is gay, his family would lose face, which is important in their culture. Further, because of his sexuality, it is stated that the applicant's father will blame him for not being able to continue the family line by having a son.
35. As set out above, the Tribunal accepts that the applicant's family know he is gay and when he told his parents his father verbally abused him and hit him (in February 2013). His father verbally abused him again when he met him in Australia later that same year, in October 2013. The Tribunal also accepts that the applicant was under pressure to marry in the past by his parents, which is not uncommon. However for the reasons that follow the Tribunal is not satisfied that the applicant's father, or any family members, would seriously harm the applicant because he is homosexual.
36. The Tribunal accepts that the applicant's father was upset when he found out that his son was gay, that he was verbally abusive and that he hit him. The Tribunal also accepts that his father was verbally abusive when he met the applicant in Sydney and continued to apply pressure on him to marry (a woman). Although upset, the applicant's father was not violent toward the applicant in Australia. At the hearing the applicant said his father does not have a lot of contacts in Australia, so it is difficult for him to harm him and that when they met his father did get "really mad" however the applicant intentionally walked away from him, not giving him a chance to hit him (reiterated in the representative's written submissions to the Tribunal). The representative submitted that it is less likely that the applicant's father would harm him in Australia in public than in Vietnam in private. In a post hearing submission the representative stated that the applicant instructed that when he and his father met up his father became angry, raised his voice, the applicant warned his father that they were in Australia, not Vietnam, that it is a free country and he could not hit him here; he then quickly left the scene and his father was unable to be violent toward him because of this; and also the applicant considers that his father would be aware that should he have become violent, the police would have been called. The Tribunal has considered the applicant's evidence and these submissions as to why the applicant's father may not have harmed him during his visit to Australia. The Tribunal is aware that Australia is a different environment to Vietnam and the applicant's father may have been reluctant to show his anger in public when he met his son at the café for the reasons advanced. However, the Tribunal notes that his father did not harm him either at the [product] shop or try to locate him to harm him afterwards, despite staying in Australia for some time at a friend's house. The Tribunal is of the view that if the applicant's father seriously wanted to harm the applicant he would have done so during his stay in Australia in late 2013.
37. The Tribunal also finds aspects of the applicant's evidence about what exactly he fears his father will do (or not do) on return to Vietnam somewhat unclear. For instance, on the one hand the applicant has claimed that his father has disowned him yet on the other hand he claimed that he fears his father will harm him on return. The Tribunal notes in this respect the applicant stated in his written statement to the Department that when he told his father

he was gay his father yelled at him, hit him across the face, told him he was not his son and to leave. At the Tribunal hearing the applicant said that because he has disgraced and embarrassed his family, he is certain his father will not leave him alone and will find all possible ways to achieve his purpose (for him to marry). However the Tribunal notes that this is at odds with the applicant's oral evidence at hearing that his father has not contacted him since two weeks after their meeting at a café in Sydney around October 2013. This indicates to the Tribunal that the applicant's father does not want to have anything more to do with his son, not that he wants to seriously harm him. The Tribunal also notes that the applicant has not contacted his father since then. The Tribunal, having regard to the totality of the evidence before it, is satisfied that the applicant will not have contact again with his father in the reasonably foreseeable future on return to Vietnam and therefore finds remote the chance that he would be seriously harmed by him on return either in the form of forcing him to marry as well as any other physical or verbal harm.

38. The Tribunal accepts that the applicant's family, in particular his father, are upset about his sexuality and are likely to continue to be on return. It accepts that there has been and is likely to continue to be a level of familial disapproval and estrangement and that this disapproval may be expressed verbally. The Tribunal acknowledges how difficult and painful this is for the applicant. However taking into account the above considerations and findings, the Tribunal finds remote the chance that the applicant's father or any of his family members would seriously harm the applicant on return to Vietnam on the basis of his membership of a particular social group of 'gay men in Vietnam'. His fear of persecution on this basis is not well founded.
39. The Tribunal has considered the applicant's claim to fear harm from his family if he continues to refuse to marry on return to Vietnam. It is submitted that his family have always placed pressure on him to marry and to fulfil his obligations to carry on the family line. In her written submission the representative refers to a 2014 article⁴ about, among other things, how men are bestowed with responsibilities of honour and morality as representatives of their family; how getting married and having children (a son) to continue the family line are the highest duties of a man toward his parents and to his kin; how gay men who are also the eldest and/or the only son thus face particularly gendered duties and burdens; and how a failure to comply does not only affect them but also their entire family, who may be socially ostracised.
40. The Tribunal accepts that the applicant was under some pressure to marry from his parents in the past and there exists an expectation that he will marry and have children. The Tribunal also accepts that this expectation contributes to the applicant's father's disappointment and anger at his son's declaration of his homosexuality. However for reasons set out above the Tribunal has found that the applicant does not face a real chance of serious harm at the hands of his father on return to Vietnam on account of his sexuality, and even when combined with his father's wish that his son marry and carry on the family line, finds remote the chance that his father would seriously harm him on return on this basis. On the evidence before it the Tribunal is of the view that the applicant is estranged from his father and does not accept that as a qualified and financially independent adult his father would be able to force him to marry against his wishes and have children. The Tribunal also notes in this respect that on the applicant's evidence at hearing about the ages of his three brothers - [three ages] – apart from his eldest brother whom he claims is infertile, there does not appear to be a reason why his other brothers are unable to have (male) children in the future. Even if they do not, for reasons above, the Tribunal finds remote the chance the applicant's father would seriously harm his son if he continued to refuse to marry

⁴ Citing Pauline Oosterhoff, Tu-Anh Hoang and Trang Thu Quach, 'Negotiating public and legal spaces: the emergency of an LGBT movement in Vietnam', IDS Evidence Report 27, June 2014, p21-22

and have children and continue the family name on return to Vietnam in the foreseeable future.

41. The Tribunal has considered the applicant's claim that his father could force him to marry. When asked at hearing how he could force him to marry against his will, the applicant said that the father has the most power in Vietnamese culture, and the children need to obey. As well, his father has numerous contacts so he can easily find a way, for example if he goes somewhere else to live his father can hire someone to follow him, force him to return, and force him to marry. Noting that the applicant is an educated and independent adult, who has lived away from his father and their home area for over a decade, and the applicant has not 'obeyed' his father in the past, the Tribunal does not accept that his father could force him to marry, as claimed.
42. The Tribunal has considered the submission that the applicant will face serious harm by members of the community and/or the authorities on return to Vietnam on account of his homosexuality.
43. The Tribunal accepts that in high school the applicant was teased, had rumours spread about him, was hit once and had rocks thrown at him one time. However this occurred about [number] years ago and the applicant no longer goes to school and has not claimed to have anything more to do with his former school mates. The Tribunal therefore finds remote the chance that the applicant would face serious harm at the hands of former classmates on the basis of these incidences or for any other reason.
44. The Tribunal also accepts that the applicant's lesbian classmate at university was verbally abused and looked down upon because of her sexuality. However although emotionally painful, the Tribunal is not satisfied being verbally abused and looked down upon constitutes serious harm. Also, these problems related to the applicant's friend at the time, not the applicant.
45. The Tribunal has considered the submission⁵ that the applicant fears he will be psychologically harmed, abused, ostracized and/or physically assaulted by members of the community or the authorities and that he will face discrimination in accessing employment, education, healthcare and other services as a homosexual on return to Vietnam.
46. In his written statement to the Department the applicant stated that in Vietnam people think being gay is an illness and there is a lot of stigma associated with this. He stated that the majority of people in Vietnam do not accept gay people and if he is openly gay, his life will be very difficult. He also stated that he is aware of people being bashed because of their sexuality.
47. The representative has provided detailed written submissions to the Department and Tribunal about, among other things, continued discrimination and stigma against homosexuals in Vietnam, despite reports indicating some progress. Her main points in the submissions are summarised as follows:
 - Despite reports indicating some progress with LGBT⁶ community rights in Vietnam, engrained cultural attitudes persist, particularly in areas outside major cities and it cannot be said that such attitudes have or will change immediately with the development of the LGBT movement. Country information from a variety of sources is referenced to support the contention that people of the applicant's profile continue to face harm in Vietnam.

⁵ In a written submission to the Department dated [in] January 2016

⁶ Stands for Lesbian, gay, bisexual and transgender people

- Whilst some reports describe improvements in tolerance of LGBTI⁷ individuals in Vietnam, this does not reflect broader societal attitudes in Vietnam. A 2014 UNDP and USAID report titled “Being LGBT in Asia: Viet Nam Country Report” is highlighted which noted that discrimination and stigma persist, along with the most recent (2014) United States Department of State Human Rights report on Vietnam which notes the pervasive societal discrimination and stigma still present in Vietnam, despite reported advances.
- Whilst reports confirm that gay pride parades have been permitted to occur in large cities and same sex marriage has been decriminalised, this does not necessarily reflect a change in broader social attitudes or government attitudes including those held by families of LGBT people or their communities. As well, although decriminalised, it is not legally possible for a same sex couple to marry in Vietnam; a report about a gay pride parade in 2014 emphasised that homosexuality remains taboo; and that some commentary speculates that LGBT activism has been tolerated by the Vietnamese government to deflect attention from political issues that may challenge the regime and also benefit Vietnam’s global image.
- The 2014 UNDP/USAID report (referenced earlier) details some challenges faced by LGBT people in Vietnam including being ostracised by the community, and facing discrimination in employment, education and accessing services such as healthcare.
- A consequence of traditional values embedded in Vietnamese culture is that LGBT people continue to face discrimination. Country information referenced from a variety of sources suggests many of the government’s practices are still consistent with traditional Vietnamese values and an example is provided that in May 2015 the Ministry of Culture banned the publication of gay romance novels.
- The changes in law are limited in nature and related to the decriminalisation of same-sex marriage. Reference is made again to the 2014 UNDP/USAID report (after the changes) specifically about the situation faced by LGBT people in Vietnam and, it is submitted, should be accepted as current.
- Country information about the absence of legal protections for LGBTI individuals is a relevant consideration with respect to the applicant’s protection on return and reflects prevailing attitudes.
- The fact that same-sex activities are decriminalised is not evidence that gay men are not at risk of harm from authorities, family members and the broader community. In this context reference is made to the UNHCR guidelines (cited earlier) that indicate that reforms need to be more than merely transitional.
- The absence of NGOs in various parts of Vietnam is likely to result in limited information or publications regarding the plight of LGBTI individuals in these areas.
- Reference is made to a recent *Time* article⁸ about ongoing discrimination and bullying affecting the LGBT community after the law abolishing the ban on same sex marriage.
- Reference is made to a report by UNESCO and an October 2015 article in the *Huffington Post* in which it is stated (among other things), that Vietnam is evolving when it comes to LGBT issues, but is not a leader in gay rights; that LGBT people

⁷ Lesbian, gay, bisexual, transgender and intersex people

⁸ Dated 18 January 2016

face widespread abuse and discrimination, particularly in their homes; that overcoming rigid family attitudes remains one of the greatest obstacles; and that because of traditional norms such as keeping the family line intact and saving face, there is a lot of stigma.

- The 2014 UNDP/USAID report refers to traditional perceptions of sex and sexuality in Vietnamese culture is generally conservative and severe; that most parents of LGBT people have beliefs and perceptions of gender that conform to traditional values; and that it is likely they will not be able to face the truth that their children have sexual orientations, identities and behaviours that deviate from societal norms, and will react disapprovingly and harshly. It is mentioned in the report that LGBT individuals have been discriminated against, physically and psychologically assaulted, abandoned, and 'cured' by their family by many harmful methods. They have also been forced to get married to those they do not love. The report provides case studies outlining situations similar to the applicant.
- Articles are referenced about gays and lesbians mistreated by family members, being resigned to marry straight people upon their families wishes and to cushion themselves from social stigma or of those too afraid to come out to families because of fear of discrimination, stigma, reprimands and harm if they do.
- There is inadequate legal protection for LGBT people (referring to the UNDP/USAID report and an investigation by an Australian NGO).

48. The Tribunal has had regard to these submissions and the country information contained within them, as well as the applicant's concerns articulated in his oral and written evidence to the Department and the Tribunal about returning to his family, community and country as a gay man. However, for the reasons that follow, the Tribunal does not find that the applicant faces a real chance of persecution on return to Vietnam from the authorities or the community as a member of a particular social group of 'gay men in Vietnam.'

49. The most recent country report on Vietnam from the Department of Foreign Affairs and Trade (DFAT) assesses the situation for homosexuals (and others of minority sexual status) in Vietnam as follows:

Same-sex sexual activity is legal in Vietnam provided it complies with other legislation also applicable to heterosexual activity (e.g. non-commercial acts between consenting adults in private). A new Law on Marriage and Family which came into effect on 1 January 2015 removed a ban on same sex marriage. However, under the new law the government does not formally recognise same sex marriages, meaning that same sex couples are not afforded the legal protections that heterosexual married couples enjoy. Transgender people also lack legal recognition, including rights to change their name and gender on official documents.

In practice, there has been a growing acceptance of the rights of lesbian, gay, bisexual, transgender/transsexual and intersex (LGBTI) people in Vietnam, in what remains a largely traditional country. In 2012, Vietnam's first gay pride rally took place, attended by around 100 people. It has since become an annual event, with several hundred people taking part in the third Viet Pride celebration in Hanoi in August 2014.

DFAT assesses that the risk of official discrimination against LGBTI people in Vietnam is low. An LGBT rights advocate was the only civil society representative permitted to leave Vietnam to attend its UPR session in February 2014.

While specific examples of societal discrimination are difficult to uncover, DFAT assesses that the risk of societal discrimination against LGBTI people in Vietnam is

moderate, particularly outside the major cities, where ongoing traditional values make social and family acceptance of LGBTI people uncertain⁹.

50. When this information was discussed at the Tribunal hearing the applicant made the following main points in response:

- He has found out via the media about more open attitudes about homosexuality in Vietnam. However, having been born and having grown up in Vietnamese culture and society he understands the mindset around homosexuality.
- Whilst there are reports about communication channels talking about same-sex (relationships) and a certain acceptance from government, acting on it is another thing. He said he thinks society's habits and cultural practices require another generation before there are changes in thinking. In practice same-sex (couples) are still discriminated against and abused.
- Even after the government passed the law consenting to same-sex sexual activity, there is still ongoing mistreatment and discrimination (he referred to articles he provided to his representative to demonstrate as set out in her submissions).
- Based on his experience, it does not matter how same-sex people are being treated, they are still the ones who are likely to experience a lot of physical and mental suffering.
- In terms of being mistreated, whilst physical wounds can heal, it is quite difficult for mental wounds to be cured and they can remain for the rest of a person's life.
- He knows that there are a lot of (same-sex) people in Vietnam who decide to hide their sexuality and choose to suffer quietly. Some decide to go to the temple to forget and some decide to end their lives to escape from suffering.
- Given the treatment he received from his father when he told him the truth about his sexuality, the applicant fears the treatment would be worse if outsiders knew.
- Whilst there is a lot of information about how same-sex people in Vietnam are being accepted and have government support, according to the applicant's experience and understanding they are treated unequally and are being abused and mistreated and the pain is emotional and mental as well as physical.

51. The representative addressed the information about sexual orientation and gender identity in the DFAT report (as discussed at hearing) in a written submission post hearing, arguing the following main points:

- Whilst some reports describe improvements, this does not reflect broader societal attitudes or that the applicant would not be at risk should he return to Vietnam (reiterating earlier submissions). Recent reports indicate that the LGBTI community in Vietnam continue to face harm from their families, societal stigma and discrimination in accessing employment and health services.
- Reports continue to indicate that gay men in Vietnam are often forced to hide their sexuality for fear of repercussions. The representative noted in this regard that

⁹ DFAT *Country Information Report Vietnam* 31 August 2015 at 3.49 to 5.52

DFAT acknowledges that “specific examples of societal discrimination are difficult to uncover”.¹⁰

- With respect to DFAT’s assessment that there is a low risk of official discrimination in Vietnam, and whilst acknowledging that same-sex relationships are not illegal in Vietnam, there are no specific legal protections for LGBTI people in Vietnam (reiterating earlier submissions). Similarly, despite the decriminalisation of same-sex marriage, same-sex partners are not afforded the same rights as their straight counterparts. It is submitted that the absence of legal protections or positive steps to create equality for LGBTI people is relevant to an assessment of both government and societal attitudes in Vietnam and evidence of limitations in the reported progression of gay rights.
- A lack of support services and the absence of government funding for existing services supports the applicant’s evidence in relation to societal and governmental attitudes toward LGBTI people in Vietnam.
- Consistent with the applicant’s claims about his family’s desire for him to have a son to carry on the family name is a section of the DFAT report that notes the prevalence of abortion in Vietnam and the disproportionate number of boys in the population driven by “societal expectations and cultural norms”.¹¹

52. At the hearing the applicant also described harassment he has been experiencing in the detention centre in Australia from another (Vietnamese) detainee on the basis of his sexuality to illustrate that although the centre is small, discrimination and harassment occurs, let alone in a society like Vietnam. (He provided a copy of his report to the detention security staff to the Tribunal after the hearing.) The Tribunal accepts the applicant may have experienced a level of harassment from another detainee at the detention centre in Melbourne, but notes that this took place in Australia, not Vietnam.

53. The Tribunal has taken into account the representative’s submissions including the country information referenced within them as well as the applicant’s concerns about what might happen to him on return to Vietnam as a homosexual. The Tribunal accepts that a degree of societal discrimination against homosexuals continues in Vietnam and that changes to community attitudes often lag behind legislative changes. However, based on DFAT’s advice as set out above about a growing acceptance of gay rights in Vietnam; that there are no laws prohibiting same-sex sexual activity in Vietnam; and that the risk of official discrimination against LGBTI people are low and the risk of societal discrimination against LGBTI is moderate, the Tribunal finds remote the chance that the applicant would be seriously harmed by the authorities and/or society on the basis of his membership of a particular social group of ‘gay men in Vietnam’ on return to Vietnam in the foreseeable future.

54. For these reasons the Tribunal does not find the applicant faces a real chance of persecution from the community or the authorities on return to Vietnam as a member of a particular social group of ‘gay men in Vietnam’ in the form of being psychologically harmed, abused, ostracized and/or physically assaulted by members of the community or the authorities, as submitted.

55. The Tribunal has considered the submission that the applicant will face discrimination in accessing employment, education, healthcare and other services as a homosexual on return to Vietnam. The representative submitted that the applicant fears he will face difficulties in

¹⁰ DFAT *Country Information Report Vietnam* 31 August 2015 at 3.52

¹¹ DFAT *Country Information Report Vietnam* 31 August 2015 at 3.48

obtaining employment as an openly gay man and referred to a UNDP report that openly gay or transgender people have difficulty finding a job that meets their expectation and competency in Vietnam. Also referenced was a survey where half of the respondents purportedly said they dared not come out in the workplace; a report about LGBTI people continuing to face discrimination in education; and a 2011 report about stigma and discrimination in access to healthcare services for gay men in Vietnam. The representative also highlights a section of the 2014 UNDP/USAID report about discrimination at health care centres, and another report about the double stigma of those with HIV. On this latter point the Tribunal notes that the applicant has not claimed to be HIV positive.

56. In his written statement to the Department the applicant stated that he is aware of people being bashed because of their sexuality and if people knew he was gay it will be very difficult for him to get a job, even if he has the right skills.
57. Taking into account these submissions and the country information contained within them, the Tribunal acknowledges that there may be a level of discrimination against openly gay men (or women) by some employers in Vietnam. However based on the country information the Tribunal is not satisfied that someone like the applicant – who is highly educated, has work experience including at a [business] for a number of years in HCMC in the past – would be denied employment as a gay man. Nor does the Tribunal accept that the applicant would be denied access to health care or other services as gay men, even if services are limited. In terms of education, the Tribunal notes that the applicant has already completed high school and an undergraduate degree. He did not complete his post graduate degree in Australia, and may want to continue his studies on return to Vietnam. However, the Tribunal is not satisfied on the information before it that he would be denied education services as a gay man or for any other reason on return to Vietnam.
58. For these reasons the Tribunal does not accept the applicant would be discriminated against in Vietnam to the extent that he would not be able to access employment, education, health care or other services because he belongs to a particular social group of 'gay men in Vietnam'. His fears of persecution on this basis are not well founded.
59. For these reasons the Tribunal does not find that the applicant faces a real chance of serious harm from the community and/or the authorities on return to Vietnam in the foreseeable future on account of his membership of a particular social group of 'gay men in Vietnam'.

Conclusion – Refugee grounds

60. Having considered the applicant's claims individually and cumulatively, for reasons set out above, the Tribunal finds that the applicant does not face a real chance of persecution on return to Vietnam for any reason in the reasonably foreseeable future and that his fear of persecution is not well-founded.
61. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

Complementary Protection

62. In considering whether the applicant meets the complementary protection criterion under s.36(2)(aa), the Tribunal has considered whether it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant

harm. In this case, the Tribunal has found that the applicant is a national of Vietnam and the Tribunal therefore finds that Vietnam is the 'receiving country' for the purposes of s.5(1).

63. It is submitted that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia there is a real risk that he will be subjected to significant harm at the hands of his father, the community or the authorities as a homosexual. The types of significant harm he will be subject to, it is submitted, are: arbitrary deprivation of life; and/or torture; and/or cruel or inhuman treatment or punishment; and/or degrading treatment or punishment. It is submitted further that in addition to targeted attacks and threats to his life in all parts of Vietnam, there is also more than a remote risk the applicant would suffer significant harm in all parts of Vietnam in the form of cumulative instances of significant ongoing discrimination. As a consequence the applicant would suffer significant, systematic discrimination that would limit his ability to subsist and affect his daily life.
64. For reasons set out above, the Tribunal has not accepted there to be a real chance that the applicant will suffer serious harm if he returns to Vietnam now or in the foreseeable future from his father, other family members, the community or the authorities on the basis of being a homosexual. The Tribunal also does not accept the applicant would be denied access to employment, education, health care or other services as a homosexual in Vietnam. In *MIAC v SZQRB*, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition.¹² For the same reasons the Tribunal does not accept that there is a real risk the applicant will suffer significant harm for reasons of his homosexuality as a necessary and foreseeable consequence of the applicant being removed from Australia to Vietnam.

CONCLUSION

65. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a).
66. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
67. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

68. The Tribunal affirms the decision not to grant the applicant a protection visa.

Nicole Burns
Member

¹² *MIAC v SZQRB* [2013] FCAFC 33 (Lander, Besanko, Gordon, Flick and Jagot JJ, 20 March 2013) per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342].

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

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.

...

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.

...

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.

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 them 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

...

(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.

...