



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

SRI LANKA
IAA reference: IAA20/08289

Date and time of decision: 12 June 2020 16:38:00
M Oakman, Reviewer

Decision

The IAA remits the decision for reconsideration with the direction that:

- the applicant is a member of the same family unit as another person mentioned in s.36(2)(a) and meets the criteria in s.36(2)(b) of the *Migration Act 1958*.

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

Background to the review

Visa application

1. The referred applicant (the applicant) claims to be a Tamil from the Northern Province, Sri Lanka. He arrived in Australia [in] October 2012 and lodged an application for a Safe Haven Enterprise visa (SHEV) (XE-790) on 29 May 2017. On 22 April 2020 a delegate of the Minister for Immigration (the delegate) refused to grant the visa.

Information before the IAA

2. I have had regard to the material given by the Secretary under s.473CB of the *Migration Act 1958* (the Act).
3. On 19 May 2020 the IAA received an email from the applicant's representative with submissions and further information attached.
4. The submissions disagree with some of the findings of the delegate and respond to those findings. To the extent the submissions discuss evidence, including country information, which was before the delegate, and contain argument, I consider this does not constitute new information and I have had regard to it.
5. The further information consists of medical reports in relation to the applicant, his wife and their son (medical information); and media articles in relation to conditions in Sri Lanka (news reports country information). The medical information and the news reports country information were not before the delegate and are new information. The medical information about the applicant and his wife is from May 2020 and post-dates the delegate's decision. The medical information about their son is from March 2020 and pre-dates the delegate's decision. The medical information is personal information in the s.473DD(b) sense. The applicant has satisfied me that s.473DD(b) has been met and given the nature of the information (details about the applicant and his family's current medical conditions) I am also satisfied that there are exceptional circumstances to justify considering the medical information. The news reports country information post-dates the delegate's decision. The submissions address how it is said the information in the news reports impacts on the applicant's risk profile, if returned to Sri Lanka. The applicant has satisfied me that s.473DD(b) has been met and I am also satisfied that there are exceptional circumstances to justify considering the news reports country information.
6. In the submissions the applicant requested that he be granted a fresh interview to provide a detailed response to issues raised with his protection claims. The legislative framework governing the IAA provides for an exhaustive statement of the natural justice hearing rule. The IAA is required, subject to Part 7AA, to review a matter without accepting or requesting new information and without interviewing the applicant (s.473DB). The IAA can obtain new information from an applicant, including at an interview, but can only consider that information in exceptional circumstances. The applicant provided various details about his protection claims in a number of interviews (entry/arrival interview, transferee interview, RSD interview on Nauru and at his SHEV interview) and in written statements (in 2013 and 2017) as well as providing submissions through his representatives to the Department and the IAA. The applicant has had a meaningful opportunity to put his case in relation to his protection claims. I have decided not to exercise my discretion to interview the applicant as requested.

7. In the course of reviewing the material referred by the Department it became apparent that the applicant's wife was granted a protection visa – SHEV 790 XE – on 31 October 2017. Although not relevant to his own protection claims, the exact status of the applicant and his wife is relevant as to the issue of whether he is entitled to the grant of a visa as the member of the same family unit as his wife. Therefore, an interview was conducted with his wife on 9 June 2020 during which she provided convincing responses which indicated that, despite a separate living arrangement (which did involve them and their son still sharing houses a number of days a week) since last year due to her having to live in a regional location because of visa requirements and his difficulties in getting to work if he was also living full time in the regional location, both she and her husband were still together and considered themselves to be in a genuine and ongoing relationship, with their current separated living arrangement only being temporary due to those circumstances. Following that interview, the applicant was invited on 9 June 2020 to provide new information about his relationship with his wife to the IAA by 12 June 2020. A request was also made to the Department on 9 June 2020 for information on whether the applicant's wife visa was a grant under s.36(2)(a), s.36(2)(aa) or another provision, of the Act. The Department provided a response on 11 June 2020 that the applicant's wife was granted under s.36(2)(a). The applicant provided a written response, together with supporting documentation, on 12 June 2020. His response confirmed the substance of the information his wife gave at her interview and his own commitment to a genuine and ongoing relationship with his wife and family and that their current separate living arrangement was only a temporary measure, and their household arrangements which included them and their son having several shared days at each of their residences in the course of the week. The supporting documentation provided examples of their shared financial arrangements and commitments and statements from some of their friends indicating they conduct themselves as a husband and wife and have a good marriage, as well as confirming the nature of their current separate living arrangements.
8. All of the information provided by the applicant, his wife, and the Department about the relationship between him and his wife and her visa grant is new information. As the new information about their relationship and her visa grant was offered in response to the requests or invitations of the IAA, I am satisfied that there are exceptional circumstances to justify considering the new information. Additionally, in relation to the new information provided by the applicant, as it is credible personal information in the s.473DD(b) sense, the applicant has satisfied e that s.473DD(b) is met.

Applicant's claims for protection

9. The applicant's claims can be summarised as follows:
 - He and his family lived in an LTTE controlled area in the Northern Province. His younger brother was forcibly recruited into the Liberation Tigers of Tamil Eelam (LTTE) in 2007, and was subsequently injured and paralysed in fighting in 2008. In 2009 he was forcibly recruited by the LTTE, held for a number of days before he escaped. After he escaped he and his family moved to an Army controlled area where they were placed in refugee camp. During question the applicant revealed his brother was in the LTTE;
 - After he and his family were released from the camp they returned home. In December 2011 the authorities came to his home and questioned the applicant and he told them about his forced recruitment. In July 2012 he was told to report to the authorities again and he was detained for five days, questioned and tortured. He was released but told to report to and sign a register. He was subject to continuous monitoring and harassment. He was afraid he would be killed so he fled Sri Lanka;

- Since he came to Australia the Army continuously monitors his family in Sri Lanka and has visited them to enquire about the applicant's whereabouts; and
- He fears that if he is returned to Sri Lanka he will be harmed by the authorities because he is considered to have LTTE links and is from a LTTE family, and he left while he was reporting and they told him he was not to leave.

Factual findings

10. On the basis of the documents and oral evidence given by the applicant, I accept that the applicant is a national of Sri Lanka. I find that the applicant's receiving country is Sri Lanka.
11. He provided a copy of his marriage certificate in his SHEV application. It confirms, and I accept, that he and his wife married [in] August 2015.
12. The applicant was generally consistent about most of his protection claims, except he did not mention some matters, such as that after he left Sri Lanka the authorities visited his home in Sri Lanka to make enquiries about him, until his SHEV interview. His failure to mention some matters prior to his SHEV interview casts considerable doubt on the credibility of those particular claims. However, for the reasons outlined below, I am not required to address the applicant's claims for protection.

Member of same family unit

13. Under s.36(2)(b) or s.36(2)(c) of the Act, an applicant may meet the criteria for a protection visa if they are a member of the same family unit as a person who (i) is mentioned in s.36(2)(a) or (aa) and (ii) holds a protection visa of the same class as that applied for by the applicant. A person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person: s.5(1). For the purpose of s.5(1), the expression 'member of the family unit' is defined in r.1.12 of the Migration Regulations 1994 to include 'Spouse'. A person is the spouse of another if they meet the definition in s.5F of the Act.
14. In my view both the applicant and his wife provided compelling evidence that they consider that they are married, that their relationship is ongoing and that their current (partial) separate living arrangements are not permanent and they will, and fully intend to, resume living together as the temporary circumstances (job location, visa conditions) are overcome. On the evidence before me, I am satisfied the applicant is in a genuine and continuing married relationship to his wife, whom he met in 2012 when they travelled together in the same boat to Australia and they married in Australia in 2015 and who has been granted a protection visa. They have a mutual commitment to a shared life as a married couple to the exclusion of all others. While the applicant and his wife have lived at separate addresses for the past year, this is due to temporary circumstances rather than any cessation of their relationship; they do not live separately and apart on a permanent basis and have clearly indicated their intention to cohabit in the future.
15. I am satisfied that the applicant and his wife are 'spouses' under s.5F of the Act. I am also satisfied that the grant of the visa is not prohibited by s.91WB of the Act since the applicant applied for his protection visa before his wife was granted a visa.
16. I am satisfied that the applicant is a member of the same family unit as his wife. His wife is a person mentioned in s.36(2)(a) of the Act. The referred applicant meets both limbs of s.36(2)(b).

Decision

The IAA remits the decision for reconsideration with the direction that:

the applicant is a member of the same family unit as another person mentioned in s.36(2)(a) and meets the criteria in s.36(2)(b) of the Migration Act 1958.

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

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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.

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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

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- (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.

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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.