



Australian Government

Immigration Assessment Authority

Decision and Reasons

Referred application

IRAQ

IAA reference: IAA23/10489

Date and time of decision: 5 June 2023 12:25:00

S Haddad, 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 a referred applicant, or their relative or other dependant.

Visa application

1. The applicant is an Iraqi national who arrived in Australia in April 2013 by sea without a valid visa and was considered an 'unauthorised maritime arrival' (UMA). He lodged an application for a temporary protection visa (Subclass 785) (TPV) in December 2016 and was found to be a person to whom Australia owed protection obligations. As a consequence, he was granted a TPV on 10 April 2018. That visa was valid for a three year period from the date of grant (ie until 10 April 2021).
2. Being a temporary protection visa holder, the applicant applied for a further TPV on 9 February 2021, and again on 17 February 2021. This review concerns the first of those further TPV applications.

Validity of the 9 February TPV application

3. Shortly after lodging the further TPV application of 9 February 2021, the Department of Home Affairs deemed that application to be invalid pursuant to s.91K of the *Migration Act 1958*. Section 91K prevents a non-citizen from making a valid protection visa application if they either hold a temporary safe haven visa (Subclass 449) at the time of application or have not left Australia since ceasing to hold such a visa. Relevantly, the provision does not apply UMAs. The applicant had previously held a Subclass 449 visa.
4. In reaching that conclusion, the Department determined that following the Federal Court judgment in *DBB16 v MIBP* [2018] FCAFC 178, which declared the appointment of the port in the Territory of Ashmore and Cartier Islands as a proclaimed port to be invalid, persons such as the applicant, who arrived via that territory prior to 1 June 2013, were not UMAs. As the applicant was not a UMA, had previously held a Subclass 449 visa and had not left Australia since it had ceased, his TPV application of 9 February 2021 was considered invalid.
5. The Department subsequently revised that view and determined the application was in fact valid. It appears that as the applicant was no longer a UMA for the purposes of the Act, the previous grant of the Subclass 449 visa to the applicant pursuant to s.195A of the Act (based on the assumption that the applicant was a UMA) was made without power and was invalid.¹ As such s.91K did not prevent the making the further PV application.
6. Having reviewed the material, I am satisfied the 9 February 2021 application is valid. It meets the requirements in item 1403 of Schedule 1 to the Migration Regulations for the making of a Class XD (Subclass 785) visa application, including relevantly 1403(3)(d).²

Events leading to the visa refusal

7. The visa granted to the applicant in 2018 was subject to several conditions including Condition 8570. That condition prohibited the applicant entering Iraq. It also prohibited him from entering any other country unless the Minister was satisfied there were compelling and compassionate circumstances to justify entry and had given written approval for entry.

¹ *MICMSMA v CBW20* [2021] FCAFC 63.

² That is, the applicant is, as required, unable to make a valid application for a Class XA protection visa (having been the holder of a TPV: cl.1401(3)(d)(i)), and was the holder of a TPV (cl.1403(3)(d)(i))

8. In November 2020 the applicant sought permission to travel to Iran later in order to care for his sick mother. In response to that request, an officer of the Department of Home Affairs requested further evidence in support of the travel application. The applicant advised he was unable to provide the requisite evidence and it appears written approval for travel was never given.
9. [In] April 2021 the applicant departed Australia. Consequently, on 30 April 2021, his TPV was cancelled pursuant to s.128 of the Act for failing to comply with Condition 8570(b).
10. It is worth mentioning at this point that in early 2023 legislative amendments to the Migration Regulations 1994 came into force that impacted the status of a large number of outstanding temporary protection visa applications. Relevantly, the Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visa) Regulations 2023 had the effect of deeming (as at 15 February 2023) certain unresolved applications for Subclass 785 and 790 visas to be applications for a Resolution of Status (Class CD) visa, and to have never been valid applications for a Subclass 785/790 visa.³ However, the cancellation of the applicant's TPV meant that his further protection visa application was not amongst those categories of Subclass 785 and 790 visa applications that were taken to be Class CD visa applications. Consequently, the applicant's further TPV application remained on foot for consideration.⁴
11. On 11 May 2023 that further temporary visa was refused on the basis that the applicant was not a non-citizen in Australia at the time of the decision.

Protection visa assessment

12. Under s.36(2) of the Act, the criteria for the grant of a protection visa require that the applicant for the visa is a 'non-citizen in Australia'. This means that a protection visa may only be granted if the applicant is physically present in Australia.
13. As noted above, according to the review material provided to the IAA, the applicant departed Australia [in] April 2021. The applicant did not have the requisite permission to depart, and there is no evidence that he holds an Australian visa of any type, including one that would permit return.
14. As such I am not satisfied that the applicant is a 'non-citizen in Australia' and so does not meet the requirements of s.36(2). The applicant does not satisfy the criteria for the grant of the visa.

Decision

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

³ See item 2 of Part 1, Schedule 1 to the Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visa) Regulations 2023, inserting r.2.08G into the Migration Regulations 1994.

⁴ By operation of Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) Instrument 2019 (LIN19/007), the applicant is also a *fast track applicant*.

Migration Act 1958

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 under the Refugees Convention as amended by the Refugees Protocol 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.

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