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1514968 (Refugee) [2016] AATA 3104 (20 January 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1514968
COUNTRY OF REFERENCE:	Ghana
MEMBER:	Louise Nicholls
DATE:	20 January 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal does not have jurisdiction in this matter.

Statement made on 20 January 2016 at 2:35pm

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.

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. An application has been lodged for review of a decision of a delegate of the Minister for Immigration, dated [in] May 2015, to refuse to grant a protection visa under s.65 of the *Migration Act 1958* (the Act). The review application was lodged with the Tribunal on [date] November 2015. For the following reasons, the Tribunal has found that it has no jurisdiction to review the decision as the application was not made in accordance with the relevant legislation.

2. Pursuant to s.412(1)(b) of the Act and r.4.31 of the Migration Regulations 1994, an application for review of this decision had to be made within 28 days after the applicant was notified of the decision in accordance with the statutory requirements.

3. The material before the Tribunal indicates that the applicant was notified of the decision by letter dated [in] May 2015 and dispatched by post.

4. The Tribunal finds that the application for the protection visa (Form 866C) asked for the applicant's current residential address in Q16 and his current postal address in Q17. The applicant stated in response to both questions that his address was "[address]". On page 14 of the application the applicant declared, amongst other things, that he would inform the Department if he intends to change his address for more than 14 days whilst his application is being considered. The applicant also indicated he did not need an interpreter if called for an interview. He also declared he would inform the Department if he changed his address on Form 866B.

5. The application also asked the applicant if he consented to the Department communicating with him by email and he answered "Yes" and gave an email address.

What are the applicant's submissions on the validity of the application for review?

6. The Tribunal wrote to the applicant inviting him to comment on the validity of his application. The Tribunal put it to him that [in] May 2015 the primary decision had been posted to the last residential address he provided to the Department for the purpose of receiving documents and on that basis he was taken to have been notified of the decision on [date] June 2015. Thus the last day for lodging an application for review was [date] July 2015. As the application was not received until [date] November 2015 the application appeared to be out of time.

7. On 14 January 2016 the applicant's representative wrote to the Tribunal and made written submissions regarding the notification of the primary decision.

8. He submitted that

   - The applicant lodged a valid application for a protection visa on [date] June 2014.

   - The applicant attended an identification test on [date] August 2014.

   - On [date] May 2015 the Department posted a letter by way of registered post to the applicant's last known address inviting him to an interview on [date] May 2015. The letter was returned to the Department on [date] June 2015 and marked as unclaimed. There was no attempt to deliver the letter by any other method.

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- The Department refused the application for a protection visa on [date] May 2015. The refusal notification was posted to the applicant's last known address. The letter was returned to the Department on [date] June 2015 and marked as unclaimed. There was no attempt to deliver the refusal notification by any other method.

- The applicant confirms that he has not received any letters from the Department by post or email.

9. The representative submitted that registered posts being sent to the last known contact address were not being received and were returned on [date] June 2015 and [date] June 2015 respectively. The applicant had provided an alternative method of communication, that is, by email and the Department made no other attempted communication with the applicant.

10. On [date] October 2015 the applicant's representative wrote to the Department seeking a copy of the refusal notification. The representative received a copy of that document on [date] October 2015. The representative submits that the applicant was actually notified of the primary decision on [date] October 2015. On the last page of the submissions the representative submits that the refusal was notified on [date] October 2015 having been deemed to have been received 7 working days from the date of the letter from the Department, which was posted on [date] October 2015. Thus he had 28 days from the date of deemed notification to lodge an application for review.

11. The representative submitted that the delegate had not followed policy advice in PAM 3 with respect to mail which has been undelivered and marked returned to sender.

12. The policy advice extracted by the representative advises officers to check the address of applicants where notifications by post have been returned unclaimed and the notification relates to cancellations of visas that have been held for at least a year.

13. The policy advice also advises that if an email notification is undelivered or has "bounced back" officers should check that the email address was typed correctly and if the notification relates to a cancellation of a visa that has been held for at least a year the Department has tried to find the applicant.

14. With respect to "actual" notification the PAM 3 notes that an undelivered letter with "returned to sender" cannot be relied upon to establish actual notification.

15. The representative submits that the Department must try to find the applicant in attempting to request further information or to notify the refusal of the visa. He submits that all methods of notification were not exhausted when attempting to notify the applicant because they had not tried to find the client by using other methods of communication, such as electronic mail and contact phone number.

16. The representative submits that the first valid notification of the refusal should be taken to be [date] October 2015, and therefore the application for review is a valid application.

What is the law relating to the method of notification of primary decisions?

17. Section 66(1) of the Migration Act and r.2.16(3) of the Regulations require the Minister to notify the applicant of a decision to refuse a visa by one of the methods specified in s.494B of the Migration Act.

18. The methods specified under s.494B are:

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- *handing the document to the recipient* - the Minister or an authorised officer handing the document to the applicant;[1]

- *handing the document to another person* - the Minister or an authorised officer handing the document to another person at the applicant's last residential or business address.[2] That other person must appear to live or work at the address and must appear to be over 16 years of age.

- *posting the document* - the Minister dating the document and dispatching it by prepaid post or by other prepaid means within 3 working days (in the place of dispatch) of the date of the document to the last address for service or last residential or business address provided by the recipient to the Minister for the purposes of receiving documents.[3]

- *faxing, emailing the document* - the Minister transmitting the document by fax, or e-mail, or other electronic means to the last fax number, e-mail address, or other electronic address provided to the Minister for the purposes of receiving documents.[4]

19. If a notice is sent in accordance with s.494B and r.2.55, the 'deemed receipt' provisions, namely ss.494C(4) and 494C(5), in the Migration Act operate whether or not the recipient actually received the notice.[5] It is not a rebuttable presumption that may be disproved by evidence to the contrary.[6] As the Full Federal Court noted in *Tay v MIAC*:

> [Section 494C] must be construed in a statutory context of similarly detailed provisions concerning the methods by which the Minister may give documents to a person when this is a requirement (s.494B) and when it is not required (s.494A) and the identification of the authorised recipient of documents (s.494D). These provisions all evidence concern that there should be certainty in the transfer of documents from the Minister both as to the method and as to the time of delivery.[7]

What is the law relating to multiple alternate addresses?

20. Where multiple alternate addresses are provided by an applicant (e.g. an email and residential address), the Minister may use any one of the methods of notification in s.494B.[8] The multiple alternate addresses do not comprise a list to be followed until actual notification has been achieved.[9]

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[1] s.494B(2).
[2] s.494B(3).
[3] s.494B(4).
[4] s.494B(5).
[5] *Murphy v MIMIA* (2004) 135 FCR 550 at [68]-[71], confirming that s.29 of the Acts Interpretation Act 1901, which provides a document is be delivered in the ordinary course of post unless the contrary is proved, did not apply in circumstances where a notice was sent in accordance with s.494B as s.494C manifested a contrary intention. Cited with approval in *Xie v MIMIA* [2005] FCAFC 172 (Spender, Kiefel and Dowsett JJ, 23 August 2005). *Xie* was subsequently followed in *Tay v MIAC* (2010) 183 FCR 163 at [19]. See also *SZBMF v MIMIA* (2005) 147 FCR 485; *MIAC v Manaf* [2009] FCA 963 (Sundberg J, 31 August 2009); *SZLXG v MIAC* [2008] FMCA 442 (Lloyd-Jones FM, 9 April 2008); *SZMYQ v MIAC* [2009] FMCA 55 (Lucev FM, 3 February 2009); *Gharti-Chhetri v MIAC* [2009] FMCA 375 (Barnes FM, 20 April 2009) at [25]; *Kaur v MIAC* [2010] FMCA 85 (Jarrett FM, 12 February 2010) at [27].
[6] *Tay v MIAC* (2010) 183 FCR 163 at [19]-[26].
[7] *Tay v MIAC* (2010) 183 FCR 163 at [19].
[8] *Maroun v MIAC* [2009] FMCA 535 (Driver FM, 23 July 2009) at [53] (undisturbed on appeal); and *SZKTR v MIAC* [2007] FMCA 1447 (Driver FM, 21 August 2007). In that case, the applicant had changed his postal address but not his residential address. The Tribunal had corresponded with the applicant at his residential address. Federal Magistrate Driver held that this method was acceptable under s.441A (or, by the Minister, s.494B) and that the Tribunal was permitted to use that address rather than a postal address: at [6]. This decision dealt with the Tribunal's prescribed ways of notifying a person under s.441A, which is, relevantly, in substantially the same terms as the methods by which the Minister can notify a person under s.494B. This finding was not disturbed on appeal, *SZKTR v MIAC* [2007] FCA 1767 (Marshall J, 20 November 2007). See also *Pathania v MIBP* [2015] FCCA 932 (Judge Manousaridis, 16 April 2015) where the Court found the Minister was entitled to notify by post under s.494B in circumstances where the applicant had agreed to email communication and Minister had communicated by email up to that point. Upheld on appeal: *Pathania v MIBP* [2015] FCA 1262 (Gilmour J, 19 November 2015).
[9] *Nemuseso v MIAC* [2010] FMCA 957 at [73].

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Consideration

21. The Tribunal has considered the information before it and the submissions made by the applicant's representative.

22. The Tribunal is satisfied that the applicant was notified of the decision in accordance with the statutory requirements.

23. The application form indicates two alternate addresses, one address being both the residential and postal address ([address]) and the other an email address. The applicant made a declaration he would inform the Department of any change of address when he made the application.

24. The evidence indicates that the applicant was notified by one of the methods specified in s.494B, that is, by sending the refusal decision by prepaid post to the last residential address provided to the Minister. Thus the application was deemed to have been received on [date] June 2015 (7 working days after the date of the document). Whilst it is understandable that the applicant may have hoped that the Departmental officer would ensure actual notification, the Tribunal does not consider that the Minister was required to exhaust the list of possible addresses until actual notification took place.

25. The Tribunal has considered the PAM 3 policy advice referred to by the applicant's representative. PAM3 contains guidance to Departmental officers as well as advice on interpretation of the legislation. However, unless there is a statutory duty or binding ministerial direction the Tribunal is not bound by policy or interpretative guidelines; it is required to determine the correct or preferable decision according to law.

26. In any event, the policy referred to by the representative is not relevant to the specific situation in this case. Officers are advised to check the address in cases of unclaimed mail or email rebounds in visa cancellations where the subject visa had been granted for at least one year. The policy underpinning this advice most likely arises because visa holders in cancellation matters are not under any obligation to advise the Department of a change of address in contrast to applicants for visas.

27. The interpretative guidelines in PAM 3 relating to "actual" notifications are not applicable in this matter as the refusal decision was not required to be "actually" notified; the applicant was deemed to have been notified according to the relevant legislation.

28. The Tribunal finds that in accordance with s.494C of the Act, the applicant is taken to have been notified of the decision on [date] June 2015. Therefore the prescribed period within which the review application could be made ended on [date] July 2015. As the application for review was not received by the Tribunal until [date] November 2015 it follows that the application for review was not made in accordance with the relevant legislation and the Tribunal has no jurisdiction in this matter.

DECISION

29. The Tribunal does not have jurisdiction in this matter.

Louise Nicholls
Senior Member

20 January 2016

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