1010743 [2011] RRTA 194 (8 March 2011)

DECISION RECORD

RRT CASE NUMBER:	1010743
DIAC REFERENCE(S):	CLF2010/91741
COUNTRY OF REFERENCE:	Jordan
TRIBUNAL MEMBER:	Gabrielle Cullen
DATE DECISION SIGNED:	8 March 2011
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the delegate's decision refusing to grant a protection visa and substitutes a decision that the protection visa application is not valid and cannot be considered.

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 and Citizenship to refuse to grant the applicant Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of Jordan and Israel arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] July 2010. The delegate decided to refuse to grant the visa [in] November 2010 and notified the applicant of the decision and his review rights by letter [on the same date].

3. The applicant applied to the Tribunal [in] November 2010 for review of the delegate's decision.

4. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

5. The delegate purported to make a decision to refuse to grant the applicant a protection visa. However, the issue in this case is whether the protection visa application was a valid application.

RELEVANT LAW

6. Section 36 of the Act establishes a class of visa known as a protection visa. Section 46(1)(d) of the Act (as amended with effect from 16 December 1999) relevantly provides that, subject to certain other requirements, an application for a visa is valid only if it is not prevented by s.91P (non-citizens with access to protection from third countries).

7. Section 91P provides that if Subdivision AK applies to a non-citizen at a particular time the application is not a valid application. Section 91N relevantly specifies that Subdivision AK applies to a non-citizen at a particular time, if at that time the non-citizen is a national of 2 or more countries: s.91N(1). The question of whether a non-citizen is a national of a particular country for the purposes of this section, must be determined solely by reference to the law of that country: s.91N(6). The Minister has a personal discretion pursuant to s.91Q to determine by written notice that s.91P does not apply to a non-citizen for a period of 7 working days after the notice is given, if satisfied that it is in the public interest to do so.

8. Subsection 47(1) of the Act provides that the Minister "is to consider a valid application for a visa". Subsection (3) provides that "to avoid doubt, the Minister is not to consider an application that is not a valid application". Section 65(1) of the Act provides for the power of the Minister to grant or to refuse to grant a visa after the Minister has considered a valid application for the visa. A decision to refuse to grant a protection visa is an RRT-reviewable decision: s.411(1)(c). Section 415(1) of the Act provides that the Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision. It follows that if a protection visa application is not valid the Tribunal can consider the review application,

but cannot make a decision on the merits of the visa application: *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486; see also *SZGME v MIAC* (2008) 168 FCR 487 per Black CJ and Allsop J at [30]

CLAIMS AND EVIDENCE

9. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Primary Application

10. The applicant indicated in a statutory declaration attached to his application form that he is a dual Israeli and Jordanian national. He claims he was born in Amman, Jordan on [date deleted] and lived in Israel from 2000 until September 2009. He claims his wife lives in Israel and father (deceased) and siblings in Jordan. The applicant attached to his application a copy of his Israeli passport issued [in] February 2008 and valid until [a date in] February 2018.

11. The applicant claims he was born a Sunni Muslim and he became interested in Christianity in 2004 and in May 2009 he was saved. He claims he has converted to Christianity and as a born again Christian he is unable to openly practise his faith in either Jordan or Israel He claims his wife has secretly also converted.

12. An interview was organised with the Department delegate scheduled [in] November 2010, however the applicant requested that the decision be made on the information submitted in his protection visa application.

13. The delegate in his decision appears to have overlooked the requirements of ss.91P and 91N as they were not addressed in the decision record.

Application for Review

14. The applicant was represented in the review by his registered migration agent.

15. [In] December 2010 the Tribunal wrote to the applicant, via his representative, asking the applicant to confirm he currently holds Jordanian nationality and whether his father at his birth held Jordanian nationality. It also asked him to provided evidence of his and his father's Jordanian nationality.

16. [In] January 2010 the applicant provided a copy of his Jordanian passport, issued [in] February 2008 and valid until [a date in] February 2013.

17. The applicant appeared before the Tribunal [in] March 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages

18. The applicant was represented in relation to the review by his registered migration agent.

19. The applicant confirmed that he was a national of both Jordan and Israel. The Tribunal explained to him Section 91P and suggested to him that his application for a protection visa may not be valid as he is a dual national. It noted that under Section 91Q only the Minister has the discretion to decide that Section 91P does not apply. It noted there is no evidence that

an application has been made to the Minister and that he has decided that section 91P does not apply.

20. The representative indicated that he understood and that the applicant would now go to the Minister.

FINDINGS AND REASONS

21. The Tribunal must consider whether the applicant is a national of two or more countries at the time of application.

22. Section 91P prevents persons who are subject to Subdivision AK of Division 3 of Part 2 of the Act from making a valid application for a protection visa. Section 91N specifies those persons who are subject to Subdivision AK Such persons include non-citizens who at the relevant time were a national of two or more countries. The prohibition in s.91P is subject to s.91Q which provides that the Minister may, if he thinks that it is in the public interest to do so, give written notice that s.91P does not apply to a visa application made by a particular person in the following seven days: s.91Q(1).

23. The evidence, in the form of current valid passports of Israel and Jordan in the applicant's name, establishes that at the time of application the applicant was a national of both Jordan and Israel. The applicant confirmed that he is a national of both countries at hearing.

24. The Tribunal finds that there is no evidence, pursuant to s.91Q, that the Minister has determined by written notice, that s.91P does not apply to the applicant.

25. The Tribunal therefore finds that the applicant was and is a national of both Israel and Jordan and he is, therefore, a dual national. Accordingly, the Tribunal finds that the applicant is precluded by s.91P from making a valid application to the Department.

CONCLUSIONS

26. For the reasons given above the Tribunal finds that the applicant's protection visa application is not valid and that the Tribunal has no power to consider it.

DECISION

27. The Tribunal sets aside the delegate's decision refusing to grant a protection visa and substitutes a decision that the protection visa application is not valid and cannot be considered.