

1004874 [2010] RRTA 665 (6 August 2010)

DECISION RECORD

RRT CASE NUMBER: 1004874

DIAC REFERENCE(S): CLF2010/56608

COUNTRY OF REFERENCE: New Zealand

TRIBUNAL MEMBER: Susan Pinto

DATE DECISION SIGNED: 6 August 2010

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 a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of New Zealand, arrived in Australia [in] May 2002 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] May 2010. The delegate decided to refuse to grant the visa [in] June 2010 and notified the applicant of the decision and her review rights [on the same date].

2. The applicant applied to the Tribunal [in] June 2010 for review of the delegate's decision.
3. 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.
4. 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

5. 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).
6. 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.
7. 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

8. 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.
9. The applicant indicated on the application form that she was born in Samoa on [date deleted: s.431(2)]. The applicant indicated that she speaks, reads and writes English. The applicant states that her citizenship at birth was Samoan and that her current citizenship is New Zealand. The applicant stated on the application form that she travelled to Australia as a New Zealand citizen and that she arrived in Australia [in] December 1997. The applicant indicated that she was educated in Samoa until the age of 10. The applicant also indicated that she migrated from Samoa to New Zealand in 1987. Samoan and that her current citizenship is New Zealand. The applicant stated on the application form that she travelled to Australia as a New Zealand citizen and that she arrived in Australia [in] December 1997
10. The applicant stated, in response to question 41, that she is seeking protection in Australia so that she does not have to return to New Zealand. In response to question 42, as to why she left that country, the applicant stated the following:

I came to live in Australia in 1997. My entire family is here. I have nobody in New Zealand and do not believe I could survive there. I believe I have been treated unfairly and that my right to remain in Australia should not have been cancelled. I intend to take my case to the Minister for Immigration on Humanitarian groups (sic).

11. The Department's decision record indicates that although the applicant did not provide a copy of her New Zealand passport to the Department, she entered and departed Australia on several occasions using that passport.
12. The applicant was interviewed by the delegate [in] May 2010. The applicant's representative attended the interview. The Tribunal has listened to the CD Rom recording of that interview and a summary follows:

The applicant was asked whether she is claiming to be a refugee from Samoa or New Zealand. The applicant indicated that she did not know. The applicant's representative explained the definition to the applicant. The applicant confirmed that she is a citizen of New Zealand and Samoa. The applicant confirmed that she is claiming to be a refugee from both New Zealand and Samoa. The applicant is separated from her former husband and is now engaged to be married. The applicant's fiancé is an Australian citizen of [Asian] background. The representative submitted that the applicant has retained her Samoan citizenship under Samoan law and she is a dual citizen. The applicant grew up without her mother and father and was brought up by her grandparents. The applicant has a son who is [age]. She had him when she was [young] when she became pregnant. The applicant was locked in the house and forced to give birth to her son. The applicant's son was taken from her when she was 2 years old. The applicant had to try to help her brother and sister. The applicant's son was given to her [distant relative] and she put him in her name. The applicant ran away at a later time and again became pregnant and had another child in [year deleted: s.431(2)]. The applicant was later taken to New Zealand by [Mr A] in 1987. The applicant did not go to the police for help because there is only one police station and she could not get assistance and had concerns for her sister and brother. The applicant's family now all lives in Australia.

When the applicant moved to New Zealand, [Mr A] moved to Samoa to help the people after the Samoan earthquake. When he returned to Samoa, [Mr A] opened another woman. The applicant felt that she was misled and was very upset as she had children with [Mr A]. The applicant has 6 sons in total. The applicant and [Mr A] broke up in 1992. He took one of her sons away and she did not see the son again. The applicant came to Australia and stayed with her brother and sister. The applicant also has cousins and aunts and uncles in Australia and was very happy when she came to Australia.

The applicant was asked why she cannot return to New Zealand. The applicant stated that she is concerned that her son will be taken away from her in New Zealand. The applicant does not wish to return to New Zealand because her parents are buried in New Zealand and she has all family in Australia, including 10 children. The delegate explained that the delegate has not provided any refugee related claims. The applicant stated that there is the race issue and her name is “[deleted: s.431(2)” and her son has been taken away from her. The applicant’s former husband made her suffer. The applicant has had a terrible life and wants to stay in Australia with her son.

The applicant was given an opportunity to discuss her claims with her representative. No further recording of the interview after the break.

Application for review

13. Following the lodgement of the application, the applicant’s representative provided a submission to the Tribunal, stating that the applicant believes that her right to remain in Australia was terminated unfairly and she is deeply concerned for the welfare of her youngest son and other family members for whom she is responsible if she is forced to leave in Australia. The representative states that the applicant wishes to take her case to the Minister.
14. The representative provided a copy of a report from the Australian Human Rights Commission in relation to a complaint made by the applicant relating to her detention in Villawood Immigration Detention Centre. The report concludes that the applicant’s detention was arbitrary and the “interference with her family occasioned by her detention was also arbitrary” The recommendation is that the applicant immediately be placed in a less restrictive form of detention.
15. The representative also provided a report from a Psychologist in relation to the applicant’s psychological condition and a draft statement by the applicant in which she refers to the problems that she has encountered whilst in Villawood Immigration Detention Centre and the serious distress that this has caused the applicant.
16. A letter addressed to the Department, “Human Rights” and the Ombudsman was also provided to the Tribunal. The applicant states in that letter that she is sad and regretful and has difficulty sleeping and eating and is very concerned for the welfare of her son and other family members due to her lengthy detention.

Tribunal hearing

17. The applicant appeared before the Tribunal [in] July 2010 to give evidence and present arguments.
18. The applicant confirmed to the Tribunal that she is a citizen of New Zealand and she was born in Samoa to Samoan parents. The Tribunal indicated that she appeared to have both

Samoa and New Zealand citizenship as the Samoan government allows its citizens to retain their Samoan nationality upon the grant of another citizenship. The Tribunal advised the applicant that in such circumstances it appears that she has dual citizenship which means that she has not made a valid application for a protection visa to the Department. The Tribunal also indicated to the applicant that it did not appear that she had made any claims to be a refugee on her application form and that this may also indicate that her application to the Department is invalid.

19. The applicant indicated that she intends to make an application to the Minister for humanitarian stated that she does not wish to return to Samoa because she is an outcast in Samoa because her circumstances have been reported in [information deleted: s.431(2)] The applicant is would be ashamed and embarrassed if she had to return to Samoa. The applicant also stated that she has lost all of her family members and her parents and two of her children died in Australia and she wishes to remain in Australia The applicant has been in the Villawood Immigration Detention Centre for almost two years and during that time she has lost the opportunity to spend time with her young son and other family members. The applicant wishes to be able to stay in Australia to care for her children and her grandchildren, some of whom are in the care of the Department of Community Services The applicant is also engaged to be married and was unable to marry her fiancé due to her detention.

Independent evidence

20. The New Zealand Department of Home Affairs websites indicates that Samoan citizens may be eligible for the grant of New Zealand citizenship under the *Citizenship (Western Samoa) Act 1982* which provides that the person must be a Samoan citizen and the applicant must have lawfully entered New Zealand on or after 15 September 1982 and can provide evidence that he or she is entitled to reside in New Zealand indefinitely; or he or she was present in New Zealand at any time on the day of 14 September 1982.
21. The Samoan Immigration Department of Prime Minister and Cabinet website indicates that Samoan citizenship by birth is granted to all individuals who are born in Samoa to parents of which at least one is a Samoan citizen. The website also indicates that, subject to the provisions of the *Citizenship Act 2004*, the Minister may order a person's citizenship be cancelled where the Minister is satisfied that the person has been or is disloyal or disaffected towards Samoa. In cases of citizenship obtained through permanent residence, a person may be deprived of Samoan citizenship in cases where the Minister is satisfied that the person has continuously resided overseas for a period of two years and the person is unlikely to reside in Samoa in the future.
22. On 15 July 2010 the Samoan High Commission in Canberra was contacted and advice was requested as to whether Samoa allows dual citizenship with New Zealand.¹ The Samoan High Commission replied on 15 July 2010 and provided the following advice:

With reference to the above subject matter and our tele/con this afternoon ([names]), I wish to confirm that Samoa allows dual citizenship with New Zealand.²

¹ RRT Country Advice Service 2010, Email to Samoan Embassy, Canberra 'Request for assistance from Refugee Review Tribunal (RRT ref: NZL36910)' 15 July.

² Samoan High Commission 2010, Email to RRT Country Advice Service: 'RE: Request for assistance from Refugee Review Tribunal (RRT ref: NZL36910)', 15 July.

FINDINGS AND REASONS

23. The Tribunal must consider whether the applicant is a national of two or more countries at the time of application.
24. 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).
25. The evidence establishes that the applicant was born in Samoa to Samoan parents and she resided in Samoa until 1987. The independent evidence establishes that a person born in Samoa to Samoan parents acquires Samoan nationality upon birth. The Tribunal finds, therefore, that the applicant acquired Samoan nationality upon her birth in Samoa. There is no evidence before the Tribunal that at the time the applicant made the application to the Department that she has renounced or had her Samoan citizenship cancelled, or that she has been deprived of Samoan citizenship. The independent evidence also indicates that the Samoan authorities permit a Samoan citizen to hold both Samoan and New Zealand citizenship. The Tribunal is, therefore, satisfied that the applicant was a national of Samoa at the time of application.
26. The evidence also establishes that the applicant subsequently acquired New Zealand citizenship and traveled to Australia on a New Zealand passport. The independent evidence set out above indicates that the New Zealand authorities permitted certain Samoan citizens to acquire New Zealand citizenship. The Tribunal finds, therefore, that the applicant was a national of New Zealand at the time of application.
27. 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.
28. The Tribunal finds that the applicant was a national of both Samoa and New Zealand and she 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.
29. The Tribunal has had regard to the submission to the Tribunal. However, the Tribunal is not satisfied that there is any evidence which alters the Tribunal's above findings. The Tribunal also notes that the applicant does not appear to have made any refugee related claims on the application form to the Department. Whilst the Tribunal considers that this raises further issues relating to the validity of the application, given the above findings it is unnecessary for the Tribunal to consider this issue.

CONCLUSIONS

30. 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.
31. The Tribunal notes that the applicant has indicated that she wishes to seek Ministerial Intervention pursuant to s.417 of the Act. The Tribunal considers that the applicant's

circumstances appear extremely unfortunate and the majority of her family members, including children and grandchildren reside in Australia. However, the Tribunal has limited information before it relating to the reasons for the cancellation of the applicant's Subclass 444 visa, and any intervention is a matter for the Minister's discretion.

DECISION

32. 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.