1318315 [2014] RRTA 290 (15 April 2014)

DECISION RECORD

RRT CASE NUMBER:	1318315
COUNTRY OF REFERENCE:	Afghanistan
TRIBUNAL MEMBER:	Kay Ransome
DATE:	15 April 2014
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies cl.866.221(2) of the Migration Regulations.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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.

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

2. The applicant, a citizen of Afghanistan, applied to the Department of Immigration for the visa [in] February 2013 and the delegate refused to grant the visa [in] December 2013 on the basis that the applicant did not meet cl.866.222 of the Migration Regulations 1994 (the Regulations).

3. The applicant appeared before the Tribunal [in] February 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.

4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing and provided written submissions.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The applicant confirmed at the hearing that he travelled to Australia by [boat] arriving [in] August 2012. He did not have a valid visa to enter Australia. He made an application for a Protection (Class XA) visa [in] February 2013. At the time he made the application, Class XA contained only one subclass, Subclass 866. If an applicant is found to meet the criteria for the grant of a Subclass 866 visa, he or she may remain permanently in Australia.

6. [In] October 2013, before the applicant's Protection visa application was determined by a delegate of the Minister, the Migration Amendment (Temporary Protection Visas) Regulation 2013 (the amending regulation) amended the Regulations to introduce a new subclass into Class XA (Protection visas). The new subclass was Subclass 785 (Temporary Protection).

7. Under the amending regulation, from 18 October 2013, an application for a Subclass 866 visa was only valid if the applicant last entered Australia lawfully, was immigration cleared, and did not hold, and had not held a Subclass 785 visa since last entering Australia. Unauthorised maritime arrivals were expressly excluded from making a valid application. An application for a Subclass 785 visa would only be valid if the applicant held or had held a Subclass 785 visa since last entering Australia, or did not enter Australia lawfully, or was not immigration cleared on last entry or was an unauthorised maritime arrival.

8. Relevantly to this application, under the amending regulation, certain existing Protection visa applications which had not been "finally determined" before the amending regulation came into effect were also deemed to be applications for a Subclass 785 visa. These were applications by persons who had made a valid application for a Class XA Protection visa before 18 October 2013 and either: did not hold a visa in effect when last entering Australia; or where not immigration cleared on last entry; or were an unauthorised maritime arrival.

9. A new time of decision criterion (cl.866.222) was also inserted by the amending regulation. This new criterion required that the applicant was not or had not been the holder of a Subclass 785 visa since last entering Australia, held a visa that was in effect when last

entering Australia, was immigration cleared on last entry and was not an unauthorised maritime arrival.

10. [In] December 2013 the applicant was granted a Subclass 785 Temporary Protection visa but refused a Subclass 866 Protection visa on the basis that he did not satisfy cl.866.222 of the Regulations. The applicant applied to the Tribunal for review of the decision to refuse him a Subclass 866 Protection visa [in] December 2013.

11. At 9:46pm on 2 December 2013 the Migration Amendment (Temporary Protection Visas) Regulation 2013 was disallowed by the Senate.

12. With effect from 14 December 2013 a new regulation, the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013, amended the Regulations by inserting a new time of decision criterion for Subclass 866 visas. The new criterion, a new cl.866.222, required that the visa applicant held a visa and was immigration cleared on last entry to Australia and was not an unauthorised maritime arrival.

13. On 27 March 2014 at 12:01pm the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 was disallowed by the Senate.

CONSIDERATION OF ISSUES

14. The criteria for a Protection visa are set out in s.36 of the Act and Schedule 2 to the Regulations. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

15. The delegate of the Minister found that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. The applicant does not seek to challenge that finding and there is not any more recent evidence before the Tribunal which would warrant a different finding being made in this regard. I am therefore satisfied that the applicant is a person to whom Australia has protection obligations and he meets s.36(2)(a) of the Act and cl.866.221(2) of the Regulations.

16. At the hearing the applicant conceded, and it is not in dispute, that he is an unauthorised maritime arrival within the meaning set out in s.5AA of the Act. The applicant has not sought to challenge the decision that he be granted a Subclass 785 visa and that is not an issue before me. The only decision sought to be reviewed is that refusing him a Subclass 866 visa.

17. The issues which arise in this case are, first, what are the criteria that are in effect under the Regulations at the time this decision on review is made and, second, what decision should the Tribunal make.

Criteria to be applied by the Tribunal

18. The decision to refuse the visa was made [in] December 2013 on the basis that the applicant was prevented by cl.866.222 as in force at the time of decision from being granted the visa. At 9:46pm on 2 December 2013 the Migration Amendment (Temporary Protection Visas) Regulation was disallowed by the Senate. The applicant has not put forward any evidence or argument that the decision was made after the Regulation was disallowed and, for the

purposes of this decision, I am content to assume the decision was made prior to disallowance.

19. The effect of disallowance is that the disallowed regulation is treated as if it had been repealed from the time of disallowance (s.45(1) *Legislative Instruments Act 2003*). The Tribunal conducts *de novo* review and this means that cl.866.222 as in force at the time the delegate's decision was made is no longer applicable to the matter before me. The applicant is therefore no longer precluded by the amendments made to the Regulations by the Migration Amendment (Temporary Protection Visas) Regulation from being granted a Subclass 866 Protection visa.

20. However, while the matter has been before the Tribunal, a further regulation, the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013, which commenced on 14 December 2013 inserted a new cl.866.222 into the Regulations which had the effect of preventing the applicant from being granted a Subclass 866 visa. As set out above, that regulation has also been disallowed by the Senate and is not, at the time of this decision, applicable to the applicant's application for a Subclass 866 Protection visa.

21. The time of decision criteria now in force with respect to a Subclass 866 visa are those which were in force immediately before the introduction of the Migration Amendment (Temporary Protection Visas) Regulation. There is no time of decision criterion which precludes the applicant from being granted a Subclass 866 visa on the basis that he is an unauthorised maritime arrival.

What is the appropriate decision?

22. There are presently on foot proceedings before the High Court of Australia concerning the validity of cl.866.222 of the Regulations as in force between 14 December 2013 and 27 March 2014 (*Plaintiff S297/2013 v Minister for Immigration and Border Protection* and *Plaintiff M150/213 v Minister for Immigration and Border Protection*). The applicant's representative has sought an adjournment of this application pending the outcome of the High Court proceedings. The application for adjournment was made prior to the disallowance of the relevant regulation. As cl.866.222 introduced by the Migration Amendment (Unauthorised Maritime Arrival) Regulation is no longer in force and is not relevant to my decision, I do not propose to adjourn this application pending resolution of the High Court proceedings. No purpose would be served by such an adjournment in this case as cl.866.22 the subject of the High Court proceedings is not relevant to my decision.

23. This brings me to the question of what decision the Tribunal should make in the present case. I have found, and have agreed with the delegate's decision, that the applicant is owed protection obligations. The applicant therefore meets cl.866.221(2) of the Regulations as he is a person to whom Australia owes protection obligations under the Refugees Convention. I have also found that there is no longer a time of decision criterion which would prevent the applicant being granted a Subclass 866 visa on the basis of his status as an unauthorised maritime arrival. There are, however, other criteria which must be met before such a visa may be granted. It is therefore appropriate to remit the matter to the department in light of the above findings.

DECISION

24. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies cl.866.221(2) of the Migration Regulations.

Kay Ransome
Principal Member