

1102676 [2011] RRTA 479 (17 June 2011)

DECISION RECORD

RRT CASE NUMBER:	1102676
DIAC REFERENCE(S):	CLF2011/2397
COUNTRY OF REFERENCE:	Vietnam
TRIBUNAL MEMBER:	Bruce MacCarthy
DATE:	17 June 2011
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal does not have jurisdiction in this matter.

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).
2. The applicant, who claims to be a citizen of Vietnam, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2008 and applied to the Department of Immigration and Citizenship for the visa [in] January 2011. The delegate decided to refuse to grant the visa [in] February 2011 and notified the applicant of the decision. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that that decision is an RRT-reviewable decision under s.411(1)(c) of the Act.
3. The applicant purportedly applied to the Tribunal [in] March 2011 for review of the delegate's decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention). Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.
5. An application to the Tribunal for review of an RRT-reviewable decision must be made by the review applicant, or authorised by him or her. Where the review application form is completed by a third party without the purported review applicant's knowledge, consent authority, it will not be an application made by him or her. Whilst the review applicant need not complete the form personally, there must be the requisite intention to apply by the person with standing: *SZMME v MIAC [2009] FMCA 323*.

CLAIMS AND EVIDENCE

6. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to other material available to it from a range of sources. The applicant appeared (by telephone) before the Tribunal [in] June 2011 to give evidence and present arguments. The Tribunal also took evidence from a witness. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages

Protection visa application

7. It was stated in the protection visa application forms and accompanying documents, that the protection visa application was prepared by the applicant without any assistance and without the

use of an interpreter (however, see below). The application indicates that she is a [age deleted: s.431(2)] single student from Vietnam. She left Vietnam legally [in] November 2008 and travelled to Australia with a passport issued in Vietnam in January 2008 and a student visa granted to her in Hanoi [in] October 2008. She had no difficulty in obtaining travel documentation.

8. Prior to her journey to Australia, she had never travelled outside Vietnam. She has never been convicted of any crime or offence and, to the best of her knowledge, she was not the subject of any criminal investigation or any pending criminal charges.
9. The application states that she was seeking protection so that she would not have to return to Vietnam. Her reasons were set out in response to questions 42-46 in application form 866C as follows (with minor editorial amendments to spelling, punctuation, grammar etc., not affecting the meaning):

42 Why did you leave that country?

I had originally come to Australia to study. Now that I have finished my studies I planned to go back to my country but when I contacted my parents my mother told me something was wrong. My father was put in jail for bribery. His business was also closed down. My mother said that he was framed by his competitors so that they could take his part. She told me that it was dangerous right now because they are also looking to take everything from him. This means me and his family. So my mother told me to stay in Australia. I hope that I will not have to go back to my own country and I can get protection here.

43 What do you fear may happen to you if you go back to that country?

That I will be harmed and put in jail like my father..

44 Who do you think may harm/mistreat you if you go back?

His competitors.

45 Why do you think this will happen if you go back?

Because they want to take everything away from him and that is me too.

46 Do you think the authorities of that country can and will protect you if you go back? If not, why not?

No, because they keep my father in jail even though he was framed.

Invitation to an interview

10. [In] January 2011, the Department wrote to the applicant to invite her to attend an interview to discuss her application. She was asked to contact the Department to arrange an interview, if she wished to attend such an interview. The letter stated that, if the writer had not heard from the applicant before the close of business [on a date in] February 2011, he would assume she did not wish to attend the interview and he would assess her application on the basis of the information currently to hand. The letter of invitation was sent by registered post to the applicant's nominated postal address (a post office box in the Sydney suburb of [suburb deleted: s.431(2)]). There is nothing to indicate that the applicant responded to that invitation, and the decision under review records that the applicant did not do so, and did not seek any extension of time in which to attend an interview. There is nothing in the Department's file to suggest that the letter of invitation was returned unclaimed to the Department. The applicant is taken to have received it.

The decision under review

11. In his decision record, the delegate who considered the application said that there was nothing in the claims put forward by the applicant to indicate that her claimed fear of harm had anything to do with any of the five Convention reasons. He noted that she stated that she wished to remain in Australia because she feared harm from her father's business competitors. In short, the delegate found that the claims raised by the applicant related to "personal matters" and that the harm she claims to fear was motivated by reasons other than those specified in the Convention.

Application to the Tribunal

12. The application for review was lodged by hand at the Tribunal's Sydney office. No further claims were made in the application and no comment was on the decision under review.
13. The Tribunal notes that the signature on the application for review, purporting to be that of the applicant, is not the same as the signature which appears in the applicant's 2008 application for a student visa, though it appears to match the signature on the protection visa application lodged in 2011.

Invitation to a hearing

14. [In] April 2011, the Tribunal wrote to the applicant advising that it had considered all the material before it relating to her application, but was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] June 2011. As the application for review had been lodged by hand in Sydney, and the applicant's postal address was in a Sydney suburb, a Member in that city was constituted as the Tribunal. For this reason, the hearing was scheduled to be held at the Tribunal's Sydney office. However, as the applicant's stated residential address was in Victoria, the letter of invitation gave her the option of requesting a video hearing from the Tribunal's Melbourne office. The Tribunal's letter went on to request the applicant to respond to the invitation.
15. The applicant did not appear before the Tribunal on the day and at the time and place at which she was scheduled to appear. However, some three hours after the scheduled time of commencement the applicant presented at another location (in Western Australia) and sought a hearing. The Tribunal arranged to take evidence by telephone.

Evidence given at the hearing

16. Soon after the commencement of the hearing, a witness who said he was a business partner of the applicant's fiancé, spoke on the applicant's behalf and said she had been the victim of some kind of scam by a person purporting to be a migration agent. He said that the applicant had a valid student visa but that person had persuaded her to cease her studies in order to work. That person (whose business card the applicant had) said that she would make arrangements to facilitate this for a fee which apparently ran into several thousand dollars.
17. The witness said that the "migration agent" had apparently lodged an application for protection, though the applicant knew nothing about that. In particular, he said that the applicant had not authorised any application to the Tribunal. He said that there were some 15 other people similarly misled by that "agent." The witness said that he had only recently ascertained the facts of the situation on the applicant's behalf. The applicant had been given a copy of the Tribunal's

letter of invitation to a hearing, which had been endorsed with handwriting to the effect that, should she wish to respond to the invitation, she should seek a hearing at the AAT offices in Perth. The witness said that, in the circumstances there did not appear to be any point in continuing the hearing.

18. The Tribunal said it needed to verify a few points with the applicant. In particular, the applicant confirmed that she had not authorised any application to the Tribunal and had not signed it. She said she had not seen the decision under review, and that the claims made in the original application had nothing to do with her. The Tribunal said that this might lead it to conclude that there was no valid application before the Tribunal, in which case it would have no jurisdiction to consider the application. However, in case it did have jurisdiction, it needed to address the question of whether or not the applicant was a refugee.
19. The Tribunal said that it understood she might wish to remain in Australia because she had a fiancé here. It asked if, aside from that consideration, there was any reason why she would fear to return to Vietnam. She said that there was no such reason. The Tribunal said that, in these circumstances, if the Tribunal were to conclude it had jurisdiction, it seemed clear that it would find that she was not a refugee. The applicant said she understood this.
20. The applicant provided her current residential address and said she had never resided in Victoria.
21. The Tribunal said that, it would be reporting the conduct of the purported migration agent to the Department. It suggested that the applicant should make a similar complaint and that she should seek advice from the Department about her situation.

FINDINGS AND REASONS

22. The Tribunal accepts the applicant's oral evidence. Had it concluded that it had jurisdiction to consider the merits of the application, the Tribunal would have found that the applicant does not have a well-founded fear of persecution in Vietnam and is therefore not a refugee. However, for the reasons which follow, the Tribunal finds it does not have jurisdiction.
23. The applicant said that she had no knowledge of the claims originally made in the application to the Department and, in particular that she had not seen the decision under review, had not authorised or signed the application for review, and had not seen it. As noted above, the Tribunal has seen the applicant's signature on the original application for a student visa, which she made in 2008. That signature is completely different from the signature which appears on the application for review.
24. In these circumstances, the Tribunal finds that the applicant did not authorise the application for review received at the Tribunal's office [in] March 2011.

CONCLUSIONS

25. For these reasons, the application for review was not valid and the Tribunal has no jurisdiction in this matter.

DECISION

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