0808551 [2009] RRTA 60 (10 February 2009)

DECISION RECORD

COUNTRY OF REFERENCE:	Stateless
RRT CASE NUMBER:	0808551
DIAC REFERENCE NUMBER:	CLF2005/21808, OSF2004/074468
TRIBUNAL MEMBER:	Paul Fisher
DATE:	10 February 2009
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 stateless and formerly resident in Kuwait, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

3. The delegate refused the visa application on the basis that as the applicant had been granted a Resolution of Status (Class CD) (Subclass 851) visa, he did not satisfy cl.866.232 of Schedule 2 to the Migration Regulations 2004 (the Regulations).

4. The applicant applied to the Tribunal for review of the delegate's decision.

5. 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.

RELEVANT LAW

6. 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.

7. 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).

8. 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.

9. Clause 866.232, one of the mandatory, time-of-decision criteria for the subclass 866 visa, provides that *the applicant does not hold a Resolution of Status (Class CD) visa*. This clause was introduced by Schedule 1 to the *Migration Amendment Regulations 2008 (No. 5)* (SLI 168 of 2008).

10. The application of these amendments to applications not finally determined is set out in the transitional provision, clause 4, which includes the following:

> The amendments made by Schedule 1 apply in relation to an application for a visa made, but not finally determined (within the meaning of subsection 5(9) of the *Migration Act 1958*), before 9 August 2008.

11. Section 82(2) of the Act provides that a substantive visa held by a non-citizen ceases to be in effect if another substantive visa (other than a special purpose visa) for the non-citizen comes into effect.

CLAIMS AND EVIDENCE

12. The Tribunal has before it the Department's files 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, including departmental movement records.

Background

13. The applicant is a 30 year old, stateless Palestinian born in Kuwait.

14. He first arrived in Australia as the holder of a Subclass 451 Secondary Movement (Relocation)(Temporary) visa granted to him while he was detained at an Offshore Immigration Reception and Processing Centre in Country A.

15. The applicant then applied for a subclass 866 Protection visa.

16. Some years after his application, the Department wrote to the applicant advising him that the Minister had agreed to exercise his power pursuant to r.866.228A(b) to allow the applicant early access to a Permanent Protection visa.

17. However, the Department again wrote to the applicant some months after explaining the new arrangements for the abolition of Temporary Protection and Temporary Humanitarian visas, and the processing of the holders of such visas through the mechanism of the Resolution of Status (Class CD) (Subclass 851) visa, pursuant to the provisions introduced by SLI 168 of 2008. The CD visa class contains only the one subclass, Subclass 851, hereafter referred to as the Resolution of Status visa

18. The applicant was granted a Resolution of Status visa that year. Departmental records indicate that the applicant was notified of the decision in person the same day.

19. At the time of notification, the applicant was invited to withdraw his Protection visa application. He declined to do so, objecting to the Department that he had not applied for this visa, nor agreed to it being granted to him. He wished instead to be granted a Subclass 866 visa, and appeared to believe that the Department was trying to foist upon him a visa which was inferior to the Protection visa for which he had applied.

20. The Tribunal notes that although there does not appear to be any discrete decision record of the protection visa refusal, the reasons for the decision are nevertheless explained in the letter notifying the application of the decision, referred to hereafter as the primary decision.

Review Application

21. The applicant applied to the Tribunal for review of the primary decision within the prescribed timeperiod for commencing a review and enclosed a copy of that decision.

22. The Tribunal then wrote to the applicant inviting him to attend a proposed hearing scheduled

23. The applicant appeared before the Tribunal to give evidence and present arguments.

24. The Tribunal explained to the applicant that the issue in dispute was whether he was precluded from satisfying cl.866.232, and thereby from being entitled to a Subclass 866 Protection visa, by virtue of his holding a Resolution of Status visa The Tribunal noted that the primary decision indicates that he is the holder of such a visa.

25. The applicant indicated that he understood this point, but denies that he does in fact hold such a visa. He explained that he had not applied for that visa, nor had he accepted it. The applicant considers that he is still the holder of the Subclass 451 Secondary Movement (Relocation)(Temporary) visa granted to him several years earlier, evidence of which was placed in his travel document stating that the visa is valid until a specified date.

26. The applicant expressed dissatisfaction that his application for a Protection visa had been sidelined, particularly given that the Minister had only recently agreed to exercise his power to allow the applicant early access to a Permanent Protection visa. He also questioned the validity of the law which could grant him a visa which he did not want and would not accept.

27. The Tribunal indicated that regardless of these circumstances, it was bound to apply the relevant law. The Tribunal's understanding of that law is that upon the applicant being granted a Resolution of Status visa, his Subclass 451 visa had ceased to have effect

28. The applicant said he understood this, but nevertheless wished to have a decision made as soon as possible so he could seek judicial review before, as he saw it, his visa expired soon. He further indicated that he intends to take this matter to the High Court.

29. The Tribunal suggested that the applicant obtain independent legal advice before taking such as step, noting that it could have serious costs implications.

FINDINGS AND REASONS

30. As indicated above, one of the mandatory time-of-decision visa criteria as set out in cl.866.232 is that the applicant not be the holder of a Resolution of Status visa.

31. The applicant argued that he does not hold such a visa because he did not apply for it and has not accepted it. He pointed to the visa evidence label in his travel document, suggesting that he holds a valid Subclass 451 visa, as evidence in support of his contention.

32. However, on the basis of its understanding of the applicable law, and the evidence before it, the Tribunal does not accept this contention. The primary decision, a copy of which was given to the Tribunal with the review application, indicates that the applicant was granted a Resolution of Status visa, and the Tribunal finds accordingly. The Tribunal also finds, having regard to s.82(2) of the Act, that the Subclass 451 visa held by the applicant ceased to be in effect at the point when the Resolution of Status visa was granted to him. He is therefore, at the time of the Tribunal's decision, the holder of Resolution of Status visa and no other visa.

33. Consequently, the Tribunal finds that the applicant does not satisfy the requirements of cl.866.232, for the reason that his is, at the time of the decision, the holder of a Resolution of Status visa

CONCLUSIONS

34. As the applicant does not satisfy one of the mandatory criteria for the grant of a Protection visa, the Tribunal therefore has no choice but to affirm the decision under review.

DECISION

35. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

I certify that this decision contains no information that is the subject of a direction pursuant to section 378 of the Migration Act 1958.

Sealing Officer's I.D. PRRTTD