0809091 [2009] RRTA 138 (5 March 2009)

DECISION RECORD

RRT CASE NUMBER:	0809091
COUNTRY OF REFERENCE:	Korea, Republic Of
TRIBUNAL MEMBER:	Ms Christine Long
DATE:	5 March 2009
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the delegate's decision and substitutes a new decision that no valid application for protection visa has been made by the applicants.

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants are citizens of Korea The first named applicant arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter

3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.

4. The applicants applied to the Tribunal for review of the delegate's decisions.

RELEVANT LAW

5. Section 47(1) of the Act that the Minister "is to consider a valid application for a visa" Section 47(3) precludes the Minister from considering an application that is not a valid application. Section 65 requires the Minister, after considering a valid application for a visa, to grant the visa or refuse to grant the visa. Section 46 addresses the requirements for a valid application for a visa. Regulation 2.07(3) of the Regulations provides that an applicant must complete an approved form in accordance with any directions on the form. The prescribed form for a Protection (Class XA) visa is Form 866. That form provides for a statutory declaration to be completed by the applicant that the information provided is complete, correct and up-to-date in every detail.

6. 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

7. The Tribunal has before it the Department's file relating to the applicants including the delegate's decision record. The Tribunal also has had regard to the material referred to in the delegate's decision. The Tribunal also has before it the applicant's application to this Tribunal for review.

8. In the application for protection visa application claims are made that the first named applicant fears harm in her country because she visited country A to help relatives there without permission of authorities in her country and will be sentenced and seen as a spy if she returns to Korea.

9. The applicant later submitted a statutory declaration to the Department indicating that she did not complete the application for protection visa form submitted to the Department and has no knowledge of what is written in the form. She states that the application was lodged without her knowledge. She said that she did not give anyone any money to pay for the application and the signature on the form is not hers. She gave her photograph to a person who was introduced to her by a church member; he helped her with another visa application. She said that she believed that the current application was to be submitted to the Minister. She states that there is no problem or issue such as religion or war that would prevent her returning to South Korea. She states that she wants to remain in Australia as she and her family have lived for many years in Australia.

10. There is a statement on the Departmental file received from the applicant essentially stating that the family has had a difficult time in Australia but she and her children are integrated into Australian society and culture, her children have grown up in Australia and have gone to school here and it would be very difficult for them to return to Korea. There is also a statement from one of the first named applicant's children, essentially stating that he has grown up in Australia, has friends and connections here and wants to remain in Australia He states that he does not know much about Korean culture or life in Korea and would find it very difficult to return there. On the Departmental file there is also a letter from the first named applicant to the Minister requesting that the family be permitted to remain in Australia on compassionate grounds

11. In the application for review the applicant makes no new claims.

12. The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.

13. At the hearing the applicant essentially confirmed that she did not fear returning to her country because of any Convention ground. Rather she said that she and her family want to remain permanently in Australia as they have lived in Australia for a number of years and the children love Australia; her youngest son does not speak Korean.

14. The Tribunal asked the first named applicant about the application for protection visa. She confirmed that she did not make, authorise or consent to the application for protection visa and nor did any member of her family. She said that the first time she knew about the application was when the delegate invited her to an interview to speak about her claims.

FINDINGS AND REASONS

15. 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 applicants have made a valid application for review under s.412 of the Act.

16. The Tribunal finds that the applicant's are citizens of the Republic of Korea and are who they claim to be. The first named applicant produced her Korean passport to the Tribunal and copies of the first pages of the applicants' Korean passports are on the Departmental file.

17. Essentially the applicant claims that she wants to stay in Australia with her family permanently because they have lived here for many years now and have integrated well into life in Australia and the Australian society; she claims her children are unfamiliar with the life and culture in Korea. She claims that neither she not any of her family members made or consented to the application for protection visa nor did they authorise any one else to make the application on their behalf. The applicant does not claim to fear harm or persecution in her country.

18. The Tribunal accepts that the first named applicant and her family have lived in Australia for many years now and that her children have gone to school here and are unfamiliar with life and culture in their own country.

19. The Tribunal finds that the application for protection visa was completed and lodged without the knowledge of the applicants and that they did not consent to or authorise any other person to lodge the application for protection and make the claims in the application. It accepts that none of the applicants signed the application or paid for the application. It accepts that first named applicant believed that an application was being made to the Minister for her and the family to stay in Australia on compassionate grounds because they have lived here for many years.

20. Whilst it is not necessary for an applicant to actually complete the application form for it to be valid (see *NAWZv MIMA* [204] FCA 160"), it is nevertheless necessary for the applicant to have "made" the application, that is it must be made with his or her knowledge and consent. Given the Tribunal's findings above that the applicants had no knowledge of the visa application and did not consent to it being made on their behalf, the Tribunal finds that their application for protection visas is not valid. It follows that the Tribunal has no power to consider the merits of that application.

DECISION

21. The Tribunal sets aside the delegate's decision and substitutes a new decision that no valid application for protection visa has been made by the applicants.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.
Sealing Officers ID: PMRT01