1501366 (Refugee) [2015] AATA 3338 (18 August 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1501366
COUNTRY OF REFERENCE:	Albania
MEMBER:	Marten Kennedy
DATE:	18 August 2015
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision to refuse to grant the applicant a Temporary Protection (Class XD) visa.

Statement made on 18 August 2015 at 12:34pm

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

1. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] January 2015 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of Albania, applied for the visa [in] October 2013. The delegate refused to grant the visa on the basis that Australia was taken not to have protection obligation to the applicant as he had not taken all necessary steps to avail himself of a right to enter and reside in a Schengen Zone member state. The delegate also remarked upon serious credibility concerns regarding the applicant in circumstances where he had raised false claims and identities in a 2003 protection visa application, a 2004 Refugee Review Tribunal review and the use of a false [Country 1] passport to enter Australia. The delegate set out the applicant's claims in respect of Albania, concerning being the subject of a blood feud, adding that the applicant clarified at interview that the claims related more to outstanding debts from 1996. The delegate did not address the claims given the conclusions on effective protections elsewhere.

Conversion to a Class XD Temporary Protection Visa application

3. The applicant applied for a Protection (Class XA) visa. However, by operation of s.45AA of the Act and r.2.08F of the Migration Regulations 1994 ('the conversion regulation'), from 16 December 2014 the application is taken to be, and to have always been, a valid application for a Temporary Protection (Class XD) visa and is taken not to be, and never to have been, a valid application for a Protection (Class XA) visa. Although the delegate refused the application as an application for a Protection (Class XA) visa, the effect of r.2.08F is such that the application the Tribunal must consider is one for a Temporary Protection (Class XD) visa.

4. In this regard, as explained later in these reasons, I find that the applicant entered Australia by producing a false passport and in reliance on a false identity. I find therefore that the applicant did not hold a visa that was in effect on the applicant's last entry into Australia, and is thus a prescribed applicant for the purposes of the 'conversion regulation'.

Limitation on criteria to be considered to 'complementary protection' criterion

5. As to the limitation on criteria to be considered in the application for the protection visa, section 48A of the Act would ordinarily impose a bar on a non-citizen making a further application for a protection visa while in the migration zone in circumstances where the non-citizen has made an application for a protection visa that has been refused.

6. The applicant in this case has made a previous application for a protection visa that has been refused, albeit he used a false identity to do so. That application was made [in] May 2003, and the decision to refuse to grant the visa ultimately affirmed by the Refugee Review Tribunal on 1 July 2004.

7. Further alternative criteria for the grant of a protection visa were subsequently inserted into the Act. The Full Federal Court in *SZGIZ v MIAC* (2013) 212 FCR 235 found that section 48A, as it stood at the time of the visa application, did not prevent a person from making another protection visa application on the new criteria for the grant of a protection visa. That is no longer the case after 28 May 2014 when section 48A was amended.

8. The Full Court held at [38] that the operation of s.48A, as it stood at the time of this visa application, is confined to the making of a further application for a protection visa which

duplicates an earlier unsuccessful application for a protection visa, in the sense that both applications raise the same essential criterion for the grant of a protection visa. Applying the reasoning in *SZGIZ v MIAC* (2013) 212 FCR 235, the Tribunal is not to consider the Refugee Convention criterion in s.36(2)(a), and has proceeded on the basis that it can only consider the applicant's claims under the 'Complementary Protection' provisions in s.36(2)(aa) of the Act.

9. In any event, for the reasons given below, I have not considered any substantive criterion for a protection visa relating to Australia's protection obligations in this matter.

Circumstances preventing the grant of the visa

10. Under s.65(1) of the Act, I must refuse to grant a visa if the grant is prevented by s.91WA. I first raised the enactment of section 91WA as an issue in this review by way of letter to the applicant and his then registered migration agent on 13 May 2015.

11. Section 91WA(1) requires the Minister to refuse to grant a protection visa to an applicant who provides a bogus document as evidence of their identity, nationality or citizenship, or has destroyed or disposed, or caused the destruction or disposal of, documentary evidence of their identity, nationality or citizenship. However, that requirement will not apply if the applicant has a reasonable explanation for the provision, destruction or disposal, and either provides relevant documentary evidence or has taken reasonable steps to provide such evidence: s.91WA(2). Section 91WA and the definition of 'bogus document' are extracted in the attachment to this decision.

12. I set out below the substantive content of a letter of 5 June 2015 sent to the applicant using the procedure provided for in section 424A of the Act. This letter outlines the information before me that would invoke the application of section 91WA of the Act, subject to the applicant providing a reasonable explanation for the provision of bogus documents as evidence of his identity. Strictly, the applicant is taken to have received this letter as it was sent

> **Information that would be the reason or part of the reason for affirming the decision under review:**
>
> - [In] May 2003 you were recorded to have told an officer of the Department that you used a [Country 1] passport in the name of [Alias A] to enter Australia at [an] airport. You are reported to have stated that you bought the passport for 2000 euros, and returned it to [Country 1] 3 weeks after your arrival.
> - Departmental records contain an incoming passenger card in the name of [variation of Alias A] with markings indicating it was presented to an officer [in] March 2003
> - Departmental records indicate a travel movement of a [further variation of Alias A] on [the same day in] March 2003
> - You are not [another variation of Alias A]
>
> Also
>
> - Departmental records contain a copy of a document assessed by Departmental specialists to be a [Country 2] Drivers license in the name of [variation on the applicant's name], born [on date] in [Town 3] ([Country 2]).
> - The document was produced to corroborate evidence given to a departmental delegate in an interview [in] July 2003, including evidence as to your identify including you were born in and are a citizen of [Country 2].
> - You are not [variation on the applicant's name], born in [Town 3], [Country 2].

The reason why this information is relevant to the review:

- The information is relevant to the review because, subject to your comment or response, I will form the view that [in] March 2003, you provided a document as evidence of your identity that purports to have been, but was not, issued in respect of you; namely the [Country 1] passport. I will form the view that it is a bogus document provided as evidence of identity.

    - Subject to your comment or response, I will form the view that on or about [date] July 2003, you provided a [Country 2] drivers licence as evidence of your identity that purports to have been, but was not, issued in respect of you. I will form the view that it is a bogus document produced as evidence of identity.

    - The Migration Act (at section 91WA) requires that your application for a protection visa must be refused if you have provided a bogus document as evidence of your identity, subject to you providing a reasonable explanation for providing it.

    - Subject to you providing a reasonable explanation for provision of a bogus document as evidence of your identity [in] May 2003, I must refuse your application for a protection visa.

    - Subject to you providing a reasonable explanation for providing a bogus document as evidence of your identity [in] July 2003, I must refuse your application for a protection visa.

The consequences of it being relied on in affirming the decision under review

The consequence of me being obliged to refuse your application for a protection visa in these circumstances is that the decision under review would be affirmed.

13. Strictly, the applicant is taken to have received this letter as it was sent to his authorised representative in circumstances where the applicant had not varied or withdrawn that authority at the time I sent the letter: sections 441G of the Migration Act as it applied to then Refugee Review Tribunal (now abolished) when the letter was sent. However, it subsequently became apparent to me (as explained below) that the applicant had neither received that letter nor been made aware of its contents prior to the third attempted hearing in this matter. I ensured a copy of that letter was subsequently provided to the applicant in immigration detention, and the applicant told me at the fourth hearing that he had received and understood its contents. I have disregarded the prescribed periods for commenting or responding to the content of that letter, and taken into careful account the comment and response made by the applicant orally at the hearing of 6 August 2015.

The hearing

14. There has been a regrettable delay in the tribunal dealing with this matter. By letter dated 11 February 2015, the applicant was invited to participate in a hearing on 22 April 2015. At that time the applicant was not represented in his review.

15. On 17 April 2015, the tribunal received a form indicating that the applicant had appointed a registered migration [agent]. On behalf of the applicant, [the agent] contacted the tribunal and requested a postponement of the hearing to enable him to take instructions and obtain tribunal and departmental records. I granted that request and invited the applicant, through [his agent] to attend a hearing on 4 June 2015.

16. On 13 May 2015 I wrote to the applicant, through [his agent] notifying him that I would be considering the effect of section 91WA on his application for a protection visa.

17. On 25 May, [his agent] made a request to postpone the hearing of 4 June 2015. I refused that request on 26 May 2015, explaining my concern that the applicant remained in immigration detention, the hearing had already been postponed, and offering to consider a request to delay making a decision after the hearing if further documentation was required,

or alternatively to assist [his agent to] obtain documentation quickly if he were to identify any particular documentation he required.

18. Unfortunately, on 4 June 2015, the interpreter arranged by the tribunal failed to attend and the hearing was abandoned in any event. I then wrote to the applicant, through [his agent], the more detailed correspondence pursuant to section 424A of the Migration Act, outlining matters arising in respect of section 91WA of the Act, and made arrangements for a third attempt at a hearing. That hearing was arranged for 21 July 2015. The invitation was sent to the applicant through [his agent] on 10 June 2015.

19. In the meantime however, [his agent] informed the tribunal on 5 June 2015 that he was no longer acting for the applicant. No notice to withdraw or vary [his agent]'s authority was received from the applicant.

20. At the hearing of 21 July 2015, the applicant told me that he was not aware that the hearing was to take place until shortly before it commenced, was not aware that [his agent] was not acting for him, and was not aware of the content of my two letters concerning section 91WA of the Act. The applicant confirmed that in light of correspondence the tribunal had received from [his agent] he no longer wished him to be his representative. In the circumstances I considered it would be unfair to the applicant to proceed with the hearing.

21. A copy of the tribunal's letter of 5 June 2015 was then sent directly to the applicant. I told the applicant at the third attempted hearing that the prescribed timeframe for responding to that letter had already expired[1] but that he should not concern himself in that regard because I would listen to his response and consider it at a reconvened hearing in any event.

22. The further hearing was arranged for 6 August 2015.

23. At the hearing, I confirmed that the applicant had received and understood my letter of 5 June 2015. I invited the applicant to comment or respond to the matters raised in the letter.

24. The applicant confirmed that he had arrived in Australia and presented a passport that did not belong to him to passport control. The applicant confirmed he had paid 2000 euros for the passport and successfully made it to Australia.

25. The applicant said a few days later he presented himself to immigration with a different name and different identity. He said he was advised to do so by an Albanian person in Sydney, acknowledging it was bad advice. The applicant also said he was advised to pretend he was a "gypsy" from [Town 3] in [Country 2].

26. The applicant said that at the time he didn't know anyone or how to apply, so he relied on the bad advice. He wanted to find refuge from people who were after him. The applicant admitted that this was a mistake.

27. I explained to the applicant that I didn't understand why, if his claims were true, he didn't make an application using his real identity and those claims. The applicant told me had had intended to do so but the person in Sydney told him he should not use his real name. The applicant said he listened to this person.

28. I confirmed with the applicant that he had produced the [Country 2] drivers licence to the Department referred to in my letter. I asked the applicant how he had obtained that document. The applicant said the person in Sydney had it.

[1] s. 441G of the Act

29. The applicant confirmed all the claims he had advanced before the Department and the Refugee Review Tribunal on the previous occasion were false.

30. I explained to the applicant that his acknowledgment that he had provided completely false claims to the Department and tribunal previously may lead me to doubt his credibility generally, including in relation to evidence he was giving me at the hearing. The applicant said he understood my concerns, but assured me he was no being honest and informing me who he was. The applicant said he did all these things because of the problems he had in Albania and out of fear for his safety. The applicant also told me that he left his family in Albania and had been absent for 15 years, and must have strong reasons for doing so.

31. The applicant confirmed he had said what he wanted to say in relation to the matters I had raised in my letter of 5 June.

Consideration

Is the grant of the visa prevented by s.91WA?

32. The issue in this case is whether the grant of the visa is prevented by s.91WA because the applicant has provided a bogus document as evidence of his identity, nationality or citizenship, without reasonable explanation.

33. Noting the applicant's concession at hearing that he produced a [Country 1] passport that did not belong to him to passport control, and having informed the department that he had done so [in] May 2003, I find that the applicant provided a bogus document of his identity, nationality and citizenship [in] March 2003 (the '[March] 2003 bogus document')

34. Noting the applicant's concession at hearing as to how he had obtained the [Country 2] driver's licence, and noting that it was provided to the Department [in] July 2003 in furtherance of the applicant's false claims to be from [Country 2], I find that the applicant provided a bogus document of his identity and nationality [in] July 2003 (the '[July] 2003 bogus document').

35. I consider both documents to be bogus documents because I reasonably suspect each document purports to have been, but was not, issued in respect of the applicant, and I reasonably suspect the [Country 2] drivers licence was either counterfeit or fraudulently altered: s.5(1) of the Act.

36. I have considered carefully the scope of s.91WA, and in particular whether the provision of the [March] 2003 bogus document falls within that scope, and also whether the provision of the [July] 2003 bogus document falls within that scope. I am not aware of any judicial guidance available to me on the correct construction of section 91WA of the Act.

37. Section 91WA does not expressly state to whom a bogus identity document must have been provided, or the purpose for which it must have been provided (e.g. immigration clearance and/or a particular visa application), or when it must have been provided. On this literal interpretation therefore, s.91WA is not limited to circumstances where a bogus document is provided in relation to a current and/or previous protection visa application, and will encompass the provision of the [March] 2003 bogus document and the [July] 2003 bogus document. I consider that on a literal interpretation, s.91WA has a broad scope and would apply to both events.

38. To elaborate on my view in this regard, I note that both s.91V and s.91W fall within the same subdivision of the Act, but in their own terms expressly link the act or omission dealt with to a current protection visa application. The fact that the language used in section 91WA makes

no such express link between the production of the bogus document and the current application for a protection visa provides a strong basis in the text of section 91WA to conclude that it is intended to have a broader scope than those provisions, and is expressly not subject to the same limitations.

39. I am conscious that I may be wrong in that strict literal interpretation of section 91WA of the Act, and am conscious that on another view, the context of section 91WA and the content of extrinsic material may support a construction of section 91WA to the effect that it applies only where a bogus document is provided in relation to a current and/or previous protection visa application.

40. In this regard, I have considered that s.91WA falls with subdivision AL of Division 3 of Part 2 of the Act: 'Other provisions about protection visas'. This could be read to mean that a protection visa application needs to be made in order to bring the person within the ambit of s.91WA. The reference to an 'applicant for a protection visa' may imply that the provision is concerned with the provision of a bogus document in connection with, or in relation to, a protection visa. A stricter interpretation again would apply the provision only to the current protection visa application made by the applicant.

41. While I am conscious of these alternative constructions, in the absence of judicial guidance I have decided to proceed on the basis of what I consider to be the literal meaning and broadest scope of section 91WA. In interpreting the scope of the provision, I place greater weight on comparing the language used in s.91WA to that used in s.91V and s.91W, and the absence of any express language limiting the provision of a bogus document other than to be for the purpose of establishing identity, nationality or citizenship to conclude that Parliament intended no limitation on the application of its provisions as to who, when or in what context a person subsequently applying for a protection visa provided a bogus document as to their identity, nationality or citizenship.

42. I add for completeness that I have examined the explanatory memorandum (the EM) in considering the scope of s.91WA in the circumstances of this case. The construction of s.91WA set out in the paragraph above may reflect a general description of s.91WA in the EM to be an 'integrity measure', but as this is obvious I consider it provides no assistance in interpreting the provision. I note that in parts, the EM mentions 'the provision of bogus documents by a protection visa applicant *for the purposes of their application',* but as this language is not then replicated in the text of the enactment, I place no weight on its inclusion in the EM.

Am I satisfied the applicant has a reasonable explanation?

43. I am conscious that 'reasonable' is a word to be given its ordinary meaning. In context, and as an adjective, it informs on the nature and quality of the explanation that is required. Even though the term has an ordinary meaning, I have revisited the Australian Concise Oxford Dictionary and noted that 'reasonable" is defined in the following ways:

- Having sound judgment; moderate; ready to listen to reason
- In accordance with reason, not absurd;
- Within the limits of reason; not greatly less or more than might be expected
- Inexpensive; not extortionate
- Tolerable, fair

- Endowed with the faculty of reason

44. I consider that in its statutory context, requiring an assessment of the nature and quality of an explanation for having provided a bogus document, the fifth-mentioned concept of reasonableness is the most apt – but I do not replace the ordinary meaning of 'reasonable' with the terms 'tolerable or fair'.

45. To put this another way, and reflecting my conclusion about the applicant's explanations, providing a bogus document to unlawfully enter Australia and another to support a fraudulent claim for a protection visa may constitute a rational action for a person who otherwise has no legitimate basis for seeking Australia's protection, but I would not view that as a relevantly 'reasonable' explanation for the conduct, because it is neither tolerable nor fair.

46. As to providing the [March] 2003 bogus document, I understand the applicant's evidence puts forward an explanation that it was used to enter Australia in order to lodge a protection visa application. The applicant has also explained that he provided the bogus documents out of fear for his safety, which I take to be a reference to his current claims for protection. I have taken that explanation into account in relation to providing the [March] 2003 bogus document.

47. My concern with the applicant's explanation is that the protection claims he subsequently advanced having entered Australia by providing a bogus document were completely false. In this sense, the explanation for providing the [March] 2003 bogus document overlaps with the explanation for providing the [July] 2003 bogus document.

48. I do not consider the applicant's explanation to the effect that he provided a bogus document in order to enter Australia and then claim Australia's protection to be reasonable when informed by the fact that the claims he subsequently made were completely false. I do not think it a reasonable explanation for providing a bogus document to passport control that it was in order to enter Australia to subsequently make an application for a protection visa setting out completely false claims.

49. I have taken into account the applicant's explanation that his conduct generally arose from fear of his safety. In this regard, the applicant has significant credibility problems having conceded that his claims for protection advanced in 2003 were completely false. I do not accept any material particular of the claims subsequently advanced by the applicant to be true in light of his acknowledgment that his earlier claims were completely false, and indeed so false that they required bogus documentation of identity and nationality to be sustained. I do not accept to be true the applicant's explanation that he engaged in the conduct above-mentioned out of fear for his safety.

50. As to providing the [July] 2003 bogus document, I note the applicant's explanation that he did so after accepting advice from an unspecified person in Sydney, who also provided him with the bogus document he subsequently provided. I do not view this explanation as reasonable. Likewise, I reject the applicant's additional explanation to the effect that he engaged in all conduct out of fear for his safety as untrue.

51. As I am conscious that the construction and application of s.91WA is not beyond doubt, I will make findings in respect of each provision of bogus documents:

- I find that I must refuse to grant a protection visa to the applicant because he provided a bogus document as evidence of his identity, nationality and citizenship to passport control [in] March 2003, and I am not satisfied he has a reasonable explanation for doing so.

- I also find, independently of the finding set out above, that I must refuse to grant a protection visa to the applicant because he provided a bogus document as evidence of his identity and nationality to an immigration officer in connection with an application for a protection visa [in] July 2003, and I am not satisfied he has a reasonable explanation for doing so.

52. For the reasons given above, s.91WA(1) applies to the applicant. Therefore the grant of the visa is prevented by s.91WA.

DECISION

53. The Tribunal sets aside the decision under review and substitutes a decision to refuse to grant the applicant a Temporary Protection (Class XD) visa.

Marten Kennedy
Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

…

***bogus document*,** in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or
(b) is counterfeit or has been altered by a person who does not have authority to do so; or
(c) was obtained because of a false or misleading statement, whether or not made knowingly

…

91WA Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
  (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
    (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
    (ii) has caused such documentary evidence to be destroyed or disposed of.
(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
  (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
  (b) either:
    (i) provides documentary evidence of his or her identity, nationality or citizenship; or
    (ii) has taken reasonable steps to provide such evidence.
(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.