

1412533 (Refugee) [2015] AATA 3258 (7 August 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1412533
COUNTRY OF REFERENCE: Sweden
MEMBER: Carolyn Wilson
DATE: 7 August 2015
PLACE OF DECISION: Adelaide
DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 866 (Protection) visa.

Statement made on 07 August 2015 at 3:50pm

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

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 866 (Protection) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant provided incorrect information with her visa and citizenship applications and failed to answer questions. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 2 December 2014 to give evidence and present arguments. The Tribunal also received oral evidence from [the applicant's husband].
4. The applicant appeared before a different member to the one making this decision. The current Tribunal member has listened to a recording of the hearing. The Tribunal informed the applicant in writing that a different member was making the decision, and noting the hearing had been held in December 2014, invited the applicant to provide further information if they wished to. The applicant was asked in particular to advise of any changes in circumstances. The applicant responded in writing. She advised she had finished her studies and wanted to start her own business. She was expecting her second baby soon. She wants to be with her family and friends in Australia.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
7. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
8. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

9. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101, which requires that all questions are answered and no incorrect answers are given or provided.

10. The s.107 notice particularised that incorrect answers were provided and some answers not provided to questions on visa application forms 866B and 866C provided [in] September 2004 for the temporary Protection visa, and forms 866B and 866C provided [in] August 2005 for the permanent Protection visa. The s.107 notice also particularised incorrect answers were provided in application form 1300t for Australian citizenship dated [in] May 2012.
11. Essentially, the applicant completed the forms mentioned above under a bogus name [Alias A], and provided bogus details about her background and how she came to Australia. She claimed to be a citizen of [Country 1] who had lived in a refugee camp in [Country 2] from 1992 to 2004. The applicant in fact came to Australia from Sweden [in] February 2004 as the holder of a valid Swedish passport and a Subclass 676 Visitor visa. She was originally from [Country 1], but had been granted refugee status in Sweden in [year], and had resided in Sweden until coming to Australia in 2004.
12. The s.107 notice particularised the following non-compliance when the applicant provided incorrect answers and failed to answer questions in her application dated [in] September 2004:

In response to question 3 form 866B *'Has any person named in question 1 previously made any other type of application to DIMIA'* the applicant put *'no'*.

In response to question 3 form 866C *'What other names have you been known as'* the applicant responded *'N/A'*.

In response to question 21 form 866C *'Your current citizenship'* the applicant did not provide an answer.

In response to question 22 form 866C *'Do you hold any other citizenship'* the applicant did not provide an answer.

In response to question 24 form 866C *'Country(s) of former habitual residence or transit before arrival in Australia'* the applicant answered *'[Country 2], [City 3] and [Country 4]'*.

In response to question 25 form 866C *'Date of departure from that country'* the applicant responded *'[Date 5 in] August 2004'* and *'[two days later]'*.

In response to question 27 form 866C *'Did you enter Australia as a...'* the applicant chose the option *'unauthorised'*.

In response to question 28 form 966C *'Date of arrival in Australia'* the applicant put *'[three days after Date 5]'*.

In response to question 30 form 866C *'Give details of the travel document you used to enter Australia'* the applicant put *'N/A'*.

In response to question 31 form 866C *'Have you ever had or used any other passports or travel documents'* the applicant answered *'Yes'* and claimed to have used a false Australian passport in the name of [Alias B].

In response to question 33 form 866C *'Give details of the most recent Australian immigration authorisation granted to you'* the applicant put *'N/A'*.

In response to question 34 form 866C 'Give details of all addresses outside Australia where you have lived for 12 months of more in the last ten years' the applicant gave addresses in [Country 1] and [Country 2].

In response to question 45 form 866C 'When did you leave your home country' the applicant replied '[the day after Date 5]'.

In response to question 54 form 866C 'Did you ever migrate to any country other than Australia' the applicant put 'No'.

In response to question 55 form 866C 'Have you ever applied for refugee status in any country other than Australia' the applicant put 'No'.

In response to question 58 form 866C 'Do you have the nationality of any country other than the country in which you claim to fear persecution' the applicant put 'No'.

13. The s.107 notice particularised the following non-compliance in her application for a permanent Protection visa, dated [in] August 2005:

In response to question 3 form 866B 'Has any person named in question 1 previously made any other type of application to DIMIA' the applicant put 'no'.

In response to question 3 form 866C 'What other names have you been known as' the applicant responded 'N/A'.

In response to question 21 form 866C 'Your current citizenship' the applicant did not provide an answer.

In response to question 22 form 866C 'Do you hold any other citizenship' the applicant did not provide an answer.

In response to question 24 form 866C 'Country(s) of former habitual residence or transit before arrival in Australia' the applicant answered '[Country 2], [City 3] and [Country 4]'.

In response to question 25 form 866C 'Date of departure from that country' the applicant responded '[Date 5 in] August 2004' and '[two days later]'.

In response to question 27 form 866C 'Did you enter Australia as a...' the applicant chose the option 'unauthorised'.

In response to question 28 form 966C 'Date of arrival in Australia' the applicant put '[three days after Date 5]'.

In response to question 30 form 866C 'Give details of the travel document you used to enter Australia' the applicant put 'N/A'.

In response to question 31 form 866C 'Have you ever had or used any other passports or travel documents' the applicant answered 'Yes' and claimed to have used a false Australian passport in the name of [Alias B].

In response to question 34 form 866C 'Give details of all addresses outside Australia where you have lived for 12 months of more in the last ten years' the applicant gave addresses in [Country 1] and [Country 2].

In response to question 45 form 866C 'When did you leave your home country' the applicant replied ' [the day after Date 5] '.

In response to question 54 form 866C 'Did you ever migrate to any country other than Australia' the applicant put 'No'.

In response to question 55 form 866C 'Have you ever applied for refugee status in any country other than Australia' the applicant put 'No'.

In response to question 58 form 866C 'Do you have the nationality of any country other than the country in which you claim to fear persecution' the applicant put 'No'.

14. The s.107 notice also particularised the following non-compliance in her application for Australian citizenship dated [in] May 2012:

In response to question 3 'Have you been known by any other name' the applicant put 'No'.

In response to question 14 'Present country of citizenship' the applicant put '[Country 1] '.

In response to question 15 'Previous country of residence' the applicant put '[Country 1] '.

15. Based on the admission by the applicant that she created a bogus identity and the undisputed evidence that she is [applicant's name] who arrived in Australia lawfully from Sweden [in] February 2004, the Tribunal is satisfied the applicant provided incorrect answers and failed to answer questions in her Protection visa applications in 2004 and 2005 and provided incorrect answers in his citizenship application in 2012.
16. The Tribunal finds there was non-compliance with s.101(a) and s.101(b) by the applicant in the way described in the s.107 notice.

Should the visa be cancelled?

17. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
18. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). In fact the applicant did not respond to the s.107 notice.
19. The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are:
- the correct information
 - the content of the genuine document (if any)
 - the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information
 - the present circumstances of the visa holder

- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act
 - any other instances of non-compliance by the visa holder known to the Minister
 - the time that has elapsed since the non-compliance
 - any breaches of the law since the non-compliance and the seriousness of those breaches
 - any contribution made by the holder to the community.
20. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual (PAM3 'General visa cancellation powers'). This policy requires delegates to also have regard to matters such as whether the visa would have been granted if the correct information had been given, whether there are persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, and whether the visa cancellation may result in Australia breaching its international obligations.
21. The correct information was that the applicant had already been granted refugee status in Sweden but concealed this so that she could apply for a Protection visa in Australia. The correct information was that she arrived lawfully in Australia in February 2004, and not under a false name as an unauthorised arrival in August 2004. The correct information was that her name was [applicant's name] and not [Alias A]. The correct information was that she was a citizen of Sweden and her country of former habitual residence and most recent residence was Sweden, not [Country 2] or [Country 1].
22. In relation to the content of the genuine document, this is not relevant in the present case as the s.107 notice relied on non-compliance with s.101, not on s.103 (relating to bogus documents).
23. The likely effect on a visa grant, had the correct information been provided, is that the applicant would probably not meet the criteria for a Protection visa. The applicant would likely not have met cl 866.211 because it would not have been found that Australia had protection obligations for her when she had already found protection in Sweden, and there is no claim made against Sweden. In relation to the likely effect on a visa grant of any other kind, had the correct information been provided, that she was in Australia on a temporary Visitor visa with condition 8503 (no further stay) attached, then she may not have been able to make a valid application for any other visa.
24. The circumstances in which the non-compliance occurred were that the applicant deliberately created a false identity and background because she found she preferred to remain in Australia rather than return to Sweden.
25. The present circumstances of the applicant are that she married an Australian citizen and they have an infant son and are expecting a second child. At hearing the applicant and her husband presented as quite distressed at the prospect of the family being separated. Her husband claimed he could not move to Sweden as it would be too difficult to re-establish himself there and learn the language. He claimed that if the applicant had to go to Sweden he would struggle to care for their son alone, and that his son would suffer the most as he is particularly bonded with his mother. The Tribunal acknowledges the family are distressed at the prospect of being separated, and the applicant's husband does not wish to relocate to

Sweden. However as a Swedish citizen the applicant's husband and children could apply for residence permits¹ such that they need not be separated as a family unit. The Tribunal acknowledges the husband's concern about learning another foreign language, after already settling in Australia and learning English. As Sweden is a member of the European Union the family may have options to move to an English speaking country.

26. In relation to the subsequent behaviour of the visa holder concerning her obligations under Subdivision C of Division 3 of Part 2 of the Act, the Tribunal notes the applicant only admitted to the deception when presented with overwhelming evidence by the Department. The Tribunal considers the the applicant's behaviour in relation to her obligations pursuant to Subdivision C of Division 3 of Part 2 of the Act was unsatisfactory.
27. The Tribunal is not aware of other instance of non-compliance by the applicant other than the creation of a false identity and background and concealment of her Swedish citizenship in two visa applications and a citizenship application.
28. In regards to the time elapsed since the non-compliance, it has been 11 years since the first instance of non-compliance. The most recent non-compliance was in the citizenship application in 2012. The Tribunal gives more weight to the period of time over which the applicant provided false information (that is 2004, 2005 and 2012) than to the period of time that has since elapsed.
29. There are no other breaches of law since the non-compliance that are known to the Tribunal.
30. In relation to contributions made to the community by the applicant, there has been no evidence put forward by the applicant on this apart from an assertion that she is involved in the community and has made friends in Australia.
31. The Tribunal has also considered other discretionary matters raised in PAM 3. The Tribunal notes there are no other persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, as her husband and child are Australian citizens.
32. In relation to Australia's international obligations, there is nothing to indicate the applicant would face a real chance of serious harm or a real risk of significant harm if returned to Sweden. The applicant stated at hearing that she could not return to Sweden as she has bad memories of living there and particularly bad memories of how she was treated by her family who were very strict. She is only in contact with one sister now. The Tribunal acknowledges the applicant's preference not to return to Sweden and her estrangement for family members, but there is nothing to indicate her return would result in Australia breaching any international agreements.
33. The Tribunal has considered the applicant's child whose interests could be affected by the cancellation and notes the best interests of the child are to be treated as a primary consideration. The Tribunal considers the best interests of the child are to remain with their mother and father. Although the father claimed at hearing that if the applicant's visa was cancelled the family would be separated, the Tribunal finds the applicant's child and husband have options to apply for residence in Sweden to remain as a family unit.
34. The Tribunal acknowledges the distress and disruption to the applicant's family that has been caused by the visa cancellation, particularly at a time when they have one young child and another expected. However, the Tribunal considers the applicant has found herself in this situation because she deliberately created a false identity and concealed her citizenship

¹ <http://www.swedenabroad.com/en-GB/Embassies/Canberra/Work--Live-in-Sweden/Applying-for-a-residence-permit-to-move-to-a-close-relative-in-Sweden/Basic-facts/>

from the Department. Her deception affected the integrity of the asylum and refugee programs in Australia. The Tribunal finds the seriousness of the applicant's actions, without which she would not have been granted the permanent visa, outweigh the factors in favour of not cancelling the visa.

35. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

36. The Tribunal affirms the decision to cancel the applicant's Subclass 866 (Protection) visa.

Carolyn Wilson
Member

ATTACHMENT – Relevant Extracts from the *Migration Act 1958*:

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- purports to have been, but was not, issued in respect of the person; or
 - is counterfeit or has been altered by a person who does not have authority to do so; or
 - was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- all questions on it are answered; and
- no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- giving particulars of the possible non-compliance; and
 - stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - if the holder disputes that there was non-compliance:
 - shows that there was compliance; and
 - in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - if the holder accepts that there was non-compliance:
 - give reasons for the non-compliance; and
 - shows cause why the visa should not be cancelled; and
 - stating that the Minister will consider cancelling the visa:
 - if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or

- (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.