1205759 [2012] RRTA 742 (31 August 2012)

DECISION RECORD

RRT CASE NUMBER:	1205759
DIAC REFERENCES:	CLF2006/34111, CLF2009/59077 and CLF2009/151847
COUNTRY OF REFERENCE:	Mongolia
TRIBUNAL MEMBER:	Jonathon Duignan
DATE:	31 August 2012
PLACE OF DECISION:	Sydney
DECISION:	The tribunal affirms the decision to cancel the applicant's Subclass 866 (Protection) 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 cancel the applicant's Subclass 866 (Protection) visa under s.109(1) of the *Migration Act 1958* (the Act).

2. The applicant applied to the Department of Immigration and Citizenship (the department) for a Protection (Class XA) visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2006 and the department granted the visa [in] December 2006. The applicant was notified that a delegate of the Minister was considering cancelling her Subclass 866 visa and the decision to cancel the visa was made [in] April 2012. The applicant was notified of that decision by letter [dated] April 2012.

3. The applicant applied to the tribunal [in] May 2012 for review of the delegate's decision.

4. The tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(d) of the Act. The tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

5. Subdivision C of Division 3 of Part 2 of the Act imposes obligations on non-citizens to provide accurate information in visa application forms and provides for a discretionary power to cancel visas based on incorrect information. Section 109(1) of the Act allows the Minister to cancel a visa if the applicant has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require visa applicants 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. Relevantly to the present matter, s.101 of the Act requires visa applicants to answer all questions on their visa application forms and not to give incorrect answers, s 102 requires that incorrect answers are not given on passenger cards and s.103 requires that bogus documents not be presented to an officer, the Minister or a relevant tribunal.

6. Section 99 makes it clear that, for the purposes of ss.100, 101(b), 102(b), 104 and 105, any information (written or oral) given or caused to be given by an applicant to the Minister, an officer or to a tribunal reviewing a decision in relation to an application for a visa is taken to be an answer to a question in the application form. Section 100 makes it clear that an answer to a question is incorrect even though the person who gave it or caused the answer to be given did not know that it was incorrect.

7. Section 107 of the Act provides that if the Minister considers that a visa holder, who has been immigration cleared, has not complied with ss.101, 102, 103, 104, 105 or 107(2), the Minister may give the visa holder a notice of intention to consider cancelling his or her visa. The giving of a notice which complies with s.107 is a statutory precondition to the exercise of the power to cancel a visa under s.109, and is only engaged when the Minister has reached a state of mind whereby he or she considers that the visa holder has not complied with one of the provisions mentioned. It is only then that a notice under s.107 may be given: *Zhong v MIAC* (2008) 171 FCR 444. The notice must give particulars of the possible non-compliance and

invite the visa holder to provide a written response, if he or she disputes that there was non-compliance, showing that there was compliance, and, in case the Minister decides that there was non-compliance, showing cause why the visa should not be cancelled. Section 108 requires the Minister to consider any response given by the visa holder and to decide whether there was non-compliance in the way described in the notice.

8. In cancellation matters the onus of establishing the facts is on the Minister (or, on review, the tribunal). Although the visa holder must be invited to show that the ground for cancellation does not exist, or if it does, that there is a reason why the visa should not be cancelled, this does not place an onus on the visa holder to establish at that point that the discretion to cancel the visa should not be exercised: see *Zhao v MIMA* [2000] FCA 1235 at [25] and [32]. (*Zhao's* case was concerned with cancellation under s.116 of the Act but the tribunal regards the Court's observations as equally applicable to cancellation under s.109). Furthermore, although the principles enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 have no direct application in the context of administrative decision-making, in reaching a decision about non-compliance it is appropriate to bear in mind the nature of the allegations and the gravity of the consequences: see *Kumar v MIMA* [1999] FCA 156 at [35], *SCAN v MIMIA* [2002] FMCA 129 at [10], *Housam Slayman v MIMA* (unreported, Federal Court of Australia, Foster J, 12 August 1997) and *Tarasovski v MILGEA* (1993) 45 FCR 570 at 572-3.

9. Section 109 of the Act gives the Minister power to cancel the visa. It provides:

> **109 Cancellation of visa if information incorrect**
>
> (1) The Minister, after:
>
> (a) deciding under section 108 that there was non compliance by the holder of a visa; and
>
> (b) considering any response to the notice about the non compliance given in a way required by paragraph 107(1)(b); and
>
> (c) having regard to any prescribed circumstances;
>
> may cancel the visa.

10. Regulation 2.41 of the Migration Regulations 1994 (the Regulations) lists the prescribed circumstances referred to in s.109(1)(c). Section 109(2) provides that if the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled. There are no circumstances declared by the Regulations for the purposes of s.109(2).

11. The tribunal's powers on review are set out in s.415 of the Act. Pursuant to s.415(1), the tribunal may exercise all the powers and discretions conferred by the Act on the primary decision-maker for the purposes of the decision under review. Where the tribunal is reviewing a decision to cancel a visa, it may affirm or vary the decision, or set it aside and substitute a new decision: s.415(2).

12. In exercising its powers of review under the Act in respect of a visa cancelled under s.109, the tribunal must first decide whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice: *Saleem v MIMIA* [2004] FCA 234

at [46]. Thus, the tribunal must direct its findings at the particulars of non-compliance which were given in the initiating notice, and no others: *SZEEM v MIMIA* [2005] FMCA 27 at [32] and [37].

13. If the tribunal decides that there was non-compliance by the applicant in the way described in the s.107 notice then it will be necessary to consider whether it is appropriate that the visa be cancelled. The power contained in s.109 is discretionary. 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 the prescribed circumstances. The prescribed circumstances are set out in r.2.41 of the Regulations. They are:

    (a) the correct information;

    (b) the content of the genuine document (if any);

    (c) the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;

    (d) the circumstances in which the non-compliance occurred;

    (e) the present circumstances of the visa holder;

    (f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;

    (g) any other instances of non-compliance by the visa holder known to the Minister;

    (h) the time that has elapsed since the non-compliance;

    (j) any breaches of the law since the non-compliance and the seriousness of those breaches;

    (k) any contribution made by the holder to the community.

14. While r.2.41 contains all of the considerations that must be taken into account, it is not an exhaustive statement of the factors that might properly be considered to be relevant in any given case: *MIAC v Khadgi* [2010] FCAFC 14. The tribunal may have regard to lawful government policy, and any other matter that the tribunal considers relevant. The tribunal will ordinarily apply lawful government policy unless there are cogent reasons against its application: see *Drake v MIEA* (1979) 24 ALR 577 per Bowen CJ & Deane J at 590, *Re Drake and MIEA* (No. 2) (1979) 2 ALD 634 per Brennan J at 645. The relevant policy when cancellation is being considered under s.109(1) is set out in the department's PAM3 'Visa Cancellation – General cancellation powers (s109, s116, s128 & s140)'.

15. The department's PAM3 'General cancellation powers' at [15.3] lists certain other matters that, where relevant, should be taken into account as a matter of government policy when considering whether to exercise the discretion to cancel a visa under s.109 of the Act. They are:

    - whether the visa would still have been granted if the correct information had been given;

- whether there are persons in Australia whose visas would, or may, be cancelled under s.140;

- whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation, for example:

    - if there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, the best interests of the children are to be treated as a primary consideration;

    - whether the cancellation would lead to the person's removal in breach of Australia's non-refoulement obligations - that is, removing a person to a country where they face persecution, death, torture, cruel, inhuman or degrading treatment or punishment; and

- any other matters raised by the visa holder in their response.

CLAIMS AND EVIDENCE

16. The tribunal has had regard to material contained on tribunal case file 1205759, departmental case files CLF2006/34111,CLF2009/59077 and CLF2009/151847 as well as oral evidence given at a hearing before it and material available to it from a range of other sources as referred to in this decision.

17. The applicant was granted a Class XA visa [in] December 2006 in the name [Ms A] with the claimed date of birth [as Date 1]. She had initially travelled to Australia using a passport issued in that identity [in] February 2006. She applied for a Protection visa [in] March 2006 in that identity, answering a range of questions indicating that she was [Ms A] and pursued that application before the department and the tribunal differently constituted on the basis that she was a lesbian woman who feared harm on that basis in Mongolia.

18. The department subsequently received four applications for Class AH visas in Shanghai indicating that the applicant was [Ms A] and the biological mother of three of the children and the adoptive mother of one of the children.

19. The department subsequently received allegations that the applicant was not in fact [Ms A] but was in fact [Ms B] and that she resided in Australia with her [husband].

20. Because of admissions made by the applicant to the tribunal it is not necessary to detail the subsequent investigation by the department which included interviews with the applicant and DNA testing. During this time however she maintained that she was in fact [Ms A] with the claimed date of birth [as Date 1] and that [Ms B] was her younger sister. The applicant maintained that allegations and evidence which supported a contrary conclusion were not correct.

21. [In] November 2009 the department issued a *Notice of Intention to Consider Cancellation under Section 109* (the notice) which referred to breaches of s.101(b), 102(b) and 103 of the Act in respect of the applicant's use of a passport in the name [Ms A] for entry to Australia

and subsequent applications, answers given in the application for a Protection visa made [in] December 2006 identifying the applicant as [Ms A] with the claimed date of birth [as Date 1], answers given to the tribunal in considering the review of that application in the same identity and answers given in the applications lodged for Class AH visas in Shanghai.

22. In responding to the notice and throughout the processing by the department the applicant maintained that she was in fact [Ms A] with the claimed date of birth [as Date 1] and she refuted evidence to the contrary. She referred to her life in Australia, to working hard and explained the circumstances by which she came to parent the four children referred to in the application.

23. [In] September 2010 [Mr C] was born in [Sydney]. His birth was registered noting that his mother was [Ms A] and his father [Mr D]. The child is an Australian citizen by birth. The applicant indicated that she wished to raise her Australian citizen son in Australia.

24. Information on the departmental file indicates that [Mr D] had made an unsuccessful application for a Class XA visa and was now seeking that a condition attached to the visa he used to enter Australia be waived to allow him to make an application for a permanent visa on the basis of his relationship with the applicant.

25. The delegate found relevant breaches of the Act and in considering the exercise of discretion determined that it was the preferable decision that the visa be cancelled. The applicant sought review of the decision in the identity [Ms A] with the claimed date of birth [Date 1]

26. The applicant's adviser submitted evidence that [Mr C] was an Australian citizen from the time of his birth in the form of a certificate issued on [date deleted: s.431(2)] by the Minister for Immigration and Citizenship.

27. The applicant attended a hearing before the tribunal [in] July 2012 and provided evidence that she was [Ms B] born on [Date 2] in Mongolia in the form of a passport issued in that name. The applicant explained that the previous identity used of [Ms A] was in fact her sister. The applicant claimed that at the time of making her application for a Protection visa she had four children, two of them biological children of hers who she regarded as members of her family. She agreed that the identity of one of her biological children was not included in the application. She agreed that the evidence of the passport she presented with her Class XA application was a passport issued in respect of her sister and included her sister's photograph.

28. The tribunal discussed with the applicant that this information appeared to indicate that she had breached s.101, 102 and s.103 of the Act in that she had provided incorrect information about her identity and provided a bogus document, in the form of passport issued in respect of her sister but which she claimed was issued in respect of her. The applicant indicated that she arrived in Australia on a false document and in a false name and continued to use that identity in the application.

29. The issues relevant to the exercise of a discretion as to cancellation in matters of this type was discussed with the applicant. The applicant was asked why she believed it would be a better decision that her visa not be cancelled. The applicant explained that she did not believe that she could have normal living conditions in Mongolia and this why she had come to Australia using a different name and made her application to remain here. She was concerned about the living conditions for her children, having one Australian citizen child who would

turn [age deleted: s.431 (2)] years of age in September and two biological children in Mongolia, being [both ages deleted: s.431(2)] years of age.

30. The applicant indicated that life in Australia was much different to Mongolia and talked about residing with her husband in Australia. Her husband had travelled to Australia before her, the couple having separated in Mongolia after their second child in [year deleted: s.431(2)]. He was in Australia when the applicant travelled here, but she claimed not to know this was the case. After her own arrival in Australia, the applicant reunited with her husband and he assisted her and she felt she should live with the father of her children. They had parted in Mongolia because her husband used to drink. The applicant indicated that claims made in 2006 that she was lesbian were true and that this happened after she had separated from her husband. She had started living with him again in 2008 and remained living with him until the present time.

31. The applicant was asked about the possibility that her claims to have been lesbian may only have been made up to support her application to remain in Australia. She explained that she had come to the tribunal to tell the truth and that she had been lesbian as claimed. The applicant indicated that if she returned to Mongolia she would do so with her husband and remain in a relationship with him.

32. The applicant indicated that her main concern about her visa being cancelled and returning to Mongolia related to her child. She was also concerned that because she had travelled to Australia using her sister's passport this would create difficulties for her.

33. She was asked about the living conditions of her current biological children living in Mongolia and indicated that they lived with their maternal grandmother in a one bedroom apartment. The [two children attended school]. She had left her two children with her mother and believed it would be difficult if she and her husband and their youngest child returned to Mongolia. The fact that her child was still of a very young age and may be expected to adapt to life in Mongolia was discussed. She referred to the weather and the environment which would be harsh for her youngest child. She and her husband did not have anything in Mongolia and would not have anywhere to live. She also referred to her belief that he child would not be accepted in Mongolia. When asked what she meant by this, she referred to fears that her sister would not accept the child because the applicant had returned to her husband. When asked for more specificity about this she indicated that she was only saying what she was thinking about.

34. The applicant was asked about any fears for herself in Mongolia and indicated that she believed that if she returned she could not provide her children with a good education and skills they required. She explained that at the present time her older child was able to study in Mongolia because she and her husband worked and spent money to support this.

35. When asked about anything that made her scared of returning, the applicant indicated that the main thing was that she thought she could not provide for her children. She explained that life was tough in Mongolia and she did not believe she would be able to find employment. She indicated that because she was known as a lesbian she would not be employed by anybody. In respect of her husband she explained that he would not able to find employment because he was about to turn [age deleted: s.431(2)] years of age and this was old in Mongolia and he would not be employed as a result.

36. In respect of her sister and brother-in-law, the applicant explained that her brother-in-law operated his own business. She did not believe that she and her husband would have such an opportunity because they would be newly returning to the country.

37. The applicant was asked about information from the United States Department of State *Country Reports on Human Rights Practices: Mongolia 2011*, which stated:

> Birth Registration: Citizenship is derived from one's parents, and births generally were registered immediately, although this was not always the case for those living in rural areas or landfill dumpsites. Failure to register can result in the denial of public services and ineligibility to participate in the Human Development Fund, which entitles each registered citizen to a share of the nation's mineral wealth as well as social welfare benefits in the form of fixed monthly cash distributions. This particularly affected citizens moving from urban to rural areas, who often had to wait decades to register and receive social services in their new location.
>
> Child Abuse: Child abuse was a significant problem, principally violence and sexual abuse. According to the governmental National Center for Children, both problems were most likely to occur within families.
>
> Child abandonment was a problem; other children were orphaned or ran away from home as a result of parental abuse, much of it committed under the influence of alcohol. Police officials stated that children of abusive parents were sent to shelters, but some observers indicated many youths were sent back to abusive parents.
>
> Sexual Exploitation of Children: Although against the law, the commercial sexual exploitation of children less than 18 years of age was a problem. According to NGOs there were instances where teenage girls were kidnapped, coerced, or deceived and forced to work as prostitutes. The minimum age for consensual sex is 16. Violators of the statutory rape law are subject to a penalty of up to three years in prison. The law prohibits the production, sale, or display of all pornography and carries a penalty of up to three months in prison. However, NGOs stated that child online pornography was not uncommon. Furthermore, NGOs reported there was no corresponding agency to deal with child pornography or sex advertisements on the Internet and that police did not investigate such crimes because they did not have the technical resources and were stretched thin with other duties.
>
> Displaced Children: According to the MSWL, there were 38 temporary shelters and orphanages, six or seven of which were government-run. There were also seven social service day care centers caring for 168 children. More than 1,100 children lived in shelters countrywide. Approximately 120 children were living on the street and 130 at dump sites.
>
> Minors who ran away from or were lost or abandoned by their parents were brought to the police-run Address Identification Center (AIC) in Ulaanbaatar to reconnect children with their families. With a capacity of 56, it sheltered 42 children in October. The AIC was unable to provide adequate medical attention to the children, many of whom could not access public health services for lack of an identification card. Since many of the children lacked identification cards, public hospitals refused to provide them even rudimentary treatment. The Law on the Provisional Detention of Homeless Children states that children should be kept in the AIC for no longer than seven days, yet in practice they were kept for up to 180 days. Children residing at the AIC for such long periods were not integrated into regular schools.

> International Child Abduction: The country is not a party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

38. The fact that this did not seem to indicate difficulties with access to education or healthcare and seemed to indicate mainly difficulties for children without family support was discussed. The fact that the applicant and her husband seemed to care for their children and wish to provide for them was discussed. The applicant explained that circumstances were different in real life to how they appeared in a report. She explained that to obtain vaccinations or education cost money and she was concerned she could not provide this. She referred to her own age and the difficulties this would create.

39. In respect of the circumstances giving rise to the non-compliance, she explained that she thought this was not possible to use her real identity after travelling here and that she had to continue to use the identity she had travelled to Australia in after her arrival and this was her biggest mistake.

40. The applicant was asked why she had resisted telling the truth about her identity even after the department questioned this in the terms detailed in the decision record regarding her cancellation which she had provided to the tribunal. The applicant explained that this was her fault and she did not know that she had the opportunity to tell the truth earlier. The applicant was asked about the correspondence and interview detailed in the department's decision record and agreed that she had attended the interview. She explained that she had thought all along that she had to maintain the name she had used to enter Australia.

41. The applicant was asked about the possibility that her actions may indicate that she was not a truthful person and that she and her husband had planned to try to gain residence in Australia and that she was not in fact lesbian but this claim was made up to support her application for a protection visa. The applicant denied this was the case and explained that she and her husband had separated as claimed. She wished to tell the truth to the tribunal and it was definitely only coincidental that she and her husband had reunited in Australia after both travelling here independently.

42. The possibility that if the applicant was not lesbian and had revealed her true identity in the application she may not have been granted the visa she sought was discussed. The applicant claimed that when she came to Australia in 2006 she was lesbian and her claims in this respect were true.

43. The applicant was asked about information available from the United States Department of State Country reports on human rights practices in the following terms:

> Consensual same-sex sexual conduct is not specifically proscribed by law. However, AI and the International Lesbian and Gay Association criticized a section of the penal code that refers to "immoral gratification of sexual desires," arguing that it could be used against persons engaging in same-sex sexual conduct. LGBT persons reported harassment and surveillance by police. Nonetheless, NGOs reported a marked improvement in police investigations of crimes against LGBT individuals as well as more respectful police treatment of victims.
>
> There were reports that individuals were assaulted in public and at home, denied service from stores and nightclubs, and discriminated against in the workplace based on their sexual orientation or gender identity. There also were reports of abuse of persons held in police detention centers based on their sexual orientation. Some

> media outlets described gay men and lesbians in derogatory terms and associated them with HIV/AIDS, pedophilia, and the corruption of youth.
>
> The government, while acknowledging that discrimination against LGBT individuals was a problem, stated that social acceptance of gay men and lesbians must be promoted before definitive steps can be taken.

44. The fact that this indicated an improving situation for lesbians and that her involvement with the lesbian community was some time ago and that she had resumed a relationship with her husband for some years was discussed. That this might indicate that there would not be an interest in the applicant's circumstances such that she would be harmed in Mongolia was discussed.

45. The applicant referred to the fact that she did not hold any documentation in respect of her son. The evidence that appeared to indicate that his citizenship would follow his parentage in Mongolia was discussed and that he would be entitled to citizenship was discussed. The fact that she held a passport validly issued in her own name that could prove her identity was also discussed.

46. The applicant's adviser indicated that the applicant admitted to the relevant breach of the law and that she was now telling the truth. He did not believe that the applicant and her husband had planned this activity because they arrived in Australia some years apart. He indicated that the main issue concerned the rights of her Australian citizen child. He submitted that the son was a citizen of Australia and that if returned to Mongolia he would be forced to live in a one bedroom flat with five others, being his siblings, parents and grandmother. It was submitted that he would never have access to the same level of benefits and education which he was entitled to in Australia and that higher education would be at a cost in Mongolia. It was submitted that it would be difficult for his parents to obtain employment in Mongolia for he reasons claimed and that they were not in a position to establish a business because they would not have sufficient financial backing.

47. It was submitted that health services in Mongolia were inferior to Australia, even if they were improving. The child was not involved with the actions of his mother, which the adviser characterised as stupid, and requiring his removal from Australia would be a punishment on him. The adviser compared the situation with that of his grandchildren and to the fact that the department had waived a condition not permitting further stay on the visa held by the applicant's husband.

FINDINGS AND REASONS

48. 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. The material available at the time of the writing of the notice and the construction of it indicates that the delegate had a state of mind that non-compliance with a provision had occurred.

Non compliance

49. The tribunal must first decide whether there was non-compliance by the applicant in the way described in the s.107 notice The non-compliance identified and particularised in that notice was non-compliance with s.101(b), s.102(b) and s.103. Each of the alleged breaches related to information and answers given in applications and on a passenger card in which the applicant assumed the identity [Ms A]. Before the tribunal the applicant has admitted that this

is not her identity and that in fact this is the identity of her sister which she assumed for the purpose of entry to Australia and related applications.

50. As the applicant has now admitted that she assumed her sister's identity in making the application for a Protection visa [in] March 2006, in a related review application on a passenger card completed [in] February 2006 and the presentation of passport to confirm her identity the tribunal finds that the applicant has breached s.101(b), s.102(b) and s.103 in that she had filled in an application form with incorrect answers, filled in a passenger card with incorrect answers and presented to an officer and the tribunal a bogus document being a passport issued in the identity of her sister.

51. For the reasons given above, the tribunal finds that there was non-compliance s.101(b), s.102(b) and s.103 by the applicant in those ways described in the s.107 notice.

Consideration of discretion

52. 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).

53. In appearing before the tribunal on this occasion, the applicant made a range of admissions which she had not previously made. She acknowledged the view that she had adopted another identity for the purpose of travel to Australia and her previous application was in fact correct.

54. In considering this matter the tribunal has reached the view that the applicant is not a truthful person and that she is prepared to make untruthful statements and pursue these with some vigour if she believes this is in her benefit In this case, the applicant seeks to rely upon her admission to the tribunal about her real identity as evidence of her truthfulness, however considering the matter overall the tribunal believes that the applicant is not being completely truthful even at this point in proceedings. In the tribunal's view, she has made the limited admission of deceit she has made only because there was no other viable option for her and in fact she maintains the deceit that she and her husband separated, reunited in Australia by coincidence and that she was ever lesbian.

55. It is notable in this matter that the applicant has had considerable opportunities in the past to reveal her true identity and circumstances to the department and to the tribunal previously and only at this very late time has she made the limited admission of deceit she had made. In the tribunal's view, the history of this matter in pursuing an initial Protection visa application and then a review as well as during the processing of this cancellation before the department without revealing her true identity indicates a person who is prepared to be untruthful if she perceives this to be to her benefit.

56. In this context, the tribunal finds it completely implausible that the applicant would separate from her husband, adopt her sister's identity to travel to Australia and only then discover that her husband was residing in Australia. In the tribunal's view, the extent and maintenance of the deceit in this matter indicates that in fact that applicant and her husband had determined they would prefer a life in Australia and have undertaken over many years a calculated plan to achieve this. While it has been argued that the delay between the arrival of her husband and the applicant's own arrival in Australia supports the view that both ending up in Australia was coincidental, the tribunal does not accept this. Given that the applicant determined to adopt her sister's identity for travel to Australia it is as likely that some complication to their

plans actually necessitated this delay in her travel and this is what the tribunal believes occurred having regard to all of the circumstances of this case.

57. In the tribunal's view, the applicant adopted her sister's identity to ensure that there was no obvious connection with her husband and to allow her to pursue claims to be lesbian in respect of the Protection visa application with limited complication. The tribunal does not believe that the applicant and her husband ever ended their relationship prior to her arrival in Australia, nor that she was ever lesbian. In the tribunal's view, the behaviour of the applicant in this matter clearly supports the view that being aware that some persons who were lesbian from Mongolia have been granted a Protection visa she sought to fabricate such a profile for herself.

58. In the tribunal's view, the correct information and a genuine passport in this case would have identified the applicant as [Ms B] born on [Date 2]. This information alone would not have necessarily altered the outcome of the processing of her application for a Protection visa, however, in the tribunal's view were that information revealed it would have seriously complicated her claim to be lesbian and likely have led to the rejection of the visa. In the tribunal's view, were the full circumstances of the applicant known, that she had a spousal relationship with a person who was also now in Australia, there is every likelihood that conclusions would have been reached adverse to the applicant's claims. In the tribunal's view it is likely she would not have been granted a protection visa on the basis of being lesbian. In the tribunal's view it is likely that these conclusions about the applicant's circumstances would have been reached had her true identity been revealed when she entered Australia and during the processing of her Protection visa application.

59. In the tribunal's view, the circumstances in which the non-compliance occurred reflect very badly on the applicant and are a reason why it is a better decision that the visa be cancelled. The applicant has adopted another identity and had a range of opportunities over many years now to correct the false information but has not done so. In the tribunal's view she consciously adopted that identity for the purpose of pursuing a baseless application for protection in Australia and has repeatedly lied to officers of the department, even during the processing of this cancellation decision. Only during the last prospect of merits review of her case has she revealed her true identity and in the tribunal's view has only done this on a limited basis. She has, in the tribunal's view continued to lie to it about the relationship with her husband and her having ever been lesbian.

60. The non-compliance with the Act commenced some years ago when she first entered Australia in February 2006 using the identity of her sister. The continued presentation of that identity as her true identity continued until she appeared before the tribunal [in] July 2012, some six years and five months later. In the tribunal's view also, she continues to be deceitful where she perceived this is to her benefit. Thus, while the initial non-compliance was some time ago the continuing nature of it means it was a continuing until at least [May] 2012 when the applicant completed an application to the tribunal in the identity of her sister.

61. There are matters in the applicant's current circumstances which would support a view that the discretion should be exercised not to cancel the visa held by the applicant. These are that she is the mother of an Australian citizen child and has been in Australia for some time with her husband and is financially supporting children in Mongolia. She also refers to the greater opportunities that she and her children have in Australia and to difficulties in access to healthcare and education in Mongolia.

62. In circumstances where one is considering the interests of an Australia citizen child this is a very important consideration and must be treated as a primary consideration. In this case, the tribunal does not believe that the best interests of the child would be affected such that the applicant's visa should not be cancelled. In the tribunal's view, the Australian citizen child is of a very young age and capable of adapting to a new environment in Mongolia if he returns with his parents there. In the tribunal's view his interests would also be served by being able to grow up with his own siblings and have contact with an extended family which does not exist in Australia. While the applicant is concerned about educational opportunities for her child, such issues are some way away given his age and living in Mongolia with his parents does not affect his status and the possibility of returning to Australia in the future as a citizen. While the applicant has raised issues about the quality of healthcare in Mongolia, there is no evidence other than her assertions of any particular difficulties which would affect her Australian citizen son in this regard.

63. While there may be some difficulties which would be encountered in Mongolia, it is notable that his siblings have been able to lead productive lives in Mongolia, with the eldest of his siblings being able to achieve university level education. The available country information regarding circumstances for children in Mongolia discussed with the applicant during the hearing does not support a view that the child's best interests would be very adversely affected by living in Mongolia with his parents. While the United States Department of State Country Reports on Human Rights Practices 2011 do indicate difficulties for some children, it is notable that these appear to be those who are abandoned or badly treated by their familial group. In this case, the applicant and her husband would be with their family unit in Mongolia and able to care for them. While the applicant has not yet applied for a Mongolian passport for her child, there is nothing which indicates that he is not able to return with them to Mongolia. While there are no doubt some differences between the available education and health care a between Australia and Mongolia, the information does not disclose such a disparity that one could say the child's best interests require that he not live in Mongolia.

64. While it has been claimed that economic circumstances in Mongolia are not the same as in Australia, and the tribunal accepts that this may be true, the tribunal does not believe that the applicant and her husband will not be able to provide for their family. She has relatives who live in Mongolia who have established a business and the applicant's relatives are able to provide for accommodation and food. The tribunal does not accept that to maintain a reasonable standard of living the applicant and her husband have to remain in Australia and support their family with money earned here. In the tribunal's view, while that is their preference, they would be able to establish a reasonable life in Mongolia. When discussing how she would be in a different position to her sister in Mongolia on return and why she and her husband could not work there, the applicant offered what the tribunal regarded as implausible and very vague reasons why this would be the case. Beyond mere assertions about difficulties they may encounter from the applicant and her adviser, there is no evidence that indicates that the family would not be in the same position as the general population of Mongolia, nor that the difficulties encountered would be of a magnitude that the best interests of the applicant or her child support a conclusion that they should not be forced to reside in Mongolia. In the tribunal's view, the applicant has overstated the difficulties she believes she would face in Mongolia for the purpose of this application. While her children in Mongolia currently live with their grandmother, the tribunal does not accept that his will be the case if the family from Australia return and in the tribunal's view the applicant and her husband are of working age and have the opportunity to work there and establish a life there.

65. Nor does the tribunal believe that the applicant, her husband or their Australian citizen child would be returning to a situation of any danger in Mongolia. In the tribunal's view, while the applicant claims to have been known as a lesbian in the past, these claims are not true. The tribunal does not accept that anybody ever believed she was lesbian and the tribunal believes the applicant has only put forward this claim and maintained it even to the present time to secure a visa for permanent stay in Australia. As a result, the tribunal does not accept that there is any danger to the applicant in Mongolia on the basis of being, or being perceived to be, lesbian and does not believe her return would be in contravention of non-refoulement obligations.

66. Furthermore, the tribunal does not believe that the Australian citizen child of the applicant and her husband would suffer any harm either because his mother was perceived to be lesbian or because she has resumed her relationship with her husband. In the tribunal's view, the applicant's relationship with her husband never ended and she would be returning to Mongolia in company with her husband in accordance with the expectations of her family and those known to her.

67. Considering these matter overall, it is the view of the tribunal that it is the preferable decision that the visa granted to the applicant [in] December 2006 be cancelled. The delegate's decision to this effect should be affirmed.

DECISION

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