



Hothnyang and Department of Immigration and Citizenship [2013] AICmr 38 (8 April 2013)

Decision and reasons for decision of
Acting Freedom of Information Commissioner, Toni Pirani

Applicant: Theb Hothnyang

Respondent: Department of Immigration and Citizenship

Decision date: 8 April 2013

Application number: MR12/00043

Catchwords: Freedom of Information — Amendment of personal records — Whether a record of date of birth should be amended — (CTH) *Freedom of Information Act 1982* ss 48, 50

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Summary

1. I affirm the decision of the Department of Immigration and Citizenship (the **Department**) of 20 October 2011 not to amend its record of the applicant’s date of birth under the *Freedom of Information Act 1982* (the **FOI Act**).

Background

2. On 20 July 2011, the applicant applied to the Department to amend its record of his date of birth from 18 October 1989 to 1 January 1993. On 19 August 2011, the Department refused to make that amendment.
3. On 19 September 2011, the applicant sought internal review of the Department's decision. On 20 October 2011, the Department affirmed its decision to refuse to amend the applicant's record of date of birth.
4. By letter dated 30 January 2012, the applicant sought IC review of this decision under s 54L of the FOI Act.

Decision under review

5. The decision under review is the decision of the Department on 20 October 2011 to refuse the applicant's request.

Amendment of personal records

6. Under s 48 of the FOI Act, a person may apply to an agency for amendment or annotation of documents of the agency that contain personal information that is incomplete, incorrect, out of date or misleading. Under s 50(1), an agency may amend the record where it is satisfied that the information that it contains is incomplete, incorrect, out of date or misleading. Under s 50(2), an amendment may be made by altering the document concerned to make the information complete, correct, up to date or not misleading; or by adding a note specifying the respects in which the information is incomplete, incorrect, out of date or misleading.
7. The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The Guidelines explain that the material that an applicant needs to provide to support their claim will vary according to each case.¹

Issues

8. The issues to be decided in this IC review are whether the Department's record of the applicant's date of birth is incorrect and, if so, whether and how the record should be amended.

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [7.28]. See also 'K' and Department of Immigration and Citizenship [2012] AICmr 20; 'M' and Department of Immigration and Citizenship [2012] AICmr 23; 'N' and Department of Immigration and Citizenship [2012] AICmr 26; and 'O' and Department of Immigration and Citizenship [2012] AICmr 27.

Is the currently recorded date of birth incorrect?

9. The applicant was born in Sudan. The applicant fled Sudan in 2002 and travelled to Egypt with his mother and five siblings.² The applicant and his family arrived in Australia from Egypt in 2003 under an Offshore Humanitarian Visa. The Department's record of the applicant's date of birth as 18 October 1989 is based on information provided during the resettlement process. The applicant has used the same date of birth since he arrived in Australia.
10. The applicant has made two previous requests to the Department to amend his personal record:
 - on 27 July 2009, to amend his date of birth from 18 October 1989 to 18 October 1992, and
 - on 17 September 2009, to amend his name and date of birth from 18 October 1989 to 1 January 1993.
11. On each occasion, the Department refused to amend the applicant's personal record as it was not satisfied that the currently recorded date of birth was incorrect, incomplete, out of date or misleading.³
12. In support of its decisions, the Department has relied on a number of documents that record the applicant's date of birth as 18 October 1989, including:
 - Refugee and Special Humanitarian Proposal (Form 681)
 - Republic of Sudan Passport (No. A673954), issued 4 October 2000
 - Application for Offshore Humanitarian Visa (Form 842)
 - Document for Travel to Australia (DFTTA) and
 - Statutory Declaration signed by the applicant in support of his Australian Citizenship application (dated 16 January 2009).
13. In his 2011 request for amendment, the applicant said that the Refugee and Special Humanitarian Proposal was completed by his family's sponsor from the Australian Southern Sudanese Support Group (**ASSSG**) and the ASSSG incorrectly listed his date of birth as 18 October 1989 on this form. The applicant further claims that this information was subsequently used on all other documentation provided to the Department, including his Republic of

² In a separate application for amendment of personal records submitted to the Department in 2003, the applicant's mother stated that the applicant was not her son; rather, she claimed he was the son of one of her deceased husband's brothers. The applicant's mother also stated that the applicant's name was incorrectly recorded on the Department's record and requested that it be amended. This request was refused by the Department on 11 December 2004 due to a lack of documentary evidence.

³ These decisions were made on 8 September 2009; 7 October 2009 and (on internal review) 20 November 2009.

Sudan Passport (No. A673954).⁴ However, in his request for amendment of records dated 27 July 2009, the applicant stated that his aunt 'put up my age when she did the paperwork to come to Australia'.⁵

14. The applicant has stated that he only became aware that his recorded date of birth was incorrect when his father in Sudan contacted him and advised him of his correct name and date of birth.
15. In support of his requests for amendment, the applicant has provided the following documentation:
 - Two translated copies of an Age Estimate Certificate (dated 13 February 2008 and 3 August 2009) from the Sudanese Ministry of Health, which the applicant claims was obtained by his father in Sudan based on hospital records of his date of birth.
 - A copy of the personal information page of a second passport (No. C0697385).
 - A letter from a general practitioner, dated 19 February 2011, which states '[i]n my opinion, [the applicant's] behaviour, mannerisms, and characteristics are consistent with him being between 17 and 18 years of age.'
 - Letter from an Employment Consultant at MAXEmployment, dated 17 December 2010, stating that whilst she is no expert, the applicant appeared to 'the social skills and demeanour of a young man of approximately 17 years of age.'
16. In support of its decision, the Department submitted that there was uncertainty about the reliability of some of the documentation provided by the applicant. The Department pointed out (and the applicant's own submissions support this) that the applicant had not been examined by a doctor in Sudan in order to obtain the Age Estimate Certificate. The applicant has submitted that his father in Sudan determined his year of birth from hospital records and that these records were used to obtain the Age Estimate Certificate, however no evidence of the hospital record has been provided. I agree with the Department that there is uncertainty about the reliability of the Age Estimate Certificate and I give it little weight in this IC review
17. The Department also made a number of observations about the second passport (No C0697385) provided by the applicant, including that it has a different passport number to the passport provided by the Applicant in the Offshore Humanitarian Visa (No. A673954); the name of the passport holder is not visible; the passport does not have a date or location of issue; and the

⁴ The passport was issued in 2000 and the applicant and his family did not apply to come to Australia until 2002, meaning that the passport actually pre-dates the Refugee and Special Humanitarian Proposal.

⁵ Given the applicant's mother's previous FOI request in which she stated she was not his mother, I take it that the applicant's reference to his aunt is a reference to his mother.

applicant provided an uncertified copy of the document. The Department also provided a Document Examination Case Report from its Document Examination Unit (**DEU**) which concluded that:

The appearance of the perforated number C0697385 on the left page appears inconsistent with the perforated number C0697385 on the right page...[g]iven the inconsistency in the perforated numbers on the two pages I would consider this document to be an unreliable document of identity.

18. Based on the conclusion of the DEU, I give little weight to the second passport provided by the applicant (No C0697385).
19. The estimates of age given by the medical practitioner and Employment Consultant are subjective and I also do not give much weight to them.

Findings

20. The Department's record of the applicant's date of birth (18 October 1989) is based on information provided to it on migration documents. The only evidence that the Department's record is incorrect is the applicant's Age Estimate Certificate and the second passport (No C0697385), neither of which I consider to be a reliable record of the applicant's date of birth.
21. Further, there is documentary evidence (the passport No. A673954) that pre-dates the applicant's Refugee and Special Humanitarian Visa application and which provides that the applicant's date of birth is 18 October 1989.
22. I am satisfied that, on the balance of probabilities, the currently recorded date of birth is not incorrect.

Should the Department's record be amended?

23. Given my finding about the currently recorded date of birth, there is no need for me to consider whether and how the record should be amended.

Decision

24. Under s 55K of the FOI Act, I affirm the Department's decision of 20 October 2011.

Toni Pirani
Acting Freedom of Information Commissioner
8 April 2013

Review rights

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$816, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website (www.aat.gov.au) or by telephoning 1300 366 700.