

CATCHWORDS

PASSPORTS – amendment to Australian passport following gender reassignment surgery – refusal of NSW Registry Births Deaths and Marriages to issue an amended birth certificate because of marriage status – consideration of legislative intent for issuing passports – department policy for guiding determination of gender and identity – matters to be taken into consideration in determining identity – decision under review set aside

LEGISLATION

Australian Passports Act 2005 – sections 7, 8 and 43

Births, Deaths and Marriages Registration Act 1995 (NSW) – section 32B

OTHER REFERENCES

Australian Passports Determination 2005

Australian Passports Amendment Determination 2007 (No.1)

Australian Passports Bill 2004 – Explanatory Memorandum

International Covenant on Civil and Political Rights – article 12

Manual of Australian Passport Issue – paragraphs 3.3.1, 3.3.2, 3.3.3 and 3.3.7

REASONS FOR DECISION

28 September 2007

The Hon RNJ Purvis AM, QC, Deputy President

THE APPLICATION

1. This matter relates to an application under date 12 March 2007 made by Ms Grace Abrams to have the Minister for Foreign Affairs and Trade issue her with an Australian passport noting on it her gender as female. A delegate of the Minister for Foreign Affairs and Trade (“the Respondent”) declined to do so on the ground that the requirements of the Department’s policy had not been met. The delegate’s decision was affirmed on 26 February 2007.

RELEVANT FACTS

2. Ms Abrams was born in Australia on 1 June 1974. Her birth certificate records her gender as male.

3. Between 2001 and October 2005, Ms Abrams underwent gender re-assignment surgery in Thailand. Certificates obtained from medical practitioners verify that she underwent gender affirmation surgery, or sexual reassignment surgery, and that she has assumed female gender.

4. On 3 September 2005, Ms Abrams married her present partner, this prior to the completion of her transition to female gender. She is not now separated from her spouse, and has no intention, even if she had the ground to do so, of seeking dissolution of the marriage.

5. On 20 April 2006, Ms Abrams applied for an Australian passport, noting in her application that her gender was female. As a married person, Ms Abrams was unable to obtain from the Registrar an alteration of the record of her sex in the registration of her birth, on account of the provisions in section 32B of the *Births, Deaths and Marriages Registration Act 1995* (NSW).

6. The Respondent refused the issue of a passport to Ms Abrams noting her gender as female, on account of her inability to provide the amended birth certificate.

7. The Tribunal is satisfied on the basis of the evidence before it, including the Applicant's evidence, medical certificates, change of name on drivers licence, Medicare card, bank accounts and a third party identification, that Ms Abrams did undergo the above mentioned surgery, and is at this time a person of the female gender. It is further satisfied, so far as it is relevant to this application, that Ms Abrams has demonstrated a genuine and reasonable need for a passport which notes her proper gender.

STATUTORY PROVISIONS AND MANUAL OF AUSTRALIAN PASSPORT ISSUE

8. *The Australian Passports Act 2005* ("the Act") provides, as is relevant:

7 Australian citizen is entitled to be issued an Australian passport

(1) An Australian citizen is entitled, on application to the Minister, to be issued with an Australian passport by the Minister.

(2) *An Australian citizen's entitlement to be issued with an Australian passport is affected by section 8 and by Division 2.*

...

8 Minister to be satisfied of person's citizenship and identity

Before issuing an Australian passport to a person, the Minister must be satisfied:

- (a) *that the person is an Australian citizen; and*
- (b) *of the identity of the person.*

Note: See sections 42 and 43 for details about how the Minister satisfies himself or herself of an Australian passport applicant's citizenship and identity.

...

43 Minister may determine information required for the purpose of satisfying Minister of person's citizenship and identity etc.

(1) *A Minister's determination may specify kinds of personal information that may be requested by the Minister for the purposes of Part 2.*

(2) *This section does not prevent the Minister from requesting under subsection 42(1) information that is not specified in a determination made for the purposes of subsection (1) of this section.*

9. The *Australian Passports Determination 2005* ("the Determination") was amended by Schedule 1 of the *Australian Passports Amendment Determination 2007* (No. 1), which provides at section 7(2), that:

(2) *For subsection 43 (1) of the Australian Passports Act, the Minister may request the following kinds of personal information for the purpose of satisfying himself or herself of the person's identity under paragraph 8 (b) of the Australian Passports Act:*

- (a) *the person's name as shown in records held by the Registrar of Births, Deaths and Marriages of an Australian State or Territory or by the Department of Immigration and Citizenship;*
- (b) *the person's date of birth as shown in those records;*
- (c) *the person's place of birth as shown in those records;*
- (d) *the person's sex as shown in those records.*

10. The above amendment, by enabling the Minister to request information as to a person's sex as shown in records held by the Registrar of Births, Deaths and Marriages, pre-supposes that this information may not have been already provided as a necessary prerequisite to establishing a person's identity. This being so, it may well be that identity is capable of being established in the absence of information as to a person's sex from the Registrar.

11. In the Explanatory Memorandum to the *Australian Passports Bill 2004*, and with reference to the issue of Australian passports, it was said by the Minister:

Part 2 - Australian travel documents

Division 1 - Issue of Australian travel documents

Subdivision A - Issue of Australian passports

Clause 7 - Australian citizen is entitled to be issued an Australian passport

8. Clause 7 will state clearly an Australian citizen's entitlement to be issued with an Australian passport. This provision is consistent with Article 12 of the International Covenant on Civil and Political Rights (Australian Treaty Series 1980 No. 23), which relates to freedom of movement.

9. Subclause 7(1) will require a citizen to make an application to the Minister. Subclause 7(2) will make clear that a citizen's entitlement is affected by new section 8 (which relates to identity and citizenship) and by new Division 2 (which relates to reasons for refusal).

...

Clause 8 - Minister to be satisfied of person's citizenship and identity

11. Clause 8 will require the Minister to be satisfied of a person's identity and citizenship before issuing an Australian passport. The Minister may request further information, which may be relevant to making this decision, in accordance with the provisions of new sections 42 and 43.

12. Article 12 of the International Covenant on Civil and Political rights provides that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

13. Under date 21 August 2007, the *Manual of Australian Passport Issue* November 2006 was amended. The amended manual, being that which applies to the present application, relevantly provides:

3.3.1.1 *Identity theft is a growing problem within Australia. Research has shown that this problem is closely linked to organised crime and the illegal use of Australian travel documents. The positive confirmation of the applicant's identity is therefore a crucial part of the passport*

interviewing and processing procedures and must be given a high priority by passport staff. Where there are any doubts whatsoever an Australian travel document must not be issued without those doubts being resolved.

...

3.3.1.3 *As part of a whole of government initiative to strengthen the proof of identity procedures within the public sector agreement was reached amongst a wide range of key Commonwealth agencies on the introduction of a standardised proof of identity model based on those identity documents assessed to have the required integrity.*

3.3.1.4 *This process is called the PIDS model (Prescribed Identification document System) and it has been designed to work in partnership with our automatic birth and citizenship validation procedures to better meet the challenges of sophisticated identity fraud practices.*

...

3.3.1.6 *The three PIDS categories included on adult passport application forms are designed to perform the following functions in confirming an applicant's identity at interview:*

- *Category A includes those documents that can tie the applicant's face to a name i.e. documents that contain a photographic image of the holder and the person's signature;*
- *Category B – those documents that prove the person operates in the community in that identity; and*
- *Category C – those documents that prove that the person in that identity is a resident in the community and provides proof of the person's address.*

3.3.1.7 *Details of the categories and combination of documents an applicant must provide at interview are set out in sections 3.3.3 Supporting documents for interviews in Australia, and 3.3.4 Supporting documents for interviews overseas.*

...

Use of a birth certificate to establish identity

3.3.2.2 *For the purposes of passport issue, the purpose of an Australian birth certificate is to confirm that the person named on the birth certificate has a claim to Australian citizenship, particularly parentage, and provides the four personal elements (name, gender, date and place of birth) that when combined with the results of the PIDS process, establishes the identity of the applicant.*

14. Proof of identity documents (PIDS) required for interviews are set forth in paragraph 3.3.3.

15. The Manual also makes provision for change of sex and relevantly provides:

3.3.7 Change of sex

3.3.7.1 A full validity passport in the new gender may be issued to a transgender person subject to the applicant meeting all relevant passport application requirements including:

- For applicants born in Australia – a birth certificate from their State/Territory RBDM showing the gender reassignment;

...

Note: All states and territories now have legislation allowing transgender persons who are at least 18 years of age, have undergone gender affirmation procedures and are not married to apply to amend the gender on their birth certificates.

...

- Requests for travel documents that fall outside this revised policy framework are not to be issued by a passport office. Where necessary, cases that fall outside of this policy may be referred to PPC [Policy Passport Coordination] for advice.

DISCUSSION OF THE POSITION TAKEN BY THE RESPONDENT AND THE APPLICANT'S CONTENTIONS

16. In the reasons for affirming the original decision, the Respondent stated:

“Applying s43(2) of the Passports Act, when considering a passport application from a person who has undergone gender reassignment surgery, the Department’s policy to request the provision of an amended birth certificate from the relevant Registrar of Births, Deaths and Marriages (RBDM) recording the applicant’s reassigned gender. This document is required as part of the process of the Minister deciding whether to issue an Australian passport.

...

The Department’s policy is informed by the Marriage Act 1961 (Cth) which does not recognise marriage between two people of the same gender. A decision to not apply the policy in circumstances where an applicant for a passport was unable to obtain an amended birth certificate in his or her assigned gender because the person was married would be contrary to the Australian Government’s legislated position which only recognises marriage between a man and a woman.

17. This position was maintained in the Respondent’s section 37 statement which relevantly stated:

1.6 When considering a passport application from a person who has undergone gender reassignment surgery, the Department’s policy in applying s43(2) of the Passports Act, is articulated in the Manual of Australian Passport Issue, which... states:

3.3.7 Change of sex

3.3.7.1 A full validity passport in the new gender may be issued to a transgender person who has undergone gender affirmation surgery subject to the applicant meeting all relevant passport application requirements including:

- *For applicants born in Australia – a birth certificate from their State/Territory RBDM showing the gender of reassignment.*

...

2.2 On 20 April 2006 the Applicant lodged an application for an Australian passport following gender reassignment surgery in Thailand in October 2005. She attached her birth certificate which recorded her gender as male and letters from treating medical practitioners confirming that she had now assumed female gender. She noted her gender as female on the application.

2.3 On 4 May 2006 the Department wrote to the Applicant advising that full validity passports in a new gender may be issued to a transgender person who has undergone gender affirmation surgery subject to the Applicant meeting all relevant passport application requirements including:

For Applicants born in Australia – a birth certificate from their State/Territory Registry of Births, Deaths and Marriages showing that gender reassignment.

As the Applicant did not provide an amended birth certificate the Department's policy was to only issue a passport in the gender shown on the Applicant's birth certificate.

...

2.8 On 19 December 2006 the Department wrote to the applicant advising that her application for an Australian passport to be issued noting her gender as female had been refused on the basis that the applicant was unable to satisfy the requirements of the Department's policy... The Department's policy is informed by the Marriage Act 1961 (Cth) which does not recognise marriage between two people of the same gender. A decision to not apply the policy in circumstances where an applicant for a passport was unable to obtain an amended birth certificate in his or her reassigned gender because the person was married would be contrary to the Australian Government's legislated position which only recognises marriage between a man and a woman."

18. The above contentions were also maintained in the Respondent's Statement of Facts and Contentions. Indeed, in the latter, the Respondent contended that the "Tribunal could be satisfied of the identity of the applicant as a person of male sex". I hasten to add that it is not so satisfied. Of course gender is an element, as the Respondent maintains, of identity. But it is only one possible element, and one way in establishing that a person has the identity specified in an application made for a passport.

19. The Respondent quite rightly directs the Tribunal's attention to the *Manual of Australian Passport Issue* ("the Manual") which contains, as already detailed above, a policy intended to guide the determination of gender and identity by decision-makers. The Tribunal is to apply this policy in its decision making. The Manual, however, anticipates a request for a passport falling outside the policy framework, as is the situation in the present circumstances. The policy guidance contained in

paragraph 3.3.7.1 of the Manual, in this respect, is not able to be complied with by Ms Abrams, this by no fault of her own.

20. It is not the intent of the Manual, or more so the Act, to prevent an Australian citizen obtaining a passport. The purport of the Manual is to ensure that the identity of the person seeking a passport is clearly established for security and other reasons. Once this identity has been established, and it corresponds with the Australian citizen, a passport is to be issued: section 7 of the Act. This is the statutory right of the citizen. There is no discretion relevant to the issue, only as to the matters that a decision-maker is to take into consideration in deciding the prerequisites of citizenship, and more especially as it relates to this application, identity.

21. It is said on behalf of the Respondent that, "it would be undesirable for the personal details recorded in a passport to be inconsistent with the information recorded about the bearer in the register of Births, Deaths and Marriages" of a State or Territory. But in the present instance, would this be so? Ms Abrams was validly married and was issued with a marriage certificate by the New South Wales Registry of Births, Deaths and Marriages on 6 September 2005. The marriage certificate speaks for itself, and is a part of the "information" recorded by the Registry. It may be that the State Legislation needs to be amended to accord with the reality. It is further said on behalf of the Respondent that, "it is therefore appropriate, for Australian-born applicants at least, for a decision-maker under the Passports Act to be guided by the contents of the relevant register in determining an applicant's gender". I have difficulty in accepting this submission. The "relevant register" in the present instance does not accord with the actual situation. It seems to me that it is inappropriate for a decision-maker to be guided in the decision making process by "contents of" a register which is currently not correct.

22. At the hearing of the application, the Respondent conceded that "one's gender is not fixed at birth", but that a passport should align with the cardinal document that is a birth certificate. This submission seems to me to negate the very intention of the Manual, and the procedures detailed in it; that is, to issue a passport that does not

accord with the factual situation, being a document that would mislead a governmental office, passport control or customs as to the true identity of the bearer.

23. It was said that the factor driving the Respondent in rejecting the application was to ensure that any outcome reflected the legislative intent; that is, the person seeking the passport has the identity referred to in the application. There can be no issue with this intent. The only concern is as to the manner in which the identification issue is to be satisfied. Section 8 of the Act is to be satisfied. It is the identity of the Applicant, in the Australian community, that is the event that makes she or he an Australian citizen. Normally, this would be by production of a birth certificate. But there are markers of identity which can change over one's life, these markers being very relevant to the identity of the person at the time of the application. For it is not so much the identity of the person as she or he was in the past, but the identity of the person as at the time of the application, that is of prime importance.

24. The policies outlined in the Manual will undoubtedly help in maintaining consistency in establishing identity. This is important and desirable. But where a situation arises which is not specifically provided for by the policy, a decision-maker, the Respondent, or the Tribunal, is to exercise the available discretion in arriving at a finding as to identity; that is, exercising the discretion as to the means to be adopted by which the identity is confirmed or otherwise. This is seen in the "kinds of personal information" the Minister may request pursuant to section 7.2(2) of the Determination.

25. It was said on behalf of the Respondent that a "passport records identity, it does not create it". More reason, it might be thought, for the passport to record an accurate identity, one in accord with the factual situation as it exists at the time the passport is applied for an issued. The passport should not align with an incorrect cardinal document. This would defeat the purport and intent of the legislative provisions and the Manual.

26. It is worthy to note that paragraph 3.3.2.2 of the Manual identifies personal elements that appear from a birth certificate, namely name, gender, date and place of birth that, when combined with the results of the prescribed identification

document system, establishes identity. The purpose of an Australian birth certificate is to confirm that a person named on the birth certificate has a claim to Australian citizenship. It does not establish identity. In the present application, the birth certificate personal elements, updated with the evidence tendered before the Tribunal as to Ms Abrams now being of the female gender, not only confirm her claim to citizenship, but clearly establish her identity. Section 8 is satisfied and section 7 is enlivened.

DECISION

27. There is no issue in this application that Ms Abrams has provided the Respondent and the Tribunal with documentary evidence to the effect that she is an Australian citizen. The Tribunal is satisfied, and so finds, that she is a female person and has the identity that she contends. Her inability to provide a birth certificate from the Registrar of Births, Deaths and Marriages that records her female gender, in circumstances where the obtaining of the same is prevented by state legislation, is not a valid ground for rejecting her passport application, where her identity can be satisfactorily established by other means.

28. Accordingly, Ms Abrams is entitled to be issued by the Respondent with a full validity Australian passport, as a female person.

29. The decision under review is set aside. The Tribunal is satisfied as to the citizenship and identity of Ms Abrams within the meaning of section 8 of the *Australian Passports Act 2005*. The application is referred back to the Respondent with the direction that an Australian passport be issued to Ms Grace Abrams, noting her female gender.

I certify that the 29 preceding paragraphs are a true copy of the reasons for the decision herein of The Hon RNJ Purvis AM, QC, Deputy President

Signed: [Skye Owen]
Associate

Date of Hearing	12 September 2007
Date of Decision	28 September 2007
Counsel for Applicant	Mr D. Shoebridge
Advocate for Applicant	Ms N. Ross
Counsel for Respondent	Mr G. Kennett
Advocate for the Respondent	Ms M. Window