



Administrative Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms [REDACTED] Wong

CASE NUMBER: 17 [REDACTED]

HOME AFFAIRS REFERENCE(S): BCC2017/[REDACTED]

MEMBER: Vanessa Plain

DATE: 4 April 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:

- cl.500.212(a) of Schedule 2 to the Regulations.

I, Member, V. Plain certify that
this is the Tribunal's statement of decision and reasons

Statement made on 04 April 2019 at 5:29pm

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 Border Protection on 7 September 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 20 July 2017. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.
3. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.212(a) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that the applicant genuinely intends to stay in Australia temporarily as a full time student.
4. The applicant appeared before the Tribunal on 25 March 2019 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was assisted in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The criteria for a Subclass 500 (Student) visa are set out in Part 500 of Schedule 2 to the Regulations. The primary criteria in cl.500.211 to cl.500.218 must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need only satisfy the secondary criteria. The issue in the present case is whether the applicant genuinely intends to stay in Australia temporarily as a full time student.
8. Clause 500.212 requires as follows:

The applicant is a genuine applicant for entry and stay as a student because:

- (a) the applicant intends genuinely to stay in Australia temporarily, having regard to:
 - (i) the applicant's circumstances; and
 - (ii) the applicant's immigration history; and
 - (iii) if the applicant is a minor—the intentions of a parent, legal guardian or spouse of the applicant; and
 - (iv) any other relevant matter; and
- (b) the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:
 - (i) the applicant's record of compliance with any condition of a visa previously held by the applicant (if any); and
 - (ii) the applicant's stated intention to comply with any conditions to which the visa may be subject; and
- (c) of any other relevant matter.

Does the applicant intend genuinely to stay in Australia temporarily?

9. In considering whether the applicant satisfies cl.500.212(a), the Tribunal must have regard to Direction No.69, 'Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications', made under s.499 of the Act. This Direction, which is attached to this decision, requires the Tribunal to have regard to a number of specified factors in relation to:
- the applicant's circumstances in their home country, potential circumstances in Australia, and the value of the course to the applicant's future;
 - the applicant's immigration history, including previous applications for an Australian visa or for visas to other countries, and previous travel to Australia or other countries;
 - if the applicant is a minor, the intentions of a parent, legal guardian or spouse of the applicant; and
 - any other relevant information provided by the applicant, or information otherwise available to the decision maker, including information that may be either beneficial or unfavourable to the applicant.
10. The Direction indicates that the factors specified should not be used as a checklist but rather, are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.
11. The applicant is a 33 year-old Malaysian female who travelled to Australia on 19 May 2017 on a Class UD Subclass 601 visa. On 20 July 2017, the applicant applied for a student visa. As at the date of the delegate's decision on 7 September 2017, the applicant had not completed a Certificate III in EAL in which she was then enrolled. Based on the evidence before the Tribunal at the time of hearing, the Tribunal accepts that the applicant has now successfully completed the following studies:
- Certificate III in EAL
 - Certificate IV in EAL
12. The Tribunal further accepts that the applicant is currently enrolled in Certificate IV in Leadership and Management course which she is expected to complete by 12 June 2019. The Tribunal further accepts that the applicant proposes to commence a Diploma of Leadership and Management on 11 July 2019 which is scheduled for completion by July 2020.
13. The applicant provided a GTE statement to the Tribunal which provided as follows:
- She completed Secondary School in Malaysia and works as a hairdresser;
 - The reason for her choice to study in Australia is to improve her English and people in Australia do not speak English with a heavy accent like people in Malaysia do;
 - The applicant believes that the courses in Leadership and Management at the Pax Institute of Education Pty Ltd are better suited to her personally, than undertaking study at an institute like The University of Melbourne, because she does not have a strong educational background;

- The applicant wishes to continue to work as a hairdresser after her studies, but believes that qualifications in the English language, together with the Leadership and Management qualification, will enable her to obtain a position managing and supervising staff and open up managerial opportunities to her generally;
 - Being able to speak English will increase her earning capacity as she will be able to service hairdressing clients who prefer to speak in English and salon managers have higher salaries;
 - The applicant will return home after her studies, as her family are in Malaysia;
 - Learning English in Australia is preferable to learning it in Malaysia, because it allows for the practice of the language with non Asian people;
 - The applicant has no military commitments or concern about civil and/or political unrest in Malaysia; and
 - In 2007 while in Australia on a visitor visa, the applicant breached a condition of that visa. She was 22 years old at the time and did not appreciate the consequences of not abiding by visa conditions.
14. The applicant gave evidence at the hearing that she finished secondary school in Malaysia and has done vocational courses there in the hair dressing field. Her desire to learn English in Australia is motivated by the fact that she believes being able to speak English will help her obtain a better job as a hairdresser, possibly in a managerial role. The Tribunal accepts that evidence and notes that it is not inconsistent with the GTE statement.
15. By letter dated 18 February 2019, the Tribunal requested the applicant provide information under s.359(2) of the Migration Act. In response to that letter, the applicant provided the following:
- A GTE Statement;
 - A statutory declaration of [REDACTED] declared 27 February 2019.
 - Documentation from the Pax Institute of Education demonstrating satisfactory completion of studies in Certificates III and IV in EAL; and
 - Submissions on behalf of the applicant prepared by her migration agent.
16. In evidence at the hearing, the applicant did not foreshadow any further study beyond the Diploma of Leadership and Management on 11 July 2019 which is scheduled for completion by July 2020. The applicant is not working in Australia. The statutory declaration demonstrates that the applicant's sister supports her financially while in Australia. The applicant lives with her sister and two other flat mates in rented premises in Melbourne. The evidence before the Tribunal demonstrates that the applicant is doing what the holder of a student visa should do; she is studying in an approved course and progressing academically.
17. The applicant was informed by the Tribunal that a previous breach of a visa condition could be a reason, or part of the reason, for the Tribunal to find that the delegate's decision should be affirmed. The applicant was invited to comment and respond. The applicant said she was only 22 at the time and had no idea it was such a serious offence to breach a visa condition. The applicant candidly admitted she had made a mistake. On the basis of the age of the applicant at the time of the breach (22 years old) and her candour in admitting the

breach, the Tribunal is satisfied that this is not a factor which ought to weigh against the applicant in the circumstances.

18. The applicant maintains contact with her family in Malaysia. Her husband lives in Malaysia and they own property together in Malaysia. There is no evidence before the Tribunal that the applicant has breached any conditions attached to her current Australian visa. There is no evidence before the Tribunal that the applicant has been denied a visa to other countries, having travelled to Singapore and Thailand for holidays previously.
19. There is no evidence before the Tribunal that the applicant has family, employment or community ties such that they would present as strong incentives to remain in Australia. The applicant declared that there are not any military service commitments, or political or civil unrest in Malaysia that would induce her to apply for a student visa as a means of obtaining entry into Australia for the purpose of remaining here indefinitely.
20. On the basis of the above, the Tribunal satisfied that the applicant intends genuinely to stay in Australia temporarily. Accordingly, the applicant meets criteria cl.500.212(a).
21. Accordingly, the Tribunal is satisfied that the applicant is a genuine applicant for entry and stay as a student as required by cl.500.212(a).
22. Given the above findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 500 (Student) visa.

DECISION

23. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
 - cl.500.212(a) of Schedule 2 to the Regulations.

Vanessa Plain
Member

Attachment – Direction No.69

**DIRECTION NUMBER 69 – ASSESSING THE GENUINE TEMPORARY ENTRANT CRITERION
FOR STUDENT VISA AND STUDENT GUARDIAN VISA APPLICATIONS**

(Section 499)

I, *PETER DUTTON*, Minister for Immigration and Border Protection give this Direction under section 499 of the *Migration Act 1958* (the Act).

Dated: 18 April 2016

Peter Dutton
Minister for Immigration and Border Protection

Note: Section 499(1) of the Act empowers the Minister to give a written direction to a person or body having functions or powers under the Act if the directions are about the performance of those functions; or the exercise of those powers. Under section 499(2) of the Act, the direction must not be inconsistent with the Act or the *Migration Regulations 1994*. Under section 499(2A) of the Act, the person or body must comply with the Direction.

Part 1 of Direction No. 69 - Preliminary

Name of Direction

This Direction is Direction No. 69 - Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications.

It may be cited as Direction No. 69.

Commencement

This Direction commences on 1 July 2016.

Interpretation

Act means the *Migration Act 1958*.

Genuine temporary entrant means a person who satisfies the genuine temporary entrant criterion for Student visa or Student Guardian visa applications.

Genuine temporary entrant criterion refers to clause 500.212(a), 500.312(a) and 590.215(a) at Schedule 2 to the Regulations.

Home country has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Regulations mean the Migration Regulations 1994.

Relative has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Spouse has the same meaning as the definition of the term in section 5F of the Act.

Student visa means a Subclass 500 (Student) visa

Student Guardian visa means a Subclass 590 (Student Guardian) visa.

Application

This Direction applies to delegates performing functions or exercising powers under section 65 of the Act in relation to assessing an applicant's temporary entrant criterion for Student visa applications in Schedule 2 to the Regulations.

This Direction also applies to members of the Administrative Appeals Tribunal who review the decisions of primary decision-makers in relation to a Student visa or a Student Guardian visa application.

The genuine temporary entrant criterion must be satisfied by all applicants who make an application for either a Student visa seeking to satisfy the primary criteria for a Student Guardian visa.

Preamble

The Australian Government operates a student visa programme that enables people who are not Australian citizens or Australian permanent residents to undertake study in Australia. A person who wants to undertake a course of study under the student visa programme must obtain a student visa before they can commence a course of study in Australia. A successful applicant must be both a genuine temporary entrant and a genuine student.

An applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to temporarily enter and remain in Australia, notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently.

The genuine temporary entrant criterion for Student visa applications requires the Minister to be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:

- a. the applicant's circumstances; and
- b. the applicant's immigration history; and
- c. if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and
- d. any other relevant matter.

This Direction provides guidance to decision makers on what factors require consideration when assessing the above paragraphs a to d, to determine whether the applicant genuinely intends to stay in Australia temporarily.

Decision makers must take a reasonable and balanced approach between the need to make a timely decision on a Student visa or Student Guardian visa application and the need to identify those applicants who, at time of decision, do not genuinely intend to stay in Australia temporarily

Part 2 of Direction No. 69 - Directions

Assessing the genuine temporary entrant criterion

1. Decision makers should not use the factors specified in this Direction as a checklist. The listed factors are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.
2. Decision makers should assess whether, on balance, the genuine temporary entrant criterion is satisfied, by:
 - a. considering the applicant against all factors specified in this Direction; and
 - b. considering any other relevant information provided by the applicant (or information otherwise available to the decision maker).
3. Decision makers may request additional information and/or further evidence from the applicant to demonstrate that they are a genuine temporary entrant, where closer scrutiny of the applicant's circumstances is considered appropriate.
4. Circumstances where further scrutiny may be appropriate include but are not limited to:
 - a. information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the department indicates the need for further scrutiny;
 - b. the applicant or a relative of the applicant has an immigration history of reasonable concern;
 - c. the applicant intends to study in a field unrelated to their previous studies or employment; and
 - d. apparent inconsistencies in information provided by the applicant in their Student visa application.
5. An application for a Student visa or a Student Guardian visa should be refused if, after weighing up the applicant's circumstances, immigration history and any other relevant matter, the decision maker is not satisfied that the applicant genuinely intends a temporary stay in Australia.

The applicant's circumstances

6. Decision makers should have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.
7. For primary applicants of Subclass 500 Student visas, decision makers should have regard to the value of the course to the applicant's future.
8. Weight should be placed on an applicant's circumstances that indicate that the Student visa or Student Guardian visa is intended primarily for maintaining residence in Australia.

The applicant's circumstances in their home country

9. When considering the applicant's circumstances in their home country, decision makers should have regard to the following factors:
 - a. whether the applicant has reasonable reasons for not undertaking the study in their home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives established by the applicant;

- b. the extent of the applicant's personal ties to their home country (for example family, community and employment) and whether those circumstances would serve as a significant incentive to return to their home country;
 - c. economic circumstances of the applicant that would present as a significant incentive for the applicant not to return to their home country. These circumstances may include consideration of the applicant's circumstances relative to the home country and to Australia;
 - d. military service commitments that would present as a significant incentive for the applicant not to return to their home country; and
 - e. political and civil unrest in the applicant's home country. This includes situations of a nature that may induce the applicant to apply for a Student visa or Student Guardian visa as means of obtaining entry to Australia for the purpose of remaining indefinitely. Decision makers should be aware of the changing circumstances in the applicant's home country and the influence these may have on an applicant's motivations for applying for a Student visa or a Student Guardian visa.
10. Decision makers may have regard to the applicant's circumstances in their home country relative to the circumstances of others in that country.

The applicant's potential circumstances in Australia

11. In considering the applicant's potential circumstances in Australia, decision makers should have regard to the following factors:
- a. The applicant's ties with Australia which would present as a strong incentive to remain in Australia. This may include family and community ties;
 - b. evidence that the student visa programme is being used to circumvent the intentions of the migration programme;
 - c. whether the Student visa or Student Guardian visa is being used to maintain ongoing residence;
 - d. whether the primary and secondary applicant(s) have entered into a relationship of concern for a successful Student visa outcome. Where a decision maker determines that an applicant and dependant have contrived their relationship for a successful Student visa outcomes, the decision maker may find that both applicants do not satisfy the genuine temporary entrant criterion; and
 - e. the applicant's knowledge of living in Australia and their intended course of study and the associated education provider; including previous study and qualifications, what is a realistic level of knowledge an applicant is expected to know and the level of research the applicant has undertaken into their proposed course of study and living arrangements.

Value of the course to the applicant's future

12. Decision makers should have regard to the following factors when considering the value of the course to the applicant's future:
- a. whether the student is seeking to undertake a course that is consistent with their current level of education and whether the course will assist the applicant to obtain employment or improve employment prospects in their home country. Decision makers should allow for reasonable changes to career or study pathways; and
 - b. relevance of the course to the student's past or proposed future employment either in their home country or a third country; and

- c. remuneration the applicant could expect to receive in the home country or a third country, compared with Australia, using the qualifications to be gained from the proposed course of study.

The applicant's immigration history

- 13. An applicant's immigration history refers both to their visa and travel history.
- 14. When considering the applicant's immigration history, decision makers should have regard to the following factors:
 - a. Previous visa applications for Australia or other countries, including:
 - i. if the applicant previously applied for an Australian temporary or permanent visa, whether those visa applications are yet to be finally determined (within the meaning of subsection 5(9) of the Act), were granted, or grounds on which the application(s) were refused; and
 - ii. if the applicant has previously applied for visa(s) to other countries, whether the applicant was refused a visa and the circumstances that led to visa refusal.
 - b. Previous travels to Australia or other countries, including:
 - i. if the applicant previously travelled to Australia, whether they complied with the conditions of their visa and left before their visa ceased, and if not, were there circumstances beyond their control;
 - ii. whether the applicant previously held a visa that was cancelled or considered for cancellation, and the associated circumstances;
 - iii. the amount of time the applicant has spent in Australia and whether the Student visa or Student Guardian visa may be used primarily for maintaining ongoing residence, including whether the applicant has undertaken a series of short, inexpensive courses, or has been onshore for some time without successfully completing a qualification; and
 - iv. if the applicant has travelled to countries other than Australia, whether they complied with the migration laws of that country and the circumstances around any non-compliance

If the applicant is a minor— the intentions of a parent, legal guardian or spouse of the applicant

- 15. If the primary or secondary applicant for a Subclass 500 Student visa is a minor, decision makers should have regard to the intentions of a parent, legal guardian or spouse of the applicant.

Any other relevant matters

- 16. Decision makers should also have regard to any other relevant information provided by the applicant (or information otherwise available to the decision maker) when assessing the applicant's intention to temporarily stay in Australia. This includes information that may be either beneficial or unfavourable to the applicant.