Administrative Appeals Tribunal

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms [redacted]
CASE NUMBER:	[redacted]
DIBP REFERENCE(S):	BC[redacted]
MEMBER:	Margie Bourke
DATE:	25 May 2017
PLACE OF DECISION:	Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(d) of Schedule 2 to the Regulations.

I, Member Margie Bourke, certify that this is the Tribunal's statement of decision and reasons

Statement made on 25 May 2017 at 12:33pm

The Tribunal directs that information that would identify the applicant (including information about family, friends or associates) not be published (under s.378 of the *Migration Act 1958*). This means that if this decision is published, names and other identifying material must be removed from or modified in the published version of the decision.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 1 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant applied for the visa on 10 February 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.

3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate found the applicant did not satisfy the Schedule 3 criteria in the delegate concluded there were no compelling reasons to waive the Schedule 3 requirement.

4. The applicant appeared before the Tribunal on 25 May 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Malay and English languages.

5. The applicant was represented in relation to the review by her registered migration agent.

6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether there are compelling reasons for not applying the Schedule 3 criteria.

SCHEDULE 3 CRITERIA (cl.820.211(2)(d))

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

8. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).

9. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

10. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.

11. The tribunal is satisfied based on the evidence of the applicant and the information recorded in the Departments decision record dated 1 July 2016, that the applicant came to Australia in 2014 on three-month tourist visa that ceased on 1 May 2014. The tribunal is satisfied that the applicant has not held a substantive visa since 1 May 2014. For the purposes of consideration of Schedule 3 criteria the tribunal is satisfied that 1 May 2014 is the relevant day.

12. Based on the application for the partner visa which is stamped as being received by the Department on 11 February 2016, the tribunal is satisfied that the application for the partner visa was made on 11 February 2016. Therefore the tribunal is satisfied that the application for the visa was not made within 28 days of the relevant day.

13. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

14. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.

15. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

16. The applicant was not the holder of a visa from 1 May 2014 until she applied for the partner visa on 11 February 2016. It is a relevant consideration that the applicant was unlawfully in Australia for this period. The applicant stated that she misunderstood the terms of the visa as the visa was granted for one year but she did not understand that she was only permitted to remain in Australia for a period of three months. The applicant stated that when she checked her passport in September 2014 she realised that she no longer had a visa to remain in Australia.

17. The applicant told the tribunal that there were many reasons why she could not return safely to Malaysia. The applicant recorded in the application for the visa that she had a son who was born in July 2013. The applicant stated that this child was born illegitimately and for her own safety she had to arrange for this child be brought up by another family. The applicant stated she has no contact with this child and only one person in Malaysia knows that she is the mother of this child.

18. The applicant stated that she was actually born in Cambodia and was adopted by a foster family and taken to Malaysia. The applicant stated she does not know who her real family are. She stated that the issue with her foster family is the cause of her difficulty, or family problem in Malaysia, and is one of the main reasons why she does not feel safe to return.

19. The applicant stated that she separated from her husband, or that he left her, five years ago and took her five children with him. She stated she has contact with her children.

20. The applicant stated that all these reasons made her question her beliefs and she struggled with her identity.

21. The applicant stated that she met her sponsor who was her neighbour when she was living in Melbourne in 2014. She told the tribunal that she developed a sense of security and safety with her belief in Christianity. The applicant stated that part of the attraction of the Christian church was that the sponsor belonged to the Christian church and she became part of his church in his community. Based on the written evidence before it the tribunal accepts that the applicant has been baptised. The applicant told the tribunal that she fears being killed if she was required to return to Malaysia which is a Muslim country.

22. The sponsor told the tribunal that he had suffered a back injury at work in 2012, which was before he met the applicant. He stated that the applicant assists him with his daily activities, and that he does rely on her for physical assistance with domestic chores and with driving him to appointments as he no longer has a drivers licence. He stated he would struggle with physical tasks if the applicant had to leave Australia. The sponsor stated that he separated from his first wife six years ago, and they have a son who is now aged eight years who lives with his mother.

23. The tribunal accepts the evidence of the sponsor who stated he understands the applicant was adopted or 'saved' by her foster family when she was very young, and that she had an unhappy style of relationship with her previous husband in Malaysia. The sponsor stated he believes the applicant has a genuine fear of reprisal because of her change of religion if she returned to Malaysia. The sponsor stated he would be very concerned and frightened for the applicant if she was required to return to Malaysia because she would be judged under Sharia law.

24. The tribunal has considered all of the above evidence. The tribunal has considered that the applicant was unlawfully in Australia from May 2014 until she applied for the partner visa in February 2016. The tribunal accepts that the applicant had suffered emotionally in Malaysia through her relationship with her foster family, her separation from her husband and five children, and having to give up her illegitimate child born in 2013. The tribunal accepts that when the applicant arrived in Australia she was emotionally fragile and felt insecure and questioned her religious beliefs. The tribunal is satisfied that the applicant has turned to Christianity for her emotional well-being, and not as a means to achieve a satisfactory visa outcome.

25. The tribunal has given weight to the applicant's fear for her life if she returns to Malaysia because of the fact she is married to a Christian man and has converted to Christianity. The tribunal has given weight to the sponsor's reliance on her for his physical well-being. The tribunal has given weight to the sponsor's fear for the applicant's safety if she was required to lodge the application offshore. The tribunal is satisfied that these matters outweigh the fact the applicant remained in Australia unlawfully for a significant period of time. The tribunal has considered these matters collectively and is satisfied that they amount to compelling reasons for not applying the Schedule 3 criteria.

26. For these reasons the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the tribunal is satisfied that the applicant meets the requirements of cl.820.211(2)(d)(ii).

27. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

28. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

    - cl.820.211(2)(d) of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

(1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).

(2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:

(a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or

(b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or

(c) if the applicant:

(i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

(ii) entered Australia unlawfully on or after 1 September 1994;

whichever is the later of:

(iii) the last day when the applicant held a substantive or criminal justice visa; or

(iv) the day when the applicant last entered Australia unlawfully; or

(d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:

(i) the day when that last substantive visa ceased to be in effect; and

(ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

(a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and

(b) on 31 August 1994, the applicant was either:

(i) an illegal entrant; or

(ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

(c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and

(d) there are compelling reasons for granting the visa; and

(e) the applicant has complied substantially with the conditions that apply or applied to:

(i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and

(ii) any subsequent bridging visa; and

(f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and

(g) the applicant intends to comply with any conditions subject to which the visa is granted; and

(h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

(a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

(b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

(c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and

(d) there are compelling reasons for granting the visa; and

(e) the applicant has complied substantially with:

(i) the conditions that apply or applied to:

(A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and

(B) any subsequent bridging visa; or

(ii) the conditions that apply or applied to:

(A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and

(B) any subsequent bridging visa; and

(f) either:

(i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or

(ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and

(g) the applicant intends to comply with any conditions subject to which the visa is granted; and

(h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.