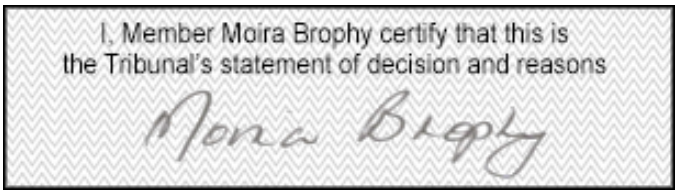
Administrative Appeals Tribunal

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	XXXXXXXX
REPRESENTATIVE:	Dr Jason Donnelly
CASE NUMBER:	2210693
Home Affairs REFERENCE(S):	BCC2022/2748497
MEMBER:	Moira Brophy
DATE:	3 August 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Bridging E (Class WE) visa.



Statement made on 03 August 2022 at 11:21am

STATEMENT OF DECISION AND REASONS

ISSUE

1. The issue in the present case is whether the applicant will abide by the conditions if granted the Bridging visa.

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Bridging E (Class WE) visa under s. 73 of the *Migration Act 1958* (Cth) (the Act) and a decision made by an authorised officer relating to requiring a security under s. 269 of the Act.

3. The applicant applied for the visa on 18 July 2022. At that time Class WE contained two subclasses: Subclasses 050 and 051. In the present case, the applicant is seeking to satisfy the criteria for the grant of a Subclass 050 visa, which are set out in Part 050 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). Relevantly to this matter, the primary criteria include cl. 050.223.

4. The decision to refuse to grant the visa was made on 21 July 2022 on the basis that the delegate was not satisfied that the applicant would comply with the conditions imposed on the visa.

5. The applicant appeared before the Tribunal on 1 August 2022 to give evidence and present arguments, via a video conference. The Tribunal was satisfied that a video hearing was appropriate in all the circumstances and the applicant confirmed her consent to a hearing by video. The hearing was scheduled during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by video, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical, and quick, and the delay to the matter if the hearing was not to be conducted by telephone.

6. The Tribunal hearing was conducted with the assistance of interpreters in the Vietnamese and English languages.

7. The applicant was represented in relation to the review.

8. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed.**

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The applicant is a 41-year-old female citizen of Vietnam. At the time of the visa application, the applicant must meet one of the alternatives set out in cls. 050.212(2)-(9). The applicant must continue to satisfy this criterion at the time of decision: cl. 050.221.

10. In her Bridging visa application form, the applicant set out that she was seeking the visa on the basis that she was awaiting judicial review of an application for a substantive visa. The applicant is awaiting a hearing date at the Federal Circuit Court: File number SYG46/201 *AAV21 v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs*. Accordingly, the applicant meets cl. 050.212(3) at the time of application and at the time of the Tribunal's decision, as the application has not yet been finally determined.

Whether the applicant will abide by conditions – cl. 050.223

11. Clause 050.223 requires that the Tribunal is satisfied at the time of decision, that if a Bridging visa is granted to the applicant, the applicant will abide by any conditions imposed on it. Conditions that may be imposed on a Subclass 050 visa are provided for in Division 050.6 and set out in Schedule 8 to the Regulations. Division 050.6 also sets out conditions to which the visa is subject.

12. When considering cl. 050.223, the Tribunal must consider which conditions, if any, should be imposed and whether it is satisfied that the applicant would abide by those conditions. In deciding the question of whether the applicant would abide by conditions imposed, the Tribunal is to consider the likely conduct of the applicant. In that context, relevant considerations may include the applicant's past immigration history, in particular any previous breaches of immigration laws; the significance of the migration laws that were breached; the wilfulness with which those laws had been breached; whether there were any mitigating circumstances justifying their breach; and whether the applicant had shown any contrition for their unlawful conduct: *Applicant VAAN of 2001 v MIMA (VAAN)* (2002) 70 ALD 289 at [15]-[16].

13. If the Tribunal is satisfied that the applicant will abide by the conditions if security of a particular amount is required, the applicant meets cl. 050.223. However, if not satisfied that the applicant will comply with the conditions, regardless of any security that may be imposed, cl. 050.223 is not met.

14. In this case, cl. 050.612A applies because the applicant is awaiting judicial review of a decision. This clause prescribes that, in addition to any mandatory conditions, certain conditions may be imposed. In considering what conditions should be imposed, the Tribunal was mindful of the applicant's immigration history, her past criminal conduct and her apparent lack of compliance with immigration laws. The Tribunal considers that the following conditions should be imposed in the circumstances of this case as conditions 8401 and 8506 are directed towards keeping her engaged with the Department and condition 8564 to ensuring she does not engage in further criminal conduct:

    8101 - No work (mandatory condition);

    8401 - Report as directed;

    8506 - Must notify Immigration at least 2 working days in advance of any change of address; and;

    8564 - Must not engage in criminal conduct.

15. In considering whether the applicant would comply with the conditions imposed on the Bridging visa, the Tribunal has had regard to her financial circumstances, immigration history, past conduct, criminal record and her evidence to the Department and the Tribunal. The decision record of the delegate, provided by the applicant to the Tribunal, sets out the following immigration history of the applicant, which was confirmed by the applicant at the hearing:

    25/11/1999: TU-560(1) granted.

    02/12/1999: Applicant arrived in Australia as the holder of a Student TU-560 visa.

    11/01/2000: TU-560(2) commenced, WA-010(1) granted.

    01/06/2000: TU-560(3) commenced, TU-560(2) ceased naturally.

02/09/2000: WA-010(2) granted, TU-560(3) granted.

14/05/2001: UK-820/BS-801 commenced (Nominator: XXXXXXXXXX

04/07/2001: TU-560(3) cancelled under s. 116, WA-010(3) ceased (defective notification but cease date passed and subsequent refusal also attracts s. 48 bar.) Applicant became unlawful non-citizen (UNC).

03/07/2022: Applicant granted be.

06/03/2003: UK-820/BS-801 refused.

24/03/2003: UK-820/BS-801 Review – commenced.

15/04/2005: UK-820/BS-801 Review – affirmed.

11/05/2005: lodged MI request under s. 351.

25/05/2005: BVE granted.

30/06/2006: UK-820/BS-801 Judicial Review – Commenced at Federal Court.

21/07/2006: MI finalised as 'inappropriate to consider'.

18/08/2006: WE-050(8) (Judicial Review) granted.

19/10/2006: UK-820/BS-801 Judicial Review – Result Minister win.

14/11/2006: UK-820/BS-801 Judicial Review – commenced.

26/03/2007: UK-820/BS-801 Judicial Review – Result Minister win.

30/05/2007: Criminal Justice Stay (ZB-951) visa application commenced.

27/06/2007: ZB-951 granted.

10/05/2007: Offence: Fail to appear in accordance with bail granted undertaking – dismissed s. 10.

27/06/2007: ZB-951 granted.

13/06/2008: UK-820/BS-801(2) commenced and determined to be invalid due to s. 48 bar.

25/06/2008: Offence: Enhanced indoor cultivation Plant for Commercial Purpose
Court result: 18 months imprisonment commencing 25/06/2008 suspended on enter bond s. 12: 18 months supervision NSW prob service.

Offence: Destroy or Damage Property >$15,000 – TI
Court result: taken into account on form 1.

Offence: Cultivate Cannabis > Indictable & < Commercial Quantity
Court Result: alternative bond: 2 years supervision NSW prob service.

01/07/2008: MI request lodged under s. 351.

14/07/2008: ZB-951 visa cancelled under s. 164. RA became UNC.

14/08/2008: Offence: Use unregistered Registrable Class A Motor Vehicle
Court Result: fine: $100.

Offence: Use uninsured motor vehicle
Court result: $100 fine.

Offence: Drive on Road etc while licence suspended
Court result: $100 fine; court costs: $73; 12 month disqualification.

16/10/2008: Offence: Unregistered registrable class A motor vehicle
Court result: conviction confirmed.

Offence: Drive on road etc while licence suspended
Court result: conviction confirmed.

Offence: use uninsured motor vehicle
Court result: conviction confirmed.

29/07/2009: Minister Evans decided not to consider this client's request for Ministerial Intervention under s. 351.

30/10/2009: Applicant's BVEs expired, and Applicant became UNC and concealed herself in the community.

18/10/2012: Applicant lodged MI request under s. 351.

01/02/2013: Applicant of Concern under s. 501 applied for Contributory Parent (Class CA) visa on 01/02/2013. Referred to Visa Applicant Character Consideration (VACCU) by Perth Parent Centre on 05/09/2014. On 25/06/2014 applicant convicted of CULTIVATE PLANT FOR COMMERCIAL PURPOSE, CULTIVATE CANNABIS AND DESTROY OR DAMAGE PROPERTY and sentenced to 18 months imprisonment (suspended).

26/02/2015: Offence: Deal with property suspected proceeds of crime
Court result: 15 months imprisonment, suspended on enter bond s.12.

14/09/2015: MI finalised as 'not considered'.

26/11/2015: Protection (XA-866) visa application commenced.

25/11/2016: XA-866 refused.

05/12/2016: XA-866 Review – commenced.

13/11/2018: International Mail New South Wales detected 5000 grams of Phenylethylamine Hydrochloride from Spain without a goods description. The consignment was selected for examination due to anomalies in the x-ray image. The drugs were concealed inside a speaker. Two persons of interest were identified, XXXXXXXXX was identified in CSP as linked to 11 Action St Greenacre NSW 2190 and having

links to criminal activity include knowingly deal with proceeds of crime. XXXXX is recorded in CRIMTRAC as a charged person by the NSW Police Service. No further details were available.

15/12/2020: XA-866 Review – affirmed.

08/01/2021: XA-866 Judicial Review commenced.

08/01/2021: Applicant appealed Tribunal's decision re Protection visa to Federal Circuit Court for review.

19/01/2021: Applicant's BVE ceased, and Applicant became UNC.

11/08/2021: Applicant lodged BVE application. Visa ceased on this day and Applicant became UNC.

Departmental records indicate on 21 April 2022, applicant was arrested and remanded into criminal custody. She was charged with "Agg b&e commit ser indict off-in company-not steal etc-SI", "SP Agg B&E & Commit serious indictable offence-weapon-SI", "Aggravated break and enter w/i- knowing person there-SI", "Not give left change of direction signal with lights", "Driver use mobile phone when not permitted", "Deal with property proceeds of crime < $100000-T2", "Possess identity info to commit etc indictable offence-T1" and "Supply prohibited drug small & indictable quantity-T1".

26/04/2022: WE-050(46) (criminal detention) granted.

01/07/2022: Applicant granted bail.

05/07/2022: Upon release from criminal custody, Applicant was detained by Australian Border Force (ABF)and transferred to Villawood Detention Centre (VDC).

07/07/2022: Criminal Justice Stay Certificate ZB-951 issued by NSW Director of Public Prosecutions.

04/08/2022: Applicant to attend court in relation to ongoing criminal charges:
- Supply prohibited drug small & indictable quantity;
- Driver use mobile phone when not permitted;
- Not give left change of direction signal with lights;
- Deal with property proceeds of crime $100,000; and
- Possess identity info to commit etc indictable offence.

February 2023: Court attendance noticed issued for Feb 2023 for Applicant's drug charges.

16. On 18 July 2022, the applicant lodged an application for a Bridging (BVE) visa. That application was refused by the Department on 21 July 2022. On 25 July 2022, the Tribunal received an application for review of this decision.

17. As set out above, the applicant has been in Australia since 2 December 1999 and she has not held a substantive visa since her Student visa was cancelled on 4 July 2001.

18. Prior to giving her evidence as to her past criminal history, the applicant was given a warning as to her right to not give evidence that could self-incriminate herself and be used in other proceedings,

19. The applicant told the Tribunal that she originally came to Australia to study English and she then commenced studying business. She has not left Australia since she arrived in 1999. She told the Tribunal that she had applied for a Partner visa after having married Jimmy Phan in either 2000 or 2001. That visa was not granted, and she then applied for a Partner visa on the basis of her relationship with XXXX. She thought that application was made in or around 2008 but that application was refused because of the imposition of a s. 48 bar. She next applied for a Contributory Parent visa (Subclass 143). She thought she made that application in or around 2011 but the application was not accepted as an onshore application. She next applied for a Protection visa which was refused by a delegate of the Department and that decision was affirmed by the Tribunal (differently constituted). When asked about her Student visa having been cancelled, the applicant said she was not aware until recently that her visa had been cancelled. She said that she paid a lawyer to represent her and to ensure that her visa status was compliant with the requirements, but her lawyer had let her down and had not done as she was paid to do.

20. The applicant said that prior to her arrest and subsequent detention at Villawood Detention Centre, she had lived with her son and daughter-in-law at the residential address given on her application. They lived in a home that her son had purchased about two years ago. She said her brother-in-law had purchased the house in 2011 and had then sold the property to her cousin who subsequently transferred the property to her son for $650,000 in 2019. When asked how her son had been able to purchase the property given his young age, she said that her mother had sent him money from Vietnam and he also has a mortgage on the property. The applicant said that she had lived at that home since 2011. When questioned about the information she had given at the time she was interviewed by the Department that she had lived at an address in Burwood, she said she must have misunderstood the question because she had lived at the property in Burwood prior to 2011. She said her friend lived in that house and still lives there.

21. When put to the applicant that she had had extensive periods since the cancellation of her Student visa in July 2001 where she had been in Australia as an unlawful non-citizen, she said that she did not know at any time prior to obtaining her immigration record for the purpose of these proceedings that her visa had been cancelled and that she had in fact been an unlawful non-citizen. She said that she had trusted her lawyer as she did not understand the law. She said the Department had not contacted her at any time, they had contacted her lawyer and she had not been made aware of the situation. She said that since she has found out, she has been unable to sleep and has been very stressed. She said that if she had been aware that she did not have a valid visa to stay in Australia, she would not have consistently lived at the same address during the relevant period. She said it was her intention to make a further application to stay in Australia by way of a Contributory Parent visa and she understood that if she did not abide by the conditions of her visa, it would not be possible for her to obtain a substantive visa to remain in Australia.

22. The Tribunal had regard for the fact that the applicant had been unlawful in Australia for substantial periods and was only detected when she was charged with criminal offences. During this period, she had continued to work, and it was her evidence that she had acted in reliance on assurances given by her lawyer that appropriate visa arrangements had been made. The applicant said that she wanted to stay in Australia as this was where her family was: she had a brother and sister in Australia, she had a cousin, and she had her son and daughter-in-law. Her parents and younger brother remained in Vietnam. She said she had not left Australia since she came here in 1999 but her parents had visited her on many occasions, the most recent being in 2019, just prior to the COVID-19 pandemic. When asked

how she had supported herself during her time in Australia, the applicant said her parents were able to send her money if and when required, and that while she had been on a Student visa, she had been allowed to work for 20 hours per week. She said after her son was born, she had been in receipt of Centrelink benefits and those benefits continued until he was in high school. When asked how she had supported herself after her son commenced high school, she said that she owned a nail and beauty shop in Westfield Sydney. She said that she had owned that business from 2014. Her business partner was Thang Phi Mac. The business had been sold in January 2019 for $100,000. When put to the applicant that at the time of the Department interview, she had said that it was her sister who owned the business with her, she said her sister had the business for the first two years, but she then changed it to her friend and the applicant. She said because she was not a permanent visa holder, she could not be a director of the business, she could only act in a shareholder capacity. When asked what she had done with the proceeds of sale, she said that she had sent a large portion of it to her parents, and she had used the remainder to help her son and to pay her living costs.

23. When considering the imposition of visa conditions as stated previously, condition 8101 is a mandatory condition. The Tribunal was mindful of the evidence given by the applicant of having worked and conducted a business up to 2019. This was despite the fact that she had not held a substantive visa since her Student visa was cancelled in July 2001. While the applicant referred to the fact she had been allowed to work for 20 hours per week while the holder of a Student visa, it was clear she had not turned her mind to any restrictions she may be subject to as an unlawful non-citizen. She did not demonstrate any insight into how and why restrictions may be placed on her right to work.

24. As to the imposition of condition 8401, it was evident the applicant did not consider she personally had any reporting obligations. She constantly referred to the failure of her previous agent to keep the Department informed, as well as the failure of the Department to contact her directly if there was a problem. On one hand, she sought to lay the blame at the feet of her agent for non-reporting of changes to the Department, or alternatively if the Department became aware of changes, the obligation was on them to contact her directly. It was clear the applicant had no insight into any obligation on her to keep the Department informed of relevant changes in her status or living arrangements. She regarded herself as a victim of failures made by persons other than herself.

25. As to condition 8564, the Tribunal noted that while the holder of a previous Bridging visa, the applicant had been convicted of engaging in criminal conduct. The applicant told the Tribunal that the reason that she got into trouble was that she had been influenced by her friends and that would not happen again. However, the applicant does not dispute that she was charged with numerous offences and that she has been convicted. She has received a custodial sentence and she has further charges pending. The Tribunal accepts the applicant intends to defend those pending charges. The Tribunal relies upon these convictions and sentences imposed to find that she has in the past engaged in criminal conduct which the Tribunal finds is of a serious nature.

26. It is of concern for the Tribunal that the applicant does not acknowledge any wrongdoing in relation to these matters. It did not appear to the Tribunal that the applicant demonstrated any contrition or acknowledgement of the potential harm associated with the offences. Given her apparent lack of insight and contrition, the Tribunal is not satisfied that if the opportunity arose, the applicant would not engage in further criminal conduct.

27. When asked at the time of hearing about her health, the applicant said she was very stressed by these proceedings and the impending criminal proceedings. She said she was having trouble sleeping. She was intending to see a doctor this week. While the Tribunal

accepts this evidence, there is no medical evidence before the Tribunal to support these conditions or their impact.

28. Having considered all the written and oral evidence before it, the Tribunal is not satisfied that the applicant will comply with Australia's immigration laws and other laws in the future. Particularly, the Tribunal has had regard to the applicant's unlawful visa status and working without permission, her serious criminal offending, and her lack of insight into this behaviour and the reasons for her past non-compliance. The Tribunal is not satisfied that the applicant will comply with the conditions imposed on the Bridging visa. Therefore, the Tribunal finds that the applicant does not meet the requirements of cl. 050.223 of Schedule 2 to the Regulations.

29. The Tribunal gave consideration as to whether the applicant would be likely to abide by conditions if a security was required. The applicant suggested that her son and daughter-in-law would provide security, and this was corroborated by letters received at time of hearing from them. Her legal representative said the evidence was indicative of financial assistance being available from her family in Vietnam. Given the applicant's unfavourable migration history and her apparent inability to take responsibility for her previous non-compliance, the Tribunal is not persuaded that any security provided will act as an incentive for the applicant to comply with the conditions of the Bridging visa.

30. For these reasons, the applicant does not satisfy the criteria for the grant of a Subclass 050 (Bridging (General)) visa.

31. The visa application is also an application for a Subclass 051 (Bridging (Protection Visa Applicant)) visa. The applicant is not a relevant eligible non-citizen as set out in cl. 051.211 of Schedule 2 to the Regulations and therefore does not meet the requirements for the grant of that visa.

DECISION

32. The Tribunal affirms the decision not to grant the applicant a Bridging E (Class WE) visa.

Moira Brophy
Member