Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2022/8960**
Re:	**MI**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Dr Linda Kirk**
Date:	**23 December 2022**
Place:	**Sydney**

The Tribunal does not have jurisdiction to consider the Second Review Application filed by the Applicant on 31 October 2022 as the Applicant did not meet all of the requirements of section 347 of the Migration Act 1958 (Cth) at the relevant time.

.....[SGD].....

Senior Member Dr Linda Kirk

CATCHWORDS

MIGRATION - jurisdiction - whether decision is a Part 5 Reviewable Decision - whether requirements for making application have been met - whether application needs to be capable of being made 'in fact' - no jurisdiction found

LEGISLATION

Migration Act 1958 (Cth)

CASES

Gajjar v Minister for Immigration and Citizenship unreported, Matter No B72 of 2012.
Trung Tien Nguyen & Ors v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (High Court of Australia, Steward J, 22 July 2022)

SECONDARY MATERIALS

Migration Regulations 1994 (Cth)

REASONS FOR DECISION

Senior Member Dr Linda Kirk

23 December 2022

BACKGROUND

1. On 13 April 2022, MI ('the Applicant') departed Australia as the holder of a Partner (Subclass 801) visa ('the Partner visa'). On that same date, the Partner visa ceased by operation of section 82 of the *Migration Act 1958* (Cth) ('the Act'). Since that date, the Applicant has not returned to Australia, and remains offshore.

2. On 15 April 2022, the Applicant made an application ('the Visa Application') for the grant of a Return (Residence) (Class BB) (Subclass 155) visa ('Resident Return visa'). He made the Visa Application for the visa whilst he was physically located outside of Australia and, therefore, outside of the migration zone.

3. On 28 September 2022, a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('the Respondent') refused the Applicant's application for the Resident Return visa under subsection 501(1) of the Act ('the Visa Refusal Decision'). The delegate found the Applicant did not pass the character test on the basis that he had a substantial criminal record and decided to exercise the discretion to refuse the Visa Application. The Applicant was notified of Visa Refusal Decision by email to his authorised recipient on 29 September 2022. The Applicant was outside Australia at the time of the Visa Refusal Decision.

4. The letter to the Applicant notifying him of the Visa Refusal Decision incorrectly stated that, as he had a de facto partner who is an Australian citizen, she could apply for review of the Decision by the Administrative Appeals Tribunal ('the Tribunal').

5. On 30 September 2022, the Applicant's de facto partner, Ms HC, applied to the Tribunal for review of the Visa Refusal Decision on behalf of the Applicant ('the first Review Application'). The Applicant was offshore at the time of the Review Application.

6. On 26 October 2022, Ms HC withdrew the Review Application.

7. On 31 October 2022, the Applicant applied to the Tribunal for review of the Visa Refusal Decision ('the second Review Application') and an extension of time in which to seek review.

8. The matter was heard at an interlocutory hearing on 15 November 2022.

LEGISLATIVE FRAMEWORK

9. Paragraph 500(1)(b) of the Act provides for applications to be made to the Tribunal for review of decisions made by a delegate of the Minister in exercising the power conferred by section 501.

10. However, subsection 500(3) of the Act provides:

> *A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground*.

11. Section 338 of the Act defines the decisions made under the Act that are *Part 5- reviewable decisions*, and are able to be reviewed under Part 5. Relevantly, subsection 338(7A) of the Act provides

> ***Definition of Part 5-reviewable decision***
>
> ***...***
>
> *(7A) A decision to refuse to grant a non-citizen a permanent visa is a Part 5-reviewable decision if:*
>
> *the non-citizen made the application for the visa at a time when the non-citizen was outside the migration zone; and*
>
> *the visa is a visa that could be granted while the non-citizen is either in or outside the migration zone.*

12. Section 347 of the Act provides the requirements for an application for review of *Part 5-reviewable decisions*.

> ***Application for review of Part 5-reviewable decisions***
>
> *(1) An application for review of a Part 5-reviewable decision must:*
>
> *(a) be made in the approved form; and*
>
> *(b) be given to the Tribunal within the prescribed period, being a period ending not later than:*
>
> *(i) if the Part 5-reviewable decision is covered by subsection 338(2), (3), (3A), (4) or (7A)--28 days after the notification of the decision; or*
>
> *…*
>
> *(c) be accompanied by the prescribed fee (if any).*

(2) An application for review may only be made by:

(a) if the Part 5-reviewable decision is covered by subsection 338(2), (3), (3A), (4) or (7A)-- the non-citizen who is the subject of that decision; or

…

(3) If the Part 5-reviewable decision was covered by subsection 338(2), (3), (3A) or (4), an application for review may only be made by a non-citizen who is physically present in the migration zone when the application for review is made.

(3A) If the Part 5-reviewable decision was covered by subsection 338(7A), an application for review may only be made by a non-citizen who:

(a) was physically present in the migration zone at the time when the decision was made; and

(b) is physically present in the migration zone when the application for review is made.

CONTENTIONS

Respondent

13. Clause 155.411 of Schedule 2 to the *Migration Regulations 1994* (Cth) states that an applicant may be in or outside of Australia at the time of the grant of a Resident Return visa. The Visa Application and the Visa Refusal Decision were both made when the Applicant was outside of Australia. Therefore, the Visa Refusal Decision is a Part 5-reviewable decision in accordance with subsection 338(7A) of the Act.[1]

14. The Applicant does not satisfy the requirements in subsection 347(3A) of the Act for an application for review to the Tribunal as he was not physically present in the migration zone at the time the Visa Refusal Decision was made, nor was he physically present in the migration zone when the Second Review Application was made. As such, the Second Review Application was not a valid application, and therefore the Tribunal is unable to proceed with the Second Review Application.[2]

[1] Respondent's Submissions on Jurisdiction [15].
[2] Respondent's Submissions on Jurisdiction [17].

15. For completeness, the Visa Refusal Decision is not a Part 5-reviewable decision under any of the other subsections of section 338 and therefore there is no other circumstance in which the Applicant could have been entitled to make the application at the time it was made.[3]

16. The Respondent acknowledges that the letter to the Applicant notifying him of the Visa Refusal Decision incorrectly stated that his de facto partner could apply to have the decision reviewed by the Tribunal. Insofar as there may be any error in the notice, the Respondent submits that it does not affect the lack of jurisdiction.[4]

17. The Tribunal does not have jurisdiction to proceed with the Second Review Application.[5]

Applicant

Tribunal's jurisdiction

18. The Applicant satisfies subsection 338(7A) of the Act. There has been a decision to refuse to grant the Applicant a permanent visa. The Applicant made the Visa Application when he was outside the migration zone. The visa is a visa that could be granted while the Applicant was outside the migration zone: see cl 155.411 of Schedule 2 of the *Migration Regulations 1994* (Cth).[6]

19. It follows that that the Applicant meets the statutory criteria reflected in subsection 500(3) of the Act. That is, the Applicant would be entitled to seek review of the hypothetical decision under Part 5 if the decision had been made on another ground.[7]

20. If the Respondent's submission is correct, subsection 338(7A) would be pointless. It would have no work to do.[8]

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[3] Respondent's Submissions on Jurisdiction [18].
[4] Respondent's Submissions on Jurisdiction [19].
[5] Respondent's Submissions on Jurisdiction [20].
[6] Applicant's Submissions on Jurisdiction [10].
[7] Applicant's Submissions on Jurisdiction [11].
[8] Applicant's Submissions on Jurisdiction [13(a)].

21. If a decision is one subject to section 338 of the Act, it does not matter whether the decision was or was not in fact reviewed by the Tribunal. Nor, also, does it matter whether the decision was or was not capable of being reviewed by the Tribunal because of non-compliance with some other requirement outside section 338: *Trung Tien Nguyen & Ors v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*Nguyen*').[9]

22. A failure to meet a requirement in subsection 347(3) of the Act does not deny or undo the character of attribute of the decision as remaining a *Part 5-reviewable decision* for the purposes of section 338 of the Act.[10]

23. The Applicant expressly relies upon the reasoning in both *Nguyen* and *Gajjar v Minister for Immigration and Citizenship ('Gajjar')*.[11] In *Gajjar*, the relevant decision satisfied the elements of subsection 338(2). However, the non-citizen did not comply with subsection 347(3) of the Act. Despite that fact, Kiefel J (as she then was) still found the Tribunal had jurisdiction.[12]

Refusal notice is invalid

24. The purported refusal notice sent to the Applicant on 29 September 2022 is invalid. It failed to comply with subparagraphs 501G(f)(iii)-(iv) of the Act, specifically if did not state that the Applicant can apply to the Tribunal for a review of the Visa Refusal Decision. Instead, the document said that the Applicant's de facto partner can apply for review. Moreover, the document incorrectly provided the email address of 'mrdivision@aat.gov.au', which is the wrong division of the Tribunal.[13] Given that the refusal notice is invalid, time has not yet commenced to run.[14]

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[9] Applicant's Submissions on Jurisdiction [13(b)] *Trung Tien Nguyen & Ors v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* '(*Nguyen*') Unreported decision, Matter No C1 of 2022, Steward J, High Court of Australia) at paragraph [20].

[10] Applicant's Submissions on Jurisdiction [13(c)] Nguyen [20].

[11] *Gajjar v Minister for Immigration and Citizenship* unreported, Matter No B72 of 2012.

[12] Applicant's Submissions on Jurisdiction [14].

[13] Applicant's Submissions on Jurisdiction [16] citing *DFQ17 v Minister for Immigration and Border Protection* [2019] FCAFC 64 ('*DFQ17*').

[14] Applicant's Submissions on Jurisdiction [17] citing *DFQ17* [62].

CONSIDERATION AND REASONS

25. An application can only be made to the Tribunal for review of a decision if the enactment under which the decision is made provides that an application for review may be made for such a decision: section 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the AAT Act').

26. Under subsection 25(3) AAT Act, where an enactment makes provision for an application to be made to the Tribunal, the enactment:

> *(a) shall specify the person or persons to whose decisions the provision applies;*
>
> *(b) may be expressed to apply to all decisions of a person, or to a class of such decisions; and*
>
> *(c) may specify conditions subject to which applications may be made.*

27. Relevantly, paragraph 500(1)(b) of the Act provides for applications to be made to the Tribunal for review of decisions made by a delegate of the Respondent in exercising the power conferred by section 501. However, in accordance with subsection 500(3) of the Act:

> *A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground*.

28. Section 338 of the Act defines decisions made under the Act that are to be regarded as *Part 5- reviewable decisions*, and therefore are able to be reviewed under Part 5. Relevantly, subsection 338(7A) of the Act provides that a decision to refuse to grant a non-citizen a visa is a *Part 5-reviewable decision* if the non-citizen made the visa application when they were outside the migration zone and the visa is one that could be granted while the non-citizen is either in or outside the migration zone.

29. The subclass of visa for which the Applicant applied was a Subclass 155 (Five Year Resident Return). Clause 155.411 of schedule 2 to the *Migration Regulations 1994* (Cth) states that an applicant may be in or outside of Australia at the time of the grant of that visa. The Visa Refusal Decision and the Second Review Application were both made when the Applicant was outside of Australia. Therefore, the Visa Refusal Decision is a Part 5-reviewable decision in accordance with subsection 338(7A) of the Act.

30. Subsection 347(3A) of the Act provides that an application for review of a *Part 5-reviewable* decision covered by subsection 338(7A) may only be made by a non-citizen who was physically present in the migration zone when the decision was made and who is physically present in the migration zone when the review application is made.

31. As was recognised in *Gajjar* and *Nguyen*, where a refusal decision satisfies the elements of section 338, but the non-citizen did not comply with the application requirements in section 347 of the Act, this does not affect the Part 5-reviewable status of the refusal decision. Accordingly, the Tribunal finds that the Visa Refusal Decision is a *Part 5-reviewable decision*.

32. While the Visa Refusal Decision is a Part 5-reviewable decision and the Applicant is entitled to lodge an application for review of the decision, he must meet the requirements of section 347 of the Act in order to do so.

33. Subsection 347(1)(b)(i) of the Act requires that a review application be lodged with the Tribunal no later than 28 days after notification of the Part 5 reviewable decision. This time period has expired and therefore, without being granted an extension of time to lodge a review application with the Tribunal, he is unable to lodge such an application.

34. The Respondent accepts that the letter to the Applicant notifying him of the Visa Refusal Decision incorrectly stated that his de facto partner could apply to the Tribunal for review of the Visa Refusal Decision. The Applicant contends that this error in the notification letter renders it invalid and accordingly, the time period for the making of a review application to the Tribunal has not yet commenced. The Tribunal accepts the Applicant's contention, and finds that the notification letter was invalid and that the time period specified in paragraph 347(1)(b)(i) for the making of an application for review of the Visa Refusal Decision has not commenced.

35. If the Tribunal is incorrect in finding that the notification letter is invalid by virtue of the error it contains, the Tribunal is satisfied that the wrong and misleading information it contained provides grounds for granting the Applicant an extension of time to lodge a review application with respect to the Visa Refusal Decision with the Tribunal.

36. Whereas the Tribunal's findings permit the Applicant to lodge an application for review of the Visa Refusal Decision with the Tribunal, he can only do so if the application is made in accordance with all the requirements of section 347. One of these requirements is that he be physically present in the migration zone when the review application is made: paragraph 347(3A)(b). The evidence before the Tribunal is that the Applicant has been offshore since departing Australia on 13 April 2022. He therefore was not physically present in the migration zone when the Second Review Application was made on 31 October 2022. As the Applicant has not satisfied paragraph 347(3A)(b) he has not made a valid application for review of the Visa Refusal Decision. It follows that the Tribunal does not have jurisdiction to consider the Second Review Application.

DECISION

37. The Tribunal does not have jurisdiction to consider the Second Review Application filed by the Applicant on 31 October 2022 as the Applicant did not meet all of the requirements of section 347 of the *Migration Act 1958* (Cth) at the relevant time.

I certify that the preceding 37 (thirty - seven) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr Linda Kirk

.....[SGD].....

Associate

Dated: 23 December 2022

Date(s) of hearing:	**15 November 2022**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Minter Ellison**