



Administrative Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr RKM KC

REPRESENTATIVE: Dr Jason Donnelly

CASE NUMBER: 2308355

Home Affairs REFERENCE(S): BCC2023/788428

MEMBER: Mr S Norman

DATE: 28 June 2023

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant meets the following criteria for a Subclass 050 (Bridging (General)) visa:

- cl.050.211 of Schedule 2 to the Regulations
- cl.050.212 of Schedule 2 to the Regulations
- cl.050.221 of Schedule 2 to the Regulations

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

Statement made on 28 June 2023 at 4:40pm

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 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). The Department delegate's decision was lodged with the Tribunal.
2. The applicant applied for the visa on 11 May 2023. 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).
3. The decision to refuse to grant the visa was made on 9 June 2023. The applicant appeared before the Tribunal on 27 June 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Ms AN and Mr DS. The applicant was represented in relation to the review.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The Tribunal acknowledges that pursuant to s.367 of the Act, Bridging visa reviews are time limited reviews. However, in the present case the delegate's decision was made on 9 June 2023 but the case was first constituted to the present Tribunal on 20 June 2023. I was advised this late constitution was due to an administrative error on the Tribunal's part.

Primary criteria:

6. Subclause 050.211(1) stated:
(1) The applicant is:
(a) an unlawful non-citizen; or
(b) the holder of a Bridging E (Class WE) visa; or
(c) the holder of a Subclass 041 (Bridging (Non-applicant)) visa.
7. The Tribunal accepts the applicant met the requirements of this subclause because at the time he made his BV E application he was an unlawful non-citizen.
8. Subclause 050.211(2) stated:
(2) The applicant is not an eligible non-citizen of the kind set out in subregulation 2.20(7), (8), (9), (10), (11) or (17).
9. The Tribunal accepts the applicant met the requirements in subclause 050.211(2) because based on the evidence, he was not an eligible non-citizen of the kind set out in regulation 2.20(7), (8), (9), (10), (11) or (17).
10. In this case, the applicant is basing his BV E on 'acceptable arrangements to depart Australia' (cl 050.212(2)). In the applicant's BVE application, he had selected departing Australia as the most appropriate reason for his being granted a BVE, with an intended

departure date of 6 August 2023. The applicant does not claim to meet any of the other alternative criteria in cl 050.212.

11. Subclause 050.212 stated:

- (1) *The applicant meets the requirements of subclause (2), (3), (3A), (4), (4AAA), (4AA), (4AB), (5), (5A), (5B), (6), (6AA), (6A), (6B), (7), (8) or (9).*
- (2) *An applicant meets the requirements of this subclause if the Minister is satisfied that the applicant is making, or is the subject of, acceptable arrangements to depart Australia.*

12. As is discussed below, and based on the evidence accepted at hearing, the Tribunal has decided to accept the applicant intended, and also intends, to obtain a ticket for travel and will make a booking or reservation to depart Australia within a reasonable period. Accordingly, the Tribunal accepts the applicant has met the primary criteria – cl.050.212(2) and therefore he meets cl.050.212.

Criteria to be satisfied at time of decision:

13. Clause 050.221 stated:

The applicant continues to satisfy the criteria set out in clauses 050.211 and 050.212.

14. For the reasons that follow, the Tribunal is satisfied the applicant meets cl 050.221.

The applicant's recent migration history:

15. As noted in the delegate's decision:

- On 22 February 2019, the applicant first arrived in Australia as the holder of a Working Holiday (TZ417) visa, which was valid until 22 February 2020
- On 14 July 2019, the applicant departed Australia and he then re-entered on 28 July 2019 as the holder Working Holiday (TZ417) visa
- On 16 December 2019, the applicant again departed Australia and he subsequently returned to Australia on 10 January 2020 as the holder of a Working Holiday (TZ417) visa
- On 13 January 2020, the applicant lodged an application for an extension of his Working Holiday (TZ417) visa. He was granted an associated BVA on the same day
- On 25 February 2019, the applicant was granted the Working Holiday (TZ417) visa – valid until 22 February 2021
- On 4 February 2021, the applicant applied for a further extension of his Working Holiday (TZ417) visa, which was granted on the same day and was valid until 22 February 2022
- On 12 November 2021, the applicant lodged an application for a Student Visa (TU500). He was granted an associated BVA on the same day
- On 18 February 2022, the applicant's Working Holiday (TZ417) visa was cancelled under s.109 of the Act, due to incorrect information being provided. At the same time, his BVA ceased and he became an unlawful non-citizen (UNC)
- On 21 February 2022, the applicant applied for merits review of the visa cancellation with the Tribunal (AAT). He was granted an associated BVE on 24 February 2023. The AAT affirmed the primary decision on 29 July 2022
- On 28 July 2022, the applicant withdrew his Student Visa application (which had been lodged 12 November 2021)
- On 2 September 2022, the applicant was granted a BVE on departure grounds with Condition 8510 (Valid Passport) imposed (applicant's passport expires 3 Oct 2027). This BVE was valid until 26 January 2023

- On 23 January 2023, the applicant was granted a further BVE on departure grounds with Conditions 8510 (Valid Passport) and 8512 (Departure Date) imposed. This BVE was valid until 2 March 2023
- On 3 March 2023, the applicant was granted a further BVE on departure grounds with Conditions 8510 (Valid Passport), 8511 (Valid Ticket) and 8512 (Departure Date) imposed. This visa ceased naturally on 15 May 2023 – and the applicant then became a UNC
- On 11 May 2023, the applicant lodged a BVE application on departure grounds, which remains outstanding. In the visa application form it was stated the applicant was making arrangements to depart Australia in August 2023
- The review of the last BV E is before the Tribunal as presently constituted

Acceptable arrangements to depart Australia

16. Subclause 050.212(2) is met if the Minister, or the Tribunal on review, is satisfied the applicant is making, or is the subject of, acceptable arrangements to depart Australia. 'Acceptable arrangements' is not defined in the Regulations. The Departmental guidelines (PAM3), whilst not binding on the Tribunal, nevertheless provide some guidance: *Chen v MIMIA* [2001] FCA 285 (*Chen*) at [26] and *Lin v MIMIA* [2001] FCA 283 (*Lin*) at [26]. It is also open to consider whether the applicant's intentions in making any arrangements to depart, were genuine (*Lin* at [30]).
17. As noted by the delegate, acceptable arrangements to leave Australia included:
 - The applicant has a valid ticket for travel and a booking or reservation to leave Australia
 - The applicant could obtain a ticket for travel and will make a booking or reservation to leave within a reasonable period
 - The applicant also holds a valid travel document or could obtain a valid travel document within a reasonable period (possibly through the assistance of IOM)
 - The applicant is actively engaging in a Status Resolution service (including assisted voluntary return (AVR) arrangements)
 - The applicant is a minor whose parent/guardian is making, or has made, departure arrangements on the minor's behalf
 - The applicant is the subject of departure arrangements in circumstances where they have a medical condition that limits their capacity to travel (for example, physical or mental health considerations) but otherwise would leave Australia if they were physically able to do so
 - The department is making arrangements on the applicant's behalf to facilitate the applicant's departure (for example, obtaining a travel document on behalf of the applicant)
18. That being said, the delegate noted that at the time of their decision there was no travel ticket or booking for travel. The delegate also noted the applicant had previously been granted multiple BVE's on departure grounds - attached conditions included Condition 8511 (Valid Ticket), and Condition 8512 (Departure Date). However, and though the applicant had been counselled to do so, he repeatedly failed to depart, and from 15 May 2023 he had become a UNC.
19. The delegate also noted the applicant had provided evidence of his medical condition, being a ACL injury which he suggested was a barrier to his departure. He said his doctors had advised him he was 'unfit for travel', but at the time of the delegate's decision, no medical certificate supporting this claim was lodged. This was despite the applicant being given an opportunity to do so by the delegate. After considering all the evidence, the delegate was not satisfied the applicant genuinely wished to depart Australia, particularly as his medical

condition had allegedly rendered him unfit for travel, and this contradicted his claim to wish to depart.

20. Next, the delegate noted the applicant's last Working Holiday visit was cancelled under s.101 of the Act, as he had been determined to have intentionally provided incorrect information in his visa application to secure the grant of a visa. The delegate noted this had been recorded in his response to the Notice of Intention to Consider Cancellation. The delegate believed this demonstrated an apparent disregard by the applicant of Australia's migration program.
21. After then considering the above findings and reasons, the delegate was not satisfied the applicant was making arrangements, or was the subject of acceptable arrangements, to depart Australia. Therefore, the applicant was found not to meet cl.050.212(2) of the Regulations.

The Tribunal's consideration of the applicant's material claims:

22. The Tribunal has seen *inter alia*:
 - Discharge referral dated 7 February 2023, indicating the applicant had a past medical history of a knee injury with meniscal repair and MCL injury
 - Letter dated 24 February 2023, indicating the applicant had attended for physiotherapy treatment in February 2023
 - Medical appointment letter dated 13 April 2023 (Prince of Wales Hospital, Orthopaedic Clinic, Adult Outpatients Department), inviting the applicant to attend an appointment on 5 May 2023 / knee injury with suspected ACL or PCL injury due to joint effusion
 - A letter dated 30 May 2023, from the applicant's agent, requesting a phone interview by the Department delegate (which request was declined)
 - The Tribunal has also seen various statements, references and other medical evidence which had also been lodged with it
23. At hearing, the Tribunal noted the applicant had lodged numerous BV applications, the last four of which (BVE's) were lodged on the basis of acceptable arrangements to depart Australia.
24. The Tribunal noted the evidence relating to the applicant being a UNC and also having had a visa cancelled due to lodging false information, may indicate a disregard for Australia's immigration law. The applicant provided a more detailed explanation in a statement dated 23 July 2022, and though the false evidence had been lodged on his behalf by his then agent, he conceded it was his own fault.
25. The Tribunal also noted the applicant had now applied for four BV E's on departure grounds. The first of these was granted on 2 September 2022. When discussed, the applicant said he suffered a knee injury in February 2023, and the injury was sufficiently debilitating such that he did not feel able to travel (medical evidence supported the nature of the injury).
26. The Tribunal then noted the BV E granted in September 2022 was granted approximately five months prior to the injury, and the January 2023 BV E was granted one month prior to the injury. The applicant said he was attempting to leave prior to February 2023, however, after having lived and worked in Australia for some time, and given he was then in a relationship with a lawful non-citizen in Australia (at the Tribunal hearing, the relationship was said to have now lasted around 12 months), it had taken some time to finalise his affairs.

27. The Tribunal also notes that in his statement of 23 July 2022, the applicant had stated *inter alia* he 'had a wonderful life in Australia', and accordingly, the Tribunal was concerned about whether the applicant genuinely intended to depart.
28. Be that as it may, the Tribunal notes the applicant had entered and departed Australia previously, that he currently held sufficient funds in his bank account to afford travel from Australia (see Cth Bank letter dated 27 June 2023), that he had lodged a number of written character references (as well as the oral evidence of his two witnesses at hearing) and some of these indicated the applicant had engaged in community organisations and was of (words to the effect) 'good character'.
29. The Tribunal also notes the 25-year-old applicant's statement of 23 July 2022 referred to a number of personal tragedies which the Tribunal has had regard to (including the suicide and attempted suicide of close family members, and mental health issues). The Tribunal has also had regard to the 'Digital National Police Certificate' dated 15 June 2023, indicating there were 'no disclosable court outcomes' relating to the applicant. At hearing, the applicant also appeared to be quite forthright in his responses to the Tribunal's questions.
30. In the circumstances, the Tribunal is satisfied it should give the applicant the benefit of the doubt and accept that with the imposition of the following condition, the applicant would meet the criteria to be satisfied at time of decision, being cl.050.221.

Condition attached to the Bridging visa:

31. Clause 050.223 stated:

The Minister is satisfied that, if a bridging visa is granted to the applicant, the applicant will abide by the conditions (if any) imposed on it.

32. Condition 8512 stated:

The holder must leave Australia by the date specified by the Minister for the purpose.

33. The Tribunal noted the applicant had previously advised of his intended departure date of 6 August 2023. The Tribunal therefore proposes to specify a departure date of 6 August 2023.
34. The Tribunal is satisfied the applicant met both cl.050.211 and cl.050.212, and the Tribunal is satisfied the applicant meets cl.050.221. Given these findings, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for the visa.

DECISION

35. The Tribunal remits the matter for reconsideration with the direction that the applicant meets the following criteria for a Subclass 050 (Bridging (General)) visa:
- cl.050.211 of Schedule 2 to the Regulations
 - cl.050.212 of Schedule 2 to the Regulations
 - cl. 050.221 of Schedule 2 to the Regulations

Mr S Norman
Member