



Administrative Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Farid Allam

VISA APPLICANT: Mrs Abir Hamiya

REPRESENTATIVE: Dr Jason Donnelly

CASE NUMBER: 1909281

DIBP REFERENCE(S): BCC2018/3255754

MEMBER: Tegen Downes

DATE: 7 November 2023

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.222 of Schedule 2 to the Regulations

I, Member T. Downes certify that
this is the Tribunal's statement of decision and reasons

Statement made on 07 November 2023 at 9:57am

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 on 6 February 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under section 65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 28 August 2018 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.222(1) of Schedule 2 to the Regulations because the sponsorship of the applicant had not been approved by the Minister.
4. The review applicant appeared before the Tribunal on 6 November 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant with the assistance of an interpreter. The hearing was conducted via Microsoft Teams.
5. The review applicant was represented in relation to the review. The representative made written submissions dated 31 October 2023.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUE AND LAW

7. The issue in the present case is whether the sponsor's sponsorship of the visa applicant should be approved.
8. Clause 309.213 of Schedule 2 to the Regulations relevantly requires that the visa applicant is sponsored by the review applicant. Clause 309.222 of Schedule 2 to the Regulations further requires that, at the time of decision, the sponsorship referred to in cl 309.213 has been approved by the Minister and is still in force.
9. Regulations 1.20J, 1.20KA, 1.20KB and 1.20KC limit the Minister's discretion to approve sponsorships. Relevantly, reg 1.20KC provides that, in relation to a provisional partner visa, the Minister must refuse to approve the sponsorship of each applicant for the visa if the sponsor has been convicted of a 'relevant offence' (or offences) and the sponsor has a 'significant criminal record' in relation to the 'relevant offence' (or offences).
10. 'Relevant offence' is defined in reg 1.20KC(2)(a) to, relevantly, include matters involving:
 - a. violence against a person, including (without limitation) murder, assault, sexual assault and the threat of violence;
 - b. firearms or other dangerous weapons; and
 - c. kidnapping or unlawful confinement.
11. 'Significant criminal record' is defined in reg 1.20KD(1) to include where 'the sponsor has been sentenced to a term of imprisonment of 12 months or more, or if the sponsor has been

sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.'

12. Regulation 1.20KC also provides, however, that the Minister may approve the sponsorship even if the applicant has been convicted of a 'relevant offence' and has a 'significant criminal record' in relation to that offence if the Minister considers it reasonable to do so, having regard to matters including the following (without limitation):
 - a. the length of time since the sponsor completed the sentence (or sentences) for the relevant offence (or offences);
 - b. the best interests of any children of the sponsor or any children of the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned; and
 - c. the length of the relationship between the sponsor and the applicant who is seeking to satisfy the primary criteria for the grant of the visa concerned.
13. Whether it is 'reasonable' to approve the sponsorship despite a 'significant criminal record' being present is a question of fact for the decision maker. The Tribunal must not restrict itself only to the factors listed above and must also have regard to all matters raised by the sponsor and applicant in support of approving the sponsorship, as well as any other relevant considerations that arise on the available evidence.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

14. The visa applicant is a 28-year-old woman from Lebanon. She is married to the sponsor, a 44-year-old Australian citizen. The couple claim to have first met on 25 October 2017 and to have married on 25 June 2018. Their marriage is confirmed by a Marriage Certificate issued by the Republic of Lebanon. The sponsor seeks to sponsor the applicant for a Partner (Provisional) (Class UF) visa.
15. The sponsor claims to have been a troubled youth. Among other things, he claims to have had a history of drug abuse and acts of delinquency to support his drug addiction, which started when he was only 11 years old. His National Police Certificate indicates that, as at 4 July 2018, he had 38 disclosable court outcomes for court dates between 1993 (when he was 14 years old) and 2015 (when he was 36 years old).
16. The sponsor gave evidence at the hearing that he committed the most serious offences detailed in his police record in 2004. He then fled the country. When he returned to Australia approximately two years later, he was arrested. He was then convicted of the offences in 2007 and spent five and a half years in prison.
17. The sponsor gave evidence at the hearing that he rehabilitated himself during his time in prison and that he has continued his rehabilitation following his parole in August 2011. He claims to have given up drugs and alcohol, and turned to prayer. Aside from a driving-related offence in 2015, he claims to have not reoffended. He has taken responsibility, and is remorseful, for his past conduct.
18. The sponsor gave evidence at the hearing that he has worked a variety of jobs since he left prison, including as a butcher, in a fruit market, and as a truck driver. Since 2021, he has owned and operated a pizza shop in Western Sydney.

19. The visa applicant briefly gave evidence at the hearing. Her evidence included that she is aware that the sponsor has been convicted of assault, theft, and weapon-related offences and that he spent approximately five years in prison. She claims that he is a changed man and is very remorseful for his past conduct.
20. The couple gave evidence at the hearing to the effect that they speak every day, that the sponsor has visited the applicant on a number of occasions, that the sponsor financially supports the applicant, and that they wish to have children together.

Does the sponsor have a significant criminal record in relation to relevant offences?

21. The sponsor concedes that he has been convicted of relevant offences and that he has a significant criminal record.
22. The sponsor completed the department's electronic 'Sponsorship for a partner to migrate to Australia' form, in which he declared that he had been convicted of offences. He also submitted to the department a National Police Certificate dated 4 July 2018, which relevantly certified that the following disclosable court outcomes were recorded against his name:

Court	Court Date	Offence	Court Result
Bidura Childrens Court	20 October 1997	Malicious Wounding	Community service order. T perform 150 hours
Bidura Childrens Court	20 October 1997	Possess Prohibited Weapon	Release on entering recognizance \$500 to be of good behaviour for 12 months
Burwood Local Court	22 May 2002	Common Assault	Imprisonment for 3 months commencing 22 May 2002
Burwood Local Court	22 May 2002	Common Assault	Imprisonment for 3 months commencing 22 May 2002
Burwood Local Court	22 May 2002	Common Assault	Imprisonment for 3 months commencing 22 May 2002
Sydney District Court	4 May 2007	Take/Detain Person in Company With Intent to Obtain Advantage	Imprisonment for 3 years commencing 13 Aug 2007

23. The representative submitted that the sponsor's criminal record should be ignored in relation to matters when he was under the age of 16, as such offences are an irrelevant consideration. In support of this submission, the representative cited s 14(1) of the *Children*

(Criminal Proceedings) Act 1987 (NSW), Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton [2023] HCA 17 (Thornton) and *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23.

24. In summary, Thornton concerned the Minister's decision not to revoke a mandatory cancellation of the visa applicant's visa. The Minister was required to consider whether the visa applicant represented an unreasonable risk of harm to the Australian community. In making the decision, the Minister took into account the visa applicant's offending as a child. The High Court decided that such was an irrelevant consideration, having regard to:
- a. section 184(2) of the *Youth Justice Act 1992* (Qld), which provides that 'a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose'; and
 - b. section 85ZR(2) of the *Crimes Act 1914* (Cth), which provides to the effect that where a person is to be taken to have never been convicted of an offence under a state law, that person shall be taken by a Commonwealth authority in all circumstances and for all purposes, never to have been convicted of an offence.
25. Thornton is not directly applicable to this application for review because it concerned Queensland legislation. The equivalent New South Wales legislation, the *Children (Criminal Proceedings) Act 1987* (NSW), is in different terms. Relevantly:
- a. section 14(1)(a) provides to the effect that a court shall not record a conviction against a child who is under the age of 16 years who has pleaded guilty or has been found guilty of an offence; and
 - b. section 15(1) provides to the effect that the fact that a person has pleaded or been found guilty of an offence shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence, if a conviction was not recorded against the person in respect of the first mentioned offence.
26. Fifteen of the disclosable court outcomes on the sponsor's National Police Certificate were heard in the Lidcombe Children's Court or the Bidura Children's Court. However, of those, only two are relevant offences for the purposes of reg 1.20KC, as referred to above. There is no evidence before the Tribunal that these offences were committed while the sponsor was under the age of 16 years. I note that at the time of conviction, the sponsor was approximately 18 years and 6 months old. Accordingly, I have taken them account in making my decision.
27. I find that the offences referred to in paragraph 22 are each relevant offences as defined in reg 1.20KC(2). As the sponsor was imprisoned for the offences of common assault and take/detain person in company for collectively more than 12 months, I find that they constitute a significant criminal record. For these reasons, pursuant to reg 1.20KC, the sponsorship must be refused.

Is it reasonable to approve the sponsorship?

28. The written submissions put forward eight reasons as to why, notwithstanding the sponsor's convictions and significant criminal record, it is reasonable to approve the sponsorship. I have summarised those reasons, the relevant evidence, and my considerations below.

Length of time since the sentence

29. The first two reasons relate to the length of time since the sponsor committed the offending conduct. In summary, the submissions note that more than 16 years have passed since the sponsor was convicted of the most serious of his criminal offences, and that it has been more than eight years since the sponsor appeared before an Australian court (at which time he was fined for 'Drive Motor Vehicle While Licence Suspended'). It is submitted that the absence of recent significant convictions '*clearly illustrates [the sponsor's] ... nominal risk to the safety and well-being of the Australian community*'.
30. Regulation 1.20KC provides that a relevant consideration is '*the length of time since the sponsor completed the sentence (or sentences) for the relevant offence or relevant offences*' [emphasis added]. I note that, according to the sponsor's parole order submitted to the Tribunal, he was released on parole on 12 August 2011, and that his sentence expired on 12 February 2014. Accordingly, I find that almost 10 years have passed since the sponsor completed his sentence, but that, taking into account the sponsor's parole period, he has successfully participated in the community without serious reoffending for more than 12 years. I give this significant weight.
31. I note that the sponsor's National Police Certificate is no longer current. However, I have had regard to the department's procedural instruction on requesting subsequent police checks and note that it provides that '*second and subsequent requests for police checks should be limited to where the delegate has sufficient reason to believe that: the sponsor has or may have, since the date of the initial police check, been convicted of a relevant offence(s) ...; or had an outstanding charge for a relevant offence(s)*'. I have accepted the sponsor's evidence that he has not reoffended since the date of the National Police Certificate as true.

The best interests of any children

32. Neither the sponsor nor the applicant claims to have any children. Accordingly, consideration of the best interests of any children is not relevant to my decision.

The length of the relationship

33. The representative submits that the sponsor and the applicant are in a long-term relationship, which has lasted over five years. I find, having regard to the marriage certificate submitted to the Tribunal, that the couple has been married for more than five years. I have given this some weight in making my decision.
34. I have not otherwise considered whether the couple's relationship meets the requirements of the Act. For the purposes of this decision, I have accepted the couple's evidence referred to at paragraph 20 at face value.

Other matters

35. The remainder of the representative's submissions broadly relate to the sponsor's rehabilitation efforts and his alleged good standing in the community. It is submitted that:
- a. while incarcerated, the sponsor completed the Violent Offender Treatment Program, which is a '*12-month residential therapeutic program for high-risk male offenders who are serving more than 2 years in custody for a violent offence. VOTP is associated with lower rates of general re-offending and return to custody*';

- b. the sponsor successfully completed his parole period and actively pursued computer and English courses during his incarceration, which *'efforts highlight his genuine commitment to rehabilitation and improving his life'*;
 - c. the sponsor currently manages a pizza shop. His *'dedication and hard work in the business have resulted in a positive contribution to the Australian community'*;
 - d. the sponsor has actively engaged in charitable endeavours, which demonstrates his *'commitment to good character'*; and
 - e. The sponsor has acknowledged his past wrongs and that *'such introspection and self-awareness are indicative of a genuine transformation'*.
36. There is no independent evidence before the Tribunal that the sponsor completed the Violent Offender Treatment Program. However, there is a certificate indicating that the sponsor completed the Violent Offenders Therapeutic Program Moderate Intensity from 5 July 2010 to 9 December 2010. This appears to be a different program to that referred to in the submissions, as it has a different name and the certificate indicates that the program duration was five months, not 12 months.
37. The sponsor gave evidence at the hearing that he found this program to be very beneficial. He said that it taught him a lot about empathy, sympathy, and his triggers, and helped him learn to control his anger. I accept this evidence and give it some weight.
38. The sponsor submitted documentary evidence to the Tribunal verifying that he has undertaken various vocational education and training courses related to Information Technology, Skills for Work and Training, Access to Work and Training, and Business. Accordingly, I accept this as true and find that the completion of these courses is consistent with the sponsor's efforts to turn away from a life of crime.
39. There is limited evidence before the Tribunal as to the sponsor's business endeavours. Aside from the sponsor's oral evidence, the Tribunal has sighted certificates indicating that the sponsor has completed food safety training, and a local newspaper article regarding the business. This evidence is not voluminous. Nonetheless, I accept the sponsor's oral evidence and I find that his business venture is again consistent with the sponsor's efforts to turn away from a life of crime.
40. The sponsor gave evidence at the hearing that his business participates in the MacArthur Workplace Learning Program, which is a not-for-profit work experience program. Some corroborating documentary evidence was provided. The sponsor also gave evidence that through his business, he donates to the local school, the New South Wales Police, and the Local Hospital. I accept these claims at face value and give them some weight.

Conclusion

41. The representative's submissions helpfully and succinctly summarise the purpose of the restrictions on sponsorship that are relevant to this matter. Accordingly, I reproduce them below:
16. *The purpose of the above legislation is to protect visa applicants seeking to enter Australia on a partner visa from being sponsored by people with convictions for child sex or other serious offences indicating that the sponsor might pose a significant risk to the visa applicant or any child in their care.*

17. *The amendments are also intended to strengthen the integrity of the visa program and improve support to visa applicants by giving the Department the ability to share the sponsor's relevant offences with the visa applicant, so they can decide whether to continue with the visa application and be able to make this decision based on information that may be relevant to their future safety and well-being.*
18. *The legislative provisions also allow the Department to refuse to approve the sponsorship for people with serious and violent criminal pasts, and thereby preventing a visa from being granted to potentially vulnerable people, particularly women and children.*
42. There is no doubt that the sponsor has committed abhorrent crimes in the past. However, on balance, the evidence before the Tribunal indicates that the sponsor has, as he put it, 'done a 180' and has turned his life around. His oral evidence and the notes he submitted from his participation in the Violent Offenders Therapeutic Program demonstrate that he has taken ownership for, and expressed significant remorse over, his past conduct. He has demonstrated insight into the harm that he caused to the victims of his crimes, and he expressed sincere contrition for that harm.
43. I note that, in the department's electronic 'Sponsorship for a partner to migrate to Australia' form, the sponsor consented for the department to disclose to the applicant any conviction for a relevant offence unless the conviction can be disregarded. I also note that the applicant's oral evidence was to the effect that she was aware of the sponsor's criminal history.
44. Having regard to all of the evidence before the Tribunal, including that not expressly referred to in this decision, I consider that it is reasonable to approve the sponsor's sponsorship of the applicant.
45. Accordingly, I find that the requirements of cl 309.222 of Schedule 2 to the Regulations are met.
46. 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 309 visa.

DECISION

47. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- CI 309.222 of Schedule 2 to the Regulations

Tegen Downes
Member