Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2013] AATA 818

Division	**GENERAL ADMINISTRATIVE DIVISION**
File Number(s)	**2013/4671**
Re	**Confidential**
	APPLICANT
And	**Minister for Immigration and Border Protection**
	RESPONDENT

DECISION

Tribunal	**Ms J Toohey, Senior Member** **Mr Dean Letcher QC, Senior Member**
Date	**19 November 2013**
Place	**Sydney**

The Tribunal affirms the decision under review.

.....[sgd].....

Ms J Toohey, Senior Member

CATCHWORDS

MIGRATION – Bridging Visa refused – substantial criminal record – application of Direction No 55 – best interests of child – whether short stay visa appropriate – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth): ss 194, 195, 499, 501(1), 501(6), 501(7)

SECONDARY MATERIALS

Direction No. 55 - Visal refusal and cancellation

REASONS FOR DECISION

Ms J Toohey, Senior Member
Mr Dean Letcher QC, Senior Member

19 November 2013

BACKGROUND

1. The Applicant was born in Samoa. His family moved to New Zealand when he was two. His parents separated and his father brought him to Australia in April 1987, when he was about five years old. Within several months, his father abandoned him and returned to New Zealand. The Applicant was raised by an uncle and aunt until he was 13 when he started living on the streets. He has never known his mother. He has not been to primary or secondary school and is barely literate.

2. The Applicant and his father arrived in Australia on a one-month visitor visa. He became an unlawful non-citizen when that visa expired but apparently did not come to the attention of the Department of Immigration until 1997 when he was convicted of larceny. Since

then he has been convicted of numerous offences and served several terms of imprisonment.

3. In May 2012, the Applicant applied for a Protection Visa. His application was refused by a delegate of the Minister for Immigration (the Minister) and by the Refugee Review Tribunal. His appeals to the Federal Circuit Court and the Full Federal Court were unsuccessful. He has lodged an application for special leave with the High Court.

4. In April 2012, when his most recent term of imprisonment expired, the Applicant was taken into immigration detention as an unlawful non-citizen. On 14 February 2013, he married Ms KG in Villawood Detention Centre. They have a daughter, born in October 2013. He remains in immigration detention.

5. On 14 March 2013, the Applicant applied for a Partner visa. His application was determined to be invalid by reason of ss 194 and 195 of the *Migration Act 1958* (the Act), the effect of which was to preclude such application because he was in detention.

6. On 15 July 2013, the Applicant applied for a Bridging Visa E (BVE) which, if granted, would permit him to be released and remain in Australia pending the outcome of his application for special leave and the final disposition of his Protection Visa application. On 11 September 2013, a delegate of the Minister refused his application for a BVE on the ground that he did not pass the character test in s 501 of the Act. The Applicant seeks review of that decision.

LEGISLATION

7. The Minister may refuse to grant a visa if the Minister reasonably suspects that a person does not pass the character test in s 501(6)(a) of the Act, and the person does not satisfy the Minister that he or she passes the character test: s 501(1).

8. A person is taken not to pass the character test if he or she has a *substantial criminal record.* A person has a *substantial criminal record* if he or she has been sentenced to a term of 12 months imprisonment or more, or has been sentenced to two or more terms of imprisonment totalling two years or more: subs 501(6)(a) and (7).

9. The Applicant concedes that he has a *substantial criminal record* and does not pass the character test. His record of convictions and penalties is set out below. We have to determine whether to exercise the discretion to refuse him a BVE.

DIRECTION NO. 55

10. The discretion in s 501(1) must be exercised in accordance with *Direction No. 55 - Visa refusal and cancellation* (Direction 55) which came into effect on 1 September 2012. Direction 55 is made by the Minister pursuant to s 499 of the Act and is binding on the Tribunal: s 499(2A).

11. Direction 55 includes principles which are "of critical importance" in furthering the Government's objective of protecting the Australia community from harm as a result of criminal activity or other serious conduct by non-citizens: cl 6.2. The principles relevant in this case are, in summary:

    1) being allowed to enter or remain in Australia is a privilege conferred in the expectation that a person will be law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community;

    2) a person who commits a serious crime, particularly against vulnerable members of the community, should expect to be denied the privilege of coming to, or to forfeit the privilege of remaining in, Australia;

    3) some conduct may be so serious that any risk of similar conduct in the future is unacceptable;

    4) the degree of tolerance of criminal or other serious conduct may be lower or higher depending on the length of time a person has been participating in, and contributing to, the Australian community; and

    5) the length of time that a person has been making a positive contribution to the Australian community, and the consequences of cancellation for minor children and other immediate family members in Australia, are to be considered.

12. Guided by these principles, a decision-maker must determine whether the risk of harm by a non-citizen is unacceptable. Doing so requires a balancing exercise, involving consideration of the likelihood of any future harm, the extent of the potential harm should it occur, and the extent to which, if at all, any risk should be tolerated by the Australian community: cl 7.

13. Recognising that persons holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of their visa, differing considerations apply to visa holders and visa applicants. In the case of a visa applicant, the following are *primary* considerations:

    (a) protection of the Australian community from criminal or other serious conduct;

    (b) the best interests of minor children in Australia; and

    (c) whether Australia has international non-refoulement obligations to the person.

14. *Other* considerations, which should generally be given less weight than *primary* considerations, must be taken into account where relevant. They include, but are not limited to:

    (a) impact of visa refusal on immediate family members in Australia, where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely;

    (b) impact of a decision to grant a visa on members of the Australian community, including victims of the person's criminal behaviour, and family members of the victim or victims, where that information is available and can be disclosed to the person being considered for visa refusal;

    (c) impact on Australian business interests if the person's visa application is refused.

15. *Primary* and *other* considerations may weigh in favour of, or against, refusal, and one or more primary considerations may outweigh other primary considerations: subcl 8(3) and (4).

PRIMARY CONSIDERATIONS

Protection of the Australian community from criminal or other serious conduct

16. When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. There is a low tolerance for visa applicants who previously engaged in criminal or other serious conduct. Decision-makers should also give consideration to the nature and seriousness of the person's conduct to date and the risk to the Australian community should he or she commit further offences or engage in other serious conduct: cl 11.1.

17. The factors to which regard must be had are set out in cll 11.1.1 and 11.1.2.

The nature and seriousness of the person's conduct

18. The Applicant's criminal record is set out in Appendix A. It spans more than 14 years from when he was 16 and includes offences ranging from driving while disqualified to armed robbery.

19. The Applicant submits that, despite his "extensive" and "undoubtedly troubling" criminal history, any risk of harm that he poses is one which the Australian community would tolerate. In particular, he says, his offences do not fall within the high range of objective seriousness; the terms of imprisonment for his two most serious offences fall "far short" of the maximum penalty; and he has only ever been dealt with in the Local Court of New South Wales and not in the higher District or Supreme Court jurisdictions. In these circumstances, he submits, the risk of future harm is not so serious as to make it unacceptable.

20. We do not accept that submission. The Applicant's criminal history spans more than 14 years from his first conviction, for larceny, at the age of 16. On that occasion he stole a school bag from a bench at a train station. He gave evidence, which we accept, that he was hungry and thought the bag might contain a lunchbox. On that basis, his offence might fairly be put down to his youth and that he was homeless.

21. However, the Applicant's offending has continued since then, ranging from repeatedly driving while disqualified, to crimes of violence including robbery, assault with a weapon, and assaulting police officers. He has been found guilty of two assaults on police, escaping from custody, and three counts of resisting arrest. He has been sentenced to two terms of 12 months' imprisonment, and on six occasions to lesser terms. Between 1997 and 2011, he committed more than 30 offences with, on average, one or two years between offences.

22. It is submitted for the Applicant that, despite the regularity of his offending, it has not increased in seriousness, and the risk of serious harm to the community in future is therefore not unacceptable. In particular, it is submitted that the term of imprisonment imposed on him in September 2011 was lighter than that imposed in August 2007. That may be, but his record demonstrates that he has not been deterred from crime, he has not learned from mistakes, and he has shown a continuing disregard for the law in many ways.

23. The Applicant concedes that he has been convicted of serious violent offences. He also accepts that he has committed offences that are considered serious by reason of the fact that they have been committed against members of the New South Wales Police Force. Direction 55 makes clear there is low tolerance for a visa applicant with such history: cl 11.1(1).

The risk to the Australian community should the person commit further offences or engage in other serious conduct

24. Clause 11.1.2 provides that, in considering whether a person represents an unacceptable risk of harm to the Australian community, decision-makers should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.

25. Decision-makers should also consider whether the purpose of the intended stay reflects strong or compassionate reasons for granting a short stay visa: cl 11.1.2(2). In making the risk assessment, decision-makers must have regard to, cumulatively:

    (a) The nature of the harm to individuals or the Australian community should the person engage in further criminal or other serious conduct; and

(b) The likelihood of the person engaging in further criminal or other serious conduct, taking into account:

(i) information and evidence from independent and authoritative sources on the risk of the person reoffending; and

(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken); and

(iii) the duration of the intended stay in Australia.

26. The Applicant gave evidence that he spent many years living on the streets using drugs and alcohol. When he was about 18 he moved to Kings Cross where he "became mixed up with the wrong crowd" of people who "were not a good influence". Some of his friends were involved in criminal activities. For about 10 years he associated with members of the Hell's Angels Motorcycle Club and joined the Club in 2011. Club members have visited him in gaol, but he says he has made clear that he wants no further involvement with them and does not want them around his wife and daughter.

27. The Applicant has undertaken several courses while in prison over the years including a literacy course, a course on responsible service of alcohol and conduct of gambling, and two anger management courses of approximately one month each which have taught him how to "take time out" and assess a situation before acting. He concedes that, while the assaults related to his anger management, his other offences did not. In these circumstances, those courses must be of limited value in reducing the risk of re-offending.

28. Asked how he intends to support his wife and child if released, the Applicant said he has done occasional labouring in the past and hopes to get work. Mr WZ, a close friend of many years, gave evidence that he will try to help him find work and is prepared to "vouch for" him with his connections in the construction industry but that is as far as it goes.

29. The Applicant says he wants to live a law-abiding life with his wife and child; he has had time to reflect while in detention and is truly remorseful for his past behaviour; he has stopped blaming others and takes responsibility for his own conduct.

30. A very real difficulty with this is that it is clear that the Applicant has no concrete plans for his future except to live with his wife and child. He regards his life as being changed by his marriage and the arrival of his child but he has little actual experience of such relationships and their pressures. Other than some labouring work, he has no work skills and he is barely literate – through no fault of his own.

31. The Applicant's mother-in-law, Ms AG , gave evidence that she will provide him with emotional and financial assistance if he is released and he can live at her home with her and her two daughters but, otherwise, he has no place to live and no means of supporting himself and his family. By his own evidence, he only became "romantically involved in a serious way" with his wife in June 2012, although he had known her since 2010. He has been in gaol and immigration detention for most of that time and the depth and future stability of the relationship must be open to serious question. We note that the possibility of Ms KG and their daughter accompanying him if he is removed it does not appear to be within their contemplation.

32. There is no expert assessment before us of the probability of future offending by the Applicant, but the regular repetition of offences, the lack of an alternative law-abiding structured life and the apparent inability to be deterred by penalties must point to a high likelihood that the Australian public would be at risk of further harm of the same kind if he were to be free in the community.

33. We note that Incident Detail Reports provided by the Department of Immigration show that the Applicant has been involved in a number of incidents described as minor "abusive/aggressive behaviour" and assault, and an alleged assault, while in detention. No doubt they reflect everyday life in detention but they do not reflect especially well on the Applicant.

34. We cannot predict the likely length of a BVE if one were granted. The Minister's representative advises that, according to the High Court Rules, the Applicant's application for special leave will be dealt with on the papers because he is unrepresented in those proceedings. That may take some months. If his application fails, a BVE would be of relatively short duration; if successful, it could be a considerable time before his Protection Visa application and any spouse visa application is finally determined. Regardless, the risk of the Applicant committing further serious offences is such that the likely period of a visa is not relevant; the level of risk is unacceptable whether it lasts for a long or short time.

35. Clause 6.3 of Direction 55 provides that Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, and the length of time that a person has been making a positive contribution to the Australian community is a relevant consideration.

36. The Applicant submits that he has made a positive contribution to the Australian community in at least two respects, which should count in his favour. Firstly, he has been involved in sport; he played football as a child and for a local team for several games in 2010 until an injury prevented him from continuing, and he helped out with the little league until the end of the season. Secondly, he has provided emotional support to various members of his extended family and friends over many years, which has helped them live enriching and fulfilling lives in Australia.

37. By his own evidence, the Applicant's involvement with football as an adult was short-lived. It is not clear in what way he has provided emotional support to family and friends but, even allowing he provided such support, there is nothing to suggest that it went beyond any normal friendship. We are not persuaded that either of these is a positive contribution to the Australian community of any weight. It must be said that the Applicant has contributed little if anything to the Australian community and has been largely removed from the education, work and social structures of it. As an applicant for a visa, he should have a low expectation of being allowed to remain here.

Are there compassionate grounds for granting a short-stay visa?

38. The Applicant submits that compassionate grounds exist for granting him a short-stay visa in the form of a BVE. He wishes to apply for a Spouse Visa in order to be with his wife and child but he is prohibited, by the effect of ss 194 and 195 of the Act, from applying for such visa while in immigration detention.

39. If refused a BVE, the Applicant will be removed from Australia once proceedings in relation to his application for a Protection Visa are concluded (assuming they are concluded unfavourably to him). He wishes to be with his wife and child pending the outcome of those proceedings. Further, he says, if removed, he will be forever barred from returning to Australia and from being united with his wife and child. He submits these constitute compassionate grounds for granting the BVE.

40. "Short-stay visa" for the purposes of Direction 55 is not defined. However, the Act and Regulations provides for several classes of visa which are described as "short-stay" visas. They include a Medical Treatment visa (subclass 602) and a Sponsored Business Visitor (Short Stay) visa (subclass 459). The Minister submits that "short-stay visas" in cl 11.1.2, should be read consistent with the nature of these other visas and applied in circumstances, such as funerals or the need for medical treatment, linked to the purpose of the intended stay in Australia.

41. We agree. Although a BVE might be of limited duration pending the final outcome of the Applicant's Protection Visa application, we are not persuaded it is the kind of visa contemplated by cl 11.1.2. It is a temporary visa allowing a person to remain in Australia while finalising an immigration matter or making arrangements to leave the country. Importantly, it would undermine the Act and Direction 55 if, his application for a BVE having otherwise failed, we were to grant the Applicant a BVE for the express purpose of enabling his release so that he could apply for a spouse visa.

42. Moreover, it is not strictly correct that the Applicant would be barred from any future application. He would not be prevented from applying for a Spouse Visa from offshore although no doubt his prospects would be reduced as a result of his removal.

The best interests of minor children in Australia affected by the decision

43. In considering the best interests of the child, the factors set out in cl 11.2(4) must be considered where relevant.

44. We accept that it is in the best interests of the Applicant's daughter that he remain in Australia. It cannot be said there is no existing relationship between them, even if she is only a few weeks old, although the effect of his removal on her would almost certainly be less than if she were older and their relationship of longer standing.

Whether Australia has international non-refoulement obligations to the person

45. The Applicant does not assert in these proceedings that Australia has any international non-refoulement obligations to him.

OTHER CONSIDERATIONS

Impact of visa refusal on immediate family members in Australia

46. The Minister submits that the strength of the Applicant's relationship with Ms KG is questionable, given its brief history and his relationship with another woman, Ms AM. The Minister submits it is open to the Tribunal to conclude that he married Ms KG for the purpose of obtaining a partner visa and remaining in Australia.

47. The Applicant and Ms KG gave evidence that they had known each other for some time before they started dating in June 2011. She was 15 or 16 when they met. The relationship became serious about a month later. They broke up in about April 2012 but resumed their relationship in about June 2012. Shortly after resuming the relationship, they decided to marry but, as Ms KG did not turn 18 until 2013, they decided to wait until then before marrying.

48. In about October 2010, the Applicant had started dating Ms AM. They broke up some time in the first half of 2011. According to him, they resumed their relationship in about April 2012 and became engaged in late April or May 2012. According to a statement by Ms AM, they resumed their relationship in February 2012. The difference in dates does

not really matter. The Applicant gave evidence that, about one week after breaking up with Ms Ghalie in April 2012, he became engaged to Ms AM. They broke up in June 2012 and he contacted Ms KG the following day. She told him that time apart had made her realise she wanted the relationship and it became serious.

49. The Applicant denies marrying Ms KG in order to remain in Australia. He describes the day they married as the happiest day of his life. We accept his evidence. We accept that Ms KG would be distressed if he is refused a BVE which would enable them to be together for at least some time. We also accept that her mother would be distressed by such decision.

50. Statements from members of the Applicant's extended family and several friends are before the Tribunal. They speak of his difficult upbringing, his remorse about his past conduct and the distress the writer would suffer at his removal from Australia. Other than Ms KG, her mother, and Mr WZ, none gave oral evidence and we place no weight on their statements. In particular, given his largely itinerant history, questions arise as to what, if any, support the writers have given to the Applicant in the past and the strength of their relationships with him now.

Impact of a decision to grant a visa on members of the Australian community including victims of the person's criminal behaviour

51. There is no evidence before us of any effect that granting the Applicant a BVE would have on members of the Australian community other than the general consideration of protection of the Australian community from serious harm.

Impact on Australian business interests if the person's visa application is refused

52. There is no suggestion that refusing the Applicant a BVE would have any adverse effect, or any effect at all, on Australian business interests.

CONCLUSION

53. As set out above, we accept that it is in the best interests of the Applicant 's daughter that he remain in Australia. However, we are not satisfied that her best interests outweigh the

real risk that he will commit further serious offences and serious harm to the Australian community if he is granted the visa. In our view, that risk is unacceptable.

54. We affirm the decision under review.

I certify that the preceding 54 (fifty-four) paragraphs are a true copy of the reasons for the decision herein of Ms J Toohey, Senior Member and Mr Dean Letcher QC, Senior Member.

.....[sgd].....

Associate

Dated 19 November 2013

Date(s) of hearing	**11 November 2013**
Counsel for the Applicant	**Mr J Donnelly**
Solicitors for the Respondent	**DLA Piper**

ANNEXURE A

Date of conviction	Offence	Court result
17 December 1997	Larceny	Fined $800
1 November 2000	Unlicensed Driver/Rider	Fined $500
20 March 2001	Supply Prohibited Drug	Fined $400
11 April 2001	Supply Prohibited Drug Unlawfully Obtained Goods Never Licensed Person Drive Vehicle on Road Drive with Low Range Prescribed Concentration of Alcohol Supply of Prohibited Drug Driver/Rider State False Name or Address	On each charge, Convicted, Bond to be of good behaviour for 12 months Fined $400, License Disqualified for 3 years Fined $400. Licence Disqualified. Fined $400 Fined $100
13 September 2002	Assault Occasioning Actual Bodily Harm Supply a Prohibited Drug Failure to Appear For Breach of Good Behaviour Bond (2 Charges) Bring/Introduce Small Quantity of Drug into Detention Centre Assault Officer in Execution of Duty Breach of Bail Taxi Passenger Fail to Pay Fare	Imprisonment for 12 months On each charge, Imprisonment for 6 months concurrent. Fined $50, pay compensation $45.
22 April 2004	Drive While Disqualified from Holding a Licence Drive While Disqualified from Holding a Licence	Convicted and a community service order. To perform 120 hours community service work. Licence disqualified for 2 years. Convicted. Bond to be of good behaviour for 12 months. Licence disqualified for 2 years.
4 June 2007	Fail to Appear in Accordance with Bail Undertaking	Without Conviction, no further penalty imposed

Date of conviction	Offence	Court result
14 August 2007	Common Assault Drive while disqualified from Holding a Licence (2 charges) (Call Up)	Imprisonment for 12 months On each charge Imprisonment for 1 month, Licence Disqualified for 2 years.
	Exceed Speed	Fined $500.
12 July 2010	Drive Whilst Disqualified	Convicted. Bond to be of good behaviour for 2 years. Licence Disqualified for 2 years.
28 September 2011	Resist Officer in Execution of Duty Assault Officer in Execution of Duty	On each charge, Imprisonment for 8 months commencing 18 August 2011.
	Drive Whilst Disqualified	Imprisonment for 6 months commencing 18 August 2011. Licence Disqualified for 2 years.
	Drive Whilst Disqualified (Call Up)	Convicted. Bond to be of good behaviour for 2 years.
	Resist Officer in Execution of Duty Escape Police Custody	On each charge, Convicted. Bond to be of good behaviour for 2 years.
	Failure to Appear in Accordance with Bail Undertaking	Convicted, no penalty imposed.
30 March 2012	Robbery Armed with Offensive Weapon (2 charges) Steal Motor Car/Motor Vehicle Assault with Intent to Rob Armed with Offensive Weapon	On each charge Probation for 6 months.