



Administrative
Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms [REDACTED]

VISA APPLICANTS: Mr [REDACTED]

CASE NUMBER: [REDACTED]

DIBP REFERENCE(S): [REDACTED]

MEMBER: Peter Emmerton

DATE: 29 January [REDACTED]

PLACE OF DECISION: Adelaide

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

cl.309.211 of Schedule 2 to the Regulations

cl.309.221 of Schedule 2 to the Regulations

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

Statement made on 29 January 2018 at 4:41pm

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 Immigration on 17 June 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant, Mr [REDACTED], (the visa applicant) applied for the visa on 7 July 2016 on the basis of their relationship with their sponsor, the review applicant, Ms [REDACTED]. 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). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the couple were in a genuine spousal relationship.
4. The review applicant appeared before the Tribunal on 29 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant via telephone. In addition two witnesses appeared before the Tribunal, Ms [REDACTED], the sponsor's sister in law and Ms [REDACTED], the sponsor's mother in law. Whilst the services of two interpreters were utilised at the hearing, the Tribunal was satisfied that the communication was of good quality and all participants were able to express themselves appropriately.
5. The review applicant was represented in relation to the review by her registered migration agent via telephone.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by section 5F of the Act.
8. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
9. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department.

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the

present case the visa applicant claims to be the spouse of the review applicant who is an Australian Permanent Resident.

11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties' wedding was held in Vietnam on 17 April 2016. The parties' signed the Marriage Certificate on 11 May 2016. The delegate accepted this as evidence of a valid marriage as does the Tribunal. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

13. In forming an opinion whether they are in a spousal relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
14. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 7 July 2016 on the grounds of being in a spousal relationship with an Australian Permanent Resident.
15. [REDACTED] is a forty four year old male from Ho Chi Minh City. He declares that he divorced his first wife in 2008. There are two male children aged fourteen and eighteen from this relationship.
16. [REDACTED] is a forty two year old Australian Permanent Resident, who resides in Woodville, South Australia. According to the information in the application forms, she married her first husband in October 2009 and he passed away in June 2010. There are no children from this relationship.
17. According to information on file and provided at interview, the sponsor was a regular customer at the restaurant of the applicant's sister in Australia. The applicant travelled to Australia on 25 February 2010 to visit his sister. The parties claimed that the applicant met the sponsor sometimes on weekends at his sister's restaurant. The applicant returned to Vietnam on 25 May 2010.
18. When the sponsor's ex-husband passed away in June 2010, the parties claimed that the applicant telephoned to convey his condolences to the sponsor.
19. The parties claimed that the sponsor started to rent a room at the applicant's sister's house in November 2015. The parties claimed that the applicant and sponsor started contacting

each other more often and the parties fell in love by the end of December 2015. The parties claimed that the applicant proposed to the sponsor at the beginning of February 2016.

20. On 2 April 2016, the sponsor travelled to Vietnam. The parties claimed that the applicant accompanied his mother and the sponsor to Thailand, to visit the sponsor's family from 9 April 2016 until 15 April 2016. The visa applicant asked the family for permission to marry the sponsor.
21. The parties' wedding was held on 17 April 2016 in Vietnam. The sponsor returned to Australia on 30 April 2016.
22. On 10 May 2016, the sponsor travelled to Vietnam. The parties signed the marriage certificate on 11 May 2016. The sponsor returned to Australia on 20 May 2016 and this application was lodged on 7 July 2016 at the Australian Consulate General in Ho Chi Minh City.
23. The sponsor travelled to Vietnam on 16 September 2017, returning to Australia on 29 September 2017.
24. Departmental systems indicate that the sponsor has not departed Australia and the applicant has not travelled to Australia since this date.
25. The Tribunal, as previously stated, has had the benefit of taking oral evidence from the sponsor and two witnesses at the hearing, as well as oral evidence via telephone from the visa applicant. The Tribunal found all those presenting evidence to be credible and persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal has considered all aspects of the relationship.
26. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
27. Any joint ownership of real estate or other major assets. The Tribunal has determined that the couple do not jointly own any major assets or real estate. This is not in the opinion of the Tribunal unusual for a couple of modest means, currently housed in two different countries, planning to live together in Australia.
28. The Tribunal received no evidence that the couple have any joint liabilities.
29. The extent of any pooling of financial resources, especially in relation to major financial commitments. The Tribunal notes, as stated by the delegate, that there have been eight money transfers from the sponsor to the visa applicant, totalling AUD\$9,500. This money was transferred between 27 January 2016 and 10 February 2017. In addition the Tribunal was provided with evidence to show that three additional money transfers, totalling AUD\$600.00, which have taken place between August and December 2017. There was no other evidence of financial resource pooling presented to the Tribunal. The couple spoke of plans to purchase a home once the visa applicant settles in Australia and has employment.
30. Whether one person in the relationship owes any legal obligation in respect of the other. The Tribunal has determined that aside from the usual legal obligations associated with a marriage, the couple have not provided any evidence to indicate additional legal obligations.
31. The basis of any sharing of day-to-day household expenses. The Tribunal acknowledges that the couple have principally lived apart post marriage, aside from three brief periods totalling six weeks, whilst staying in hotels or as guests of relatives. Evidence was presented

to show that the cost of trips to Vietnam and Thailand, in order to visit each other and each other's families, have been shared, roughly in proportion to their relative financial circumstances.

32. The Tribunal places moderate weight on the cumulative evidence in support of the financial aspects of the relationship.
33. In relation to the nature of the household aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
34. Any joint responsibility for the care of children. The Tribunal notes the sponsor does not have children and the visa applicant has two teenage children whom live with their mother following their parent's divorce. He visits on a regular basis and helps support them financially, however the boy's mother provides the principal day to day parenting. Both the visa applicant and sponsor provided corroborated evidence that they would like to have up to two children and had discussed the practicalities of having children at their age.
35. The living arrangements of the visa applicant and the sponsor. The couple have principally been separated by geography post their marriage, aside from three brief periods together. The Tribunal notes that an application for a visitor's visa made by the visa applicant was refused. The separation is not of their making but within the financial resources available to them they have co-located as often as possible.
36. Any sharing of responsibility for housework. The Tribunal notes little opportunity has existed to share household responsibilities as they have stayed together in hotels or relative's homes.
37. The Tribunal places moderate weight on the cumulative evidence presented in relation to the nature of the household.
38. In relation to the social aspects of the relationship between the applicant and the sponsor, the Tribunal has considered the following.
39. Whether the persons represent themselves to other people as being married to each other. Evidence was presented at the hearing by the visa applicant's mother and sister, leaving the Tribunal no doubt as to their belief that the couple were in a genuine married relationship. Photographic evidence was presented to the Tribunal demonstrating aspects of a traditional Vietnamese wedding ceremony and celebration in traditional dress. Substantiated evidence was presented at the hearing regarding the visa applicant's close relatives attending from Australia and friends and relatives located in Vietnam attending. A total of eighty plus guests attended. The Tribunal noted that the aged and unwell parents of the sponsor did not attend from Thailand. The explanation surrounding the health issues was accepted by the Tribunal.
40. Whilst it was a relatively modest wedding by Vietnamese standards, the travel and subsequent attendance of close relatives from Australia adds weight to the perceived genuine nature of the relationship. The Tribunal also notes that it was the second wedding for both parties and the couple have modest financial resources, both factors which may have contributed to a more subdued celebration.
41. Any basis on which the persons plan and undertake joint social activities. Additional photographic evidence was produced at the hearing to demonstrate social activities with family, friends and the couple alone together.
42. The Tribunal places substantial weight upon the cumulative evidence provided in support of the social aspects of their relationship.

43. In relation to the nature of the persons' commitment to each other, the Tribunal has considered the following.
44. The duration of the relationship. The Tribunal was presented with a range of testimony showing that the relationship evolved over a substantial period of time, following the death of the sponsor's first husband in 2010, a few months after the couple met in the visa applicant's sister's restaurant. It is noted that the sponsor shares a house with the visa applicant's sister and her family, which the parties and witnesses demonstrated, assisted the relationship to develop.
45. The length of time they have lived together. As previously stated the couple have only lived together for short periods of time, due to circumstances the Tribunal accepts are out of their control.
46. The degree of companionship and emotional support that the persons draw from each other. The Tribunal was convinced by the testimony of the couple, which was supported by the witness statements that the relationship is mutually emotionally nourishing.
47. The Tribunal determines that the various pieces of evidence provided to demonstrate ongoing communication between the visa applicant and the sponsor and her family, further strengthen the body of evidence supporting the genuineness of this relationship.
48. Both the sponsor and the visa applicant were able to demonstrate substantial knowledge about each other, their daily activities, occupations and their future plans. As previously stated, intimate reproductive details had clearly been discussed in detail. The couple expressed mutually compatible knowledge regarding each other's family circumstances both past and present. In addition evidence was provided to demonstrate mutual understanding of the couple's previous relationships.
49. The Tribunal places substantial weight upon the cumulative evidence provided in support of the couple's commitment to each other.
50. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
51. Therefore the visa applicant meets cl.309.211 and cl.309.221.
52. 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

53. 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 309.211 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).