



# Administrative Appeals Tribunal

## DECISION RECORD

**DIVISION:** Migration & Refugee Division

**APPLICANT:** Miss [REDACTED]

**CASE NUMBER:** [REDACTED]

**HOME AFFAIRS REFERENCE(S):** BC [REDACTED]

**MEMBER:** Mark Bishop


**DATE:** 23 August 2018

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:

- cl.500.212 of Schedule 2 to the Regulations..

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



Statement made on 23 August 2018 at 1:54pm

## 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 and Border Protection on 5 April 2017 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 12 March 2017. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.
3. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.212 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied that the applicant intended genuinely to stay temporarily in Australia.
4. The applicant provided a copy of the decision record to the Tribunal. The decision record contained a copy of the applicant's PRISMS record. The decision record contained an extensive discussion of the applicant's visa, immigration and study history.
5. The applicant appeared before the Tribunal on 23 August 2018 to give evidence and present arguments. At the outset the applicant advised the Tribunal she did not require the assistance of an interpreter. The MA confirmed this advice. The Tribunal hearing was conducted in the English language.
6. The applicant was assisted in relation to the review by their registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be remitted.

### CONSIDERATION OF CLAIMS AND EVIDENCE

8. The criteria for a Subclass 500 (Student) visa are set out in Part 500 of Schedule 2 to the Regulations. The primary criteria in cl.500.211 to cl.500.218 must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need only satisfy the secondary criteria.

#### **Genuine applicant for entry and stay as a student (cl.500.212)**

9. Clause 500.212 requires as follows:

The applicant is a genuine applicant for entry and stay as a student because:

- (a) the applicant intends genuinely to stay in Australia temporarily, having regard to:
  - (i) the applicant's circumstances; and
  - (ii) the applicant's immigration history; and
  - (iii) if the applicant is a minor—the intentions of a parent, legal guardian or spouse of the applicant; and
  - (iv) any other relevant matter; and
- (b) the applicant intends to comply with any conditions subject to which the visa is granted, having regard to:

- (i) the applicant's record of compliance with any condition of a visa previously held by the applicant (if any); and
  - (ii) the applicant's stated intention to comply with any conditions to which the visa may be subject; and
- (c) of any other relevant matter.

### **Does the applicant intend genuinely to stay in Australia temporarily?**

10. In considering whether the applicant satisfies cl.500.212(a), the Tribunal must have regard to Direction No.69, 'Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications', made under s.499 of the Act. This Direction requires the Tribunal to have regard to a number of specified factors in relation to:
- the applicant's circumstances in their home country, potential circumstances in Australia, and the value of the course to the applicant's future;
  - the applicant's immigration history, including previous applications for an Australian visa or for visas to other countries, and previous travel to Australia or other countries;
  - if the applicant is a minor, the intentions of a parent, legal guardian or spouse of the applicant; and
  - any other relevant information provided by the applicant, or information otherwise available to the decision maker, including information that may be either beneficial or unfavourable to the applicant.
11. The Direction indicates that the factors specified should not be used as a checklist but rather, are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.

### **Relevant Criteria**

12. It appropriate to observe that compliance with the prescribed criteria turns on the Tribunal's satisfaction on review as to whether or not the criteria have been met and not on the objective existence of that fact. *Minister for Immigration and Border Protection V Angkawijaya* [2016] FCAFC 5 at 15
13. In determining whether it is so satisfied, the Tribunal is not required to uncritically accept any or all of the allegations made and it has not done so. As Heerey J observed in *Selvadurai v Minister of Immigration and Ethnic Affairs and J Good (Member of the Refugee Review Tribunal)* [1994] FCA 1105 at [7]:

*A decision-maker does not have to have rebutting evidence available before he or she can lawfully hold that a particular factual assertion by an applicant is not made out.*

14. Similarly, as observed by McHugh J sitting in the High Court's original jurisdiction as a single judge in *Re Minister for Immigration & Multicultural Affairs; ex parte Durairajasingham* [2000] 168 ALR 407 at [67]:

*If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was*

*not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence.*

15. The Tribunal further observes that a decision-maker is not required to make the applicant's case. It is for the applicant to satisfy the Tribunal that the requirements of the Act and Regulations have been met. Although the concept of onus of proof is not appropriate to administrative decision-making, the relevant facts of the individual case have to be supplied by the applicant, in as much detail as is necessary to enable the examiner to establish the relevant facts. As stated by the Full Federal Court in *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [76]:

*In an inquisitorial process, it was for the respondent to put whatever evidence or argument he wished to the decision-maker to enable her to reach the requisite state of satisfaction.*

16. The applicant provided a GTE statement to the Department as follows:
- She chose to study in Australia because her aunt is an Australian citizen. Her aunt provides financial support. She has an interest in Australian culture. She has regard for Australia's reputation for quality education;
  - She did not complete study at Victoria University because she was depressed and confused after failing several subjects. She studied courses in patisserie instead. She was very interested in making cakes and obtained experience in hospitality during this time;

The Tribunal inquired as to whether the applicant had received any form of counselling, professional, or medical assistance in this period. The applicant advised she had received none.

- The applicant states that, on the other hand, she would like to study hairdressing and beauty as well. She loves experimenting with makeup and states a career in beauty could be just what she is looking for. She claims career options for beauty therapists in Vietnam are endless;
  - The applicant states that she might operate a business out of a spare room in her house and invite clients over to do their makeup and nails;
  - The applicant's parents and aunt have accepted her changing courses. The applicant believes in her decision and will do her best to pass all her subjects, finish her proposed study and have success in a future career.
17. The Tribunal provided to the applicant a copy of her PRISMS record. The Tribunal read to the applicant s.359AA statement. The statement provided as follows:

**s.359AA Statement to be read out by the presiding member at hearing in Case No 1709136**

Ms [REDACTED], I am going to share with you some adverse information that I have from a Departmental database. It is called PRISMS (the Provider Registration and International Students Management System). It tracks, based on information reported by Australian education providers, the enrolment and education achievements of international students in Australia. I have a PRISMS report dated 13 August 2018.

The information from PRISMS is:

1. PRISMS show you have enrolled in 31 courses during the five (5) years you have been resident in Australia.

2. PRISMS show you have finished only two (2) courses in the English language field in 2013/2014. Finished does not mean completed or graduated. It means the course time has expired. You did not provide a Certificate of Graduation for either of these courses to the Department or the Tribunal. You provided two letters from Victoria University dated 8 May 2014 and 8 July 2014 that outlined your enrolment in two English language programs in 2013. Neither of these letters indicated any academic progress or achievement.
3. PRISMS show you completed a Certificate III in Patisserie on 9 April 2016 after a period of study from 1 February 2016 until 9 April 2016. You provided a Certificate of Graduation to the Tribunal to this effect.
4. PRISMS show you completed a Certificate IV in Patisserie on 18 January 2017 after a period of study from 25 April 2016 until 18 January 2017 involving four (4) separate enrolments in this course. You provided academic transcript and a Certificate of Graduation to the Tribunal to this effect. The academic transcript shows you studied and completed 12 units and received a credit transfer for 20 units.
5. PRISMS show you completed a Certificate IV in Commercial Cookery on 14 April 2018 after a period of study from 1 May 2017 until 14 April 2018. You provided academic transcript and a Certificate of Graduation to the Tribunal to this effect. The academic transcript shows you studied and completed 14 units and received a credit transfer for 18 units.
6. PRISMS show you enrolled in a Diploma of Hospitality Management from 30 April 2018 until 30 September 2018. You provided academic transcript to this effect. The academic transcript shows you received a credit transfer for 22 units, completed 3 units and are enrolled in a further 3 units scheduled to conclude on 30 September 2018.
7. PRISMS show you enrolled in a Certificate III in Hairdressing in the period 6 February 2017 until 14 April 2017. You provided a Statement of Results for this course. The statement of results shows you gained competency results in 8 units and no results in a further 20 units.
8. PRISMS show you enrolled in an Advanced Diploma of Hospitality Management in the period 15 October 2018 until 13 April 2019.
9. PRISMS show you in a Bachelor of Business on 3 occasions in the period 21 July 2014 until 5 November 2015. PRISMS show your period of study in these 3 enrolments was 21 July 2014 until 21 August 2014 a period of 1 month. Otherwise your enrolment was cancelled prior to commencement on 5 July 2013 for reason of transfer or on 5 November 2015 for reason of "non-commencement of studies". You did not provide provided a Statement of Attainment or academic transcript for any enrolments in a Bachelor of Business in this period.
10. PRISMS show you were not enrolled in an approved course in the Higher Education (HE) sector in the period 21 August 2014 until 15 March 2017 a period of 30 months.
11. PRISMS show you did not complete or graduate from any courses in the period 5 July 2013 until 15 March 2017, a period of 33 months.

*This information is relevant for the following reason.*

*It shows that your enrolments in all courses (excluding VET level courses in English) from 5 July 2013 until 15 March 2017 have been cancelled. It indicates a lack of academic progress that in the absence of other explanation is not consistent with you being a genuine student staying in Australia temporarily.*

*If the Tribunal relies on this information in making its decision, it may lead me to believe that you are not a genuine student, and that you do not meet cl.500.212(a). If the Tribunal so finds, this information would be a reason, or part of the reason, for me to affirm the decision of the Department in your case and refuse your application for a student visa.*

*I invite you to comment on or respond to that information. You do not have to respond or comment now. You may seek additional time to comment on or respond to that information. If you do want additional time, I will consider your request and will grant you a reasonable amount of time to consider the information I have given to you and to consider your response to that information.*

*Do you want to comment on or respond to the information I have just provided to you now or would you like some time to consider it before you respond?*

18. At the resumption of the hearing the MA advised the Tribunal that a mistake had been made in the provision of the PRISMS record to the applicant in that 2 copies of page 2 had been provided and page 1 omitted. The Tribunal checked the material provided to the applicant. The statement of the MA was correct. The Tribunal provided a corrected PRISMS record to the applicant and the MA and the applicant checked the correct pages were included. Both the MA and the applicant agreed they now had the correct PRISMS record attached to the s.359AA statement. The Tribunal granted a further adjournment of ten minutes for the applicant to consider the s.359AA statement and corrected attachments.

19. The Tribunal to comment on each paragraph of the s.359AA statement as referred to in paragraph 17 above. In respect of each paragraph the applicant advised as follows:
- Paragraph 1 the applicant advised she did not realise she had enrolled in so many courses. The applicant pointed out some enrolments was on the same day. The Tribunal accepts this advice. The applicant advised she had not been aware of the activities of her MA.
  - Paragraph 2 the applicant advised she studied at Victoria University for twenty weeks and passed the relevant subjects. The applicant advised she could not provide a Certificate of Graduation.
  - Paragraph 3 the applicant advised was correct;
  - Paragraph 4 the applicant advised was correct;
  - Paragraph 5 the applicant advised was correct;
  - Paragraph 6 the applicant advised was correct and she anticipated graduating in September 2018;
  - Paragraph 7 the applicant advised was correct. The applicant advised she was not interested in Hairdressing and sought transfer to Cooking;
  - Paragraph 8 the applicant advised was correct and the applicant advised she intended to study that course.
  - Paragraph 9 the applicant advised it was correct. The applicant advised she did not study at any time in the Bachelor of Business and enrolled at the suggestion of her family and Education Agent.

20. The applicant's study history as derived from PRISMS is outlined below:

- She is currently studying a Diploma of Hospitality Management, course end date 30 September 2018;
- She is enrolled in an Advanced Diploma of Hospitality Management, course end date 13 April 2019;
- Did not complete courses proposed in current application.

*6 courses completed*

**2013** – English Language Programs – Beginner to Advanced  
**2014** – Diploma of Business (Enterprise)  
**2014** – General English Elementary to Advanced 5-50 weeks  
**2014** – General English Elementary to Advanced 5-50 weeks (second enrolment)  
**2015** – Certificate III in Patisserie  
**2016** – Certificate III in Patisserie (second enrolment)  
**2016** - Certificate IV in Patisserie  
**2016** - Certificate IV in Patisserie (second enrolment)  
**2017** – Certificate IV in Patisserie (third enrolment)  
**2018** - Certificate IV in Commercial Cookery

*8 courses cancelled*

Bachelor of Business (Accounting)  
 IELTS preparation (Intermediate to Advanced)  
 Diploma of Management  
 Diploma of Hospitality  
 Bachelor of Business (Management)  
 Diploma of Leadership and Management  
 Certificate III in Hairdressing  
 Diploma of Beauty Therapy

21. The applicant provided a s.359(2) statement to the Tribunal. It provided as follows:
- The applicant completed secondary school in Vietnam in 2008;
  - The applicant declined to provide written information concerning work experience in Vietnam prior to coming to Australia;
  - The applicant declined to provide written information concerning previous visa applications to Australia;
  - The applicant advised she had completed courses in English (3), Certificate III in Patisserie, Certificate IV in Patisserie, Certificate III in Hairdressing;
  - The applicant advised she had been working as a waitress and cook since August 2017 until the present time at a current salary of \$9,300 per annum;
  - The applicant advised she had visited Vietnam once in July 2016 for a brief period since coming to Australia in January 2013;
  - The applicant advised she had not applied for a visa to any other country excluding Australia;
  - The applicant advised her annual living expenses were \$12,200 per annum;
  - The applicant advised she last saw family (uncle and aunty) in Australia in April 2018.

22. The MA for the applicant provided a statement as follows:

- Concedes applicant's study history as listed in the delegate's decision;
- States the applicant came to Australia as an impressionable and naïve 19 year old after completing high school in Vietnam. She was temporarily unsure of her study and career directions and was at an age to explore her interests and career options. She chose to study business courses on recommendation of her parents and education agent but decided to withdraw after completing five units over two terms.

In evidence the applicant confirmed the above statement was correct. This statement did not provide an explanation of the applicant's regression to courses in the Vocational Education and Training (VET) sector while holding a Student TU-573 visa (breach of visa conditions 8202 and 8516).

This statement did not provide an explanation as to why the applicant sought entry into Australia as the holder of a TU-573 visa and has not carried out study in the HE sector. In evidence the applicant advised she had early on lost interest in studying in the HE sector. She enrolled in the HE sector at the insistence of her parents and following advice from her Education Agent.

- The applicant discovered that she is more interested in cooking and baking and has completed patisserie courses with 'Academia'.
- After completing a Certificate IV in Patisserie on 3 July 2016, consulted with her education agent about future career directions and was wrongly advised to pursue courses in hairdressing and beauty therapy. Agent was eager to sell courses without

fully engaging with her in relation to career aspirations. Admits fault in relying on agent's advice when her passion lies in baking and cooking.

- Completed 10 weeks of hairdressing course then enrolled in her preferred course, Certificate IV in Commercial Cookery, which she has successfully completed.
  - She has now commenced study of Diploma of Hospitality Management and thereafter an Advanced Diploma of Hospitality Management.
  - Applicant believes qualifications in hospitality management will enhance her future career by providing her with skills and knowledge to be a supervisor or manager of a 5-star restaurant in her home country. Subjects include finance, staff supervision and quality management related to the hospitality industry.
  - Chosen education provider, 'Academia', provides internships with 5-star hotel chains and 'Patisserie stream' will build on applicant's previous studies.
  - Provides student reviews of 'Academia' from the education provider's website and promotion material which states that 'Academia' courses prepare students for careers as head patissiers.
  - Applicant now works as a cook at 'Saigon Allee' in Ballarat Central, pursuing her ambition to work in the hospitality industry.
  - Disputes delegate's allegation of changing fields in unrelated courses; submits that, with exception of hairdressing and business courses where applicant was exploring her options, study has been in alignment with current career aspirations. Submits Direction 53 (**NB** relevant instrument for TU-500 applications is Direction 69) requires the Tribunal to 'allow for reasonable changes to career or study pathways' (*Singh v MIBP [2017] FCCA 1901*).
  - Disputes delegate's allegation that courses are of limited value to applicant's future; submits current employment as a cook demonstrates value of study already completed. Further submits living in Ballarat and commuting three hours to Melbourne for study demonstrates the applicant's belief in the value of current study to her future.
23. The Tribunal sought an explanation for the applicant's constant enrolment and cancellation of course in the period July 2013 until February 2016. In evidence the applicant advised she had not been aware of many enrolments. She advised she had only paid for enrolment in one course. She advised she was unaware of multiple enrolments.
24. The Tribunal sought advice from the applicant if she had ever sought to obtain a TU-572 visa in the period November 2012 to March 2017. In evidence the applicant advised she had never applied for a TU-572 visa.
25. The applicant provided Certificates of Graduation from the following courses:
- Certificate III in Patisserie January 2017 for study in the period February 2016 until April 2016;



- Certificate IV in Patisserie January 2017 for study in the period April 2016 until January 2017;
  - Certificate III in Hairdressing for study in the period February 2017 until April 2017;
  - Certificate IV in Commercial Cookery in the period May 2017 until April 2018
26. The applicant provided a copy of academic transcript for enrolment in a Diploma of Hospitality Management in the period April 2018 until September 2018. This academic transcript shows credit transfer of 22 out of 28 modules, completion of a further 3 modules and anticipated completion of a final 3 modules by September 2018.
  27. The applicant provided a copy of a COE for enrolment in an Advanced Diploma of Hospitality Management in the period October 2018 until April 2019. The COE disclosed the applicant had not paid any tuition fees for enrolment in this course. The Tribunal inquired how many course credits the applicant anticipated gaining for her enrolment in the Advanced Diploma of Hospitality Management. In evidence the applicant advised she would gain some credit for a number of units already passed but did not know the exact number.
  28. The Tribunal considers Ministerial Direction Number 69 (MD69).
  29. The Tribunal considers cl.9 of MD69 the applicant's circumstances in her home country.
  30. The applicant came to Australia at a relatively young age at the insistence of her parents. She did not do any serious exploratory work as to the type or nature of courses on offer in Australia. She did not do any research into doing study in her home country. She relied almost exclusively on the advice of Education Agents as to courses of study in Australia. She explained strong and continuing family ties to Vietnam. She advised her economic circumstances in Vietnam would greatly improve if she was able to complete the current program of courses. She advised she did not have any military service commitments and was not aware of civil or political disturbances in Vietnam. The Tribunal is of the view the applicant's close ties to her family in both Australia and Vietnam, her obvious respect for the desires of her parents, and her sense of obligation to her aunt in aggregate act as a significant incentive to return to her home country. She has generally resided in Ballarat with her aunt who provides considerable financial assistance. She commutes to Melbourne every day attend college. She advised she had a limited circle of friends, was not in a relationship rarely attended temple
  31. The Tribunal considers cl. 11 of MD69 the applicant's potential circumstances in Australia.
  32. The applicant has generally resided in Ballarat with her aunt who provides considerable financial assistance. She commutes to Melbourne every day to attend college. She advised she had a limited circle of friends, was not in a relationship, rarely attended temple and because of study commitments was only able to work part time in a restaurant in Ballarat on weekends. She explained her life was pretty full with study, work and a lengthy daily commute. She did not advise of extensive social activities. She did advise she was not in a relationship. The Tribunal is of the view the applicant has limited ties to Australia. Those ties are limited to work and study. The applicant expressed strong desire to conform to family expectations of returning home to start a career. The Tribunal is of the view the applicant's ties to Australia do not present as a strong incentive to remain in Australia.
  33. The Tribunal considers cl. 12 of MD69 the value of the course to the applicant's future.
  34. The applicant's study progress in Australia can conveniently be divided into two distinct periods. The first was a time of waste and non-achievement when the applicant took insufficient interest in her own future and her own potential career. The applicant allowed

enrolments in many courses did not commence most, withdraw from many and followed poor advice from Education Agents. Her record of achievement was minimal.

35. After 2016 the applicant took her study more seriously. She enrolled in a set of courses in the VET sector and has completed (or almost completed) courses in Commercial Cookery, Patisserie and Hospitality Management, generally at Certificate level but also at Diploma level. The applicant has worked extensively in restaurants as a cook and a waitress. She has been a diligent student since 2016 and has acquired a set of trade equivalent qualifications that will enable her to find well paid employment in either Australia or Vietnam. The applicant wishes to conclude a further six months of study at Advanced Diploma level and then return to Vietnam. Her record of recent years indicates this outcome is most likely. Her MA submitted the applicant does not qualify to obtain alternate visas that might enable continuing residence in Australia for reason of lack of HE qualifications or work experience. The Tribunal is of the view the applicant seeks to undertake a course that is consistent with her current level of education and that the course will assist the applicant to gain employment in her home country.
36. The Tribunal considers cl. 13 and 14 of MD69 the applicant's immigration history.
37. There was no evidence before the Tribunal that the applicant has been in breach of a visa or conditions attached to her visa. The applicant has not applied for visas to other countries. The applicant has not visited other countries. The applicant has not been onshore for some time without gaining qualifications. In recent years the applicant has studied in the VET sector and graduated from each relevant course, hence obtaining qualifications.
38. On the basis of the above, the Tribunal is satisfied that the applicant intends genuinely to stay in Australia temporarily. Accordingly, the applicant meets cl.500.212(a).

#### **Conclusion on cl.500.212**

39. Accordingly, the Tribunal is satisfied that the applicant is a genuine applicant for entry and stay as a student as required by cl.500.212.
40. Given the above findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 500 (Student) visa.

#### **DECISION**

41. The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa:
  - cl.500.212 of Schedule 2 to the Regulations.

Mark Bishop  
Member