



Administrative Appeals Tribunal

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Michael John Williamson

VISA APPLICANT: Mrs Aihua Shen

CASE NUMBER: 1508702

DIBP REFERENCE(S): BCC2014/2688081

MEMBER: Justin Meyer


DATE: 20 July 2016

PLACE OF DECISION: Melbourne

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.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

I, Member Justin Meyer certify that this is
the Tribunal's statement of decision and reasons



Statement made on 20 July 2016 at 9:09am

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 12 June 2015 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 13 October 2014 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). 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.309.221 of Schedule 2 to the Regulations.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 due to there being insufficient evidence of a genuine and continuing spousal relationship.
4. The review applicant appeared before the Tribunal on 11 July 2016 to give evidence and present arguments. The Tribunal also received oral evidence from Mrs Aihua Shen, Mrs Jane Williamson and Mr Peter Williamson.
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
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 at the time of application and at the time of decision the parties were in a genuine spousal relationship.

Whether the parties are in a spouse or de facto relationship

8. 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 citizen.
9. '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 as to 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?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. In this case the parties were married in Melbourne on 4 January 2013. 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?

Financial Aspects

11. The review applicant is a 67-year-old Australian man who was previously employed at the Ford Motor Company as a fitter and turner. He is now retired. He has forwarded in the recent past regular sums of money in the order of AUD100 per week to the visa applicant, who resides in China. The review applicant receives approximately AUD1,300 per fortnight from private and government pensions and I accept that his contributions to his wife were a reflection of how he sees himself as a provider and husband.
12. In the period in which the couple were living together utilities accounts in joint names operated and I find this to be evidence of financial mingling. Some small sums were earned by the visa applicant whilst in Australia for cleaning services which assisted with the parties' household expenses. A joint bank account has been in place since 2013 which has served certain financial needs of the parties, evidenced by ongoing regular transactions.
13. The parties have resided away from one another for a considerable period by necessity, as the visa applicant was required to leave Australia due the expiration of her visa in 2014. The visa applicant had little opportunity to earn money in Australia due to visa restrictions, which explains her minimal financial input into the relationship. Thus the opportunity to arrange joint ownership of assets, joint liabilities, pooled financial resources, mutual financial legal obligations owed to the other parties, and sharing of day-to-day household expenses is limited. Nonetheless there is evidence of limited but clear joint financial activities taking place. The review applicant has arranged for small sums to be given to the visa applicant several times.
14. I find that there are sufficient and ongoing joint financial activities that support a genuine spousal relationship.

Nature of the Household

15. I give regard to the nature of the household (including any joint responsibility for care and support of children, parties' living arrangements; and any sharing of housework), and again, note that the review applicant and the visa applicant have resided away from one another for a long period and have had only a limited period of living together. Nonetheless in the time where the couple co-habited, before their wedding and afterward for some 21 months, the relationship assumed the flavour of a household. Everyday activities such as shopping and gardening were undertaken jointly from time to time during the period of living together in Australia.
16. I accept the evidence of all witnesses in the hearing that both parties set up a household together and wish to do so once again if they are reunited in Australia. I find that these are ongoing desires of the parties, from the beginning of their relationship to the present.

Social Aspects

17. Turning to social aspects of the relationship, I am satisfied that the parties represent themselves to other people as being married to each other. There were a number of guests at the wedding ceremony of the couple in 2013. Photographic evidence supports the presence of guests at this ceremony. Oral evidence from the review applicant's brother and sister-in-law shows that they were present at the wedding ceremony, as were friends of the visa applicant. Both witnesses added that the parties undertook social activities as man and wife, including visits to the home of the review applicant's brother and sister-in-law. The review applicant's brother and sister-in-law also visited the home of the parties. I give weight to this evidence.
18. This situation points to social recognition. The oral evidence of the witnesses supports the conclusion that the review applicant's and visa applicant's family and acquaintances are aware of a genuine relationship. I find that the parties represented themselves to others as being a married couple from the beginning of their marriage to the present, and that they undertake joint social activities when together, with others.

Commitment to Each Other

19. In respect of the persons' commitment to each other, the duration of the relationship spans some three years. A good deal of degree of companionship and emotional support is evident from records of and witness accounts of constant communication, electronic and otherwise, over a period of years to the present. Both members of the couple state that they are in constant contact - as evidenced by extensive phone and electronic message. I find that this is a committed relationship which is treated as long-term, and that the present lesser level of face-to-face contact comes about because of the inability of the review applicant to regularly visit due to legitimate constraints. This position adequately explains the time spent apart.

Other matters

20. I consider the visa applicant's past conduct in her dealings with the Department of Immigration and Border Protection to be potentially of concern. A number of questionable applications and submissions might have been made over a period of years that might bring into question her bona fides. These concerns were summarised in the delegate's decision. However, the visa applicant's past conduct in this regard is not the direct issue before the Tribunal. Whilst the questionable advice of a migration agent - who was later penalised by the Department of Immigration and Border Protection - may well have been followed, it does not relieve the parties of the need to be candid and transparent in immigration dealings. However, the issue that I must consider in this case is whether the review applicant is in a genuine spousal relationship with the visa applicant at the time when this application was made and at the time of this decision. The degree of the visa applicant's truthfulness in past dealings with the department does not affect the nature of that relationship.
21. Therefore, having had regard to the financial aspects, the nature of the household, the social aspects and the nature of the persons' commitment to each other, I consider these findings together demonstrate that there is a mutual commitment to a future shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. I am further satisfied that the parties do not live separately and apart on a permanent basis. They therefore would meet the requirements of s.5F for a spousal relationship.
22. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
23. Therefore the visa applicant meets cl.309.211 and cl.309.221.

24. 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

25. 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.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Justin Meyer
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).