

Maazuddin (Migration) [2020] AATA 1151 (30 March 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Mohammed Maazuddin

CASE NUMBER: 1934453

HOME AFFAIRS REFERENCE(S): BCC2019/3329314

MEMBER: Vanessa Plain

DATE: 30 March 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision to cancel the applicant's Class TU visa.

Statement made on 30 March 2020 at 3:50pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) – Subclass 500 (Student) – enrolment at lower level than visa requirement – discretion to cancel visa – enrolment in higher-level courses cancelled for poor academic progress – no approach to education provider or department – change of subject area and intention to progress to original level – significant period of breach – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 116(1)(b)

*Migration Regulations 1994 (Cth), Schedule 8, condition 8202(2)(b)***STATEMENT OF
DECISION AND REASONS**

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 3 December 2019 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116(1)(b) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the applicant failed to maintain enrolment in a registered course that once completed, would provide a qualification from the Australia Qualifications Framework (AQF) that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 27 March 2020 to give evidence and present arguments.
4. The applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant, as the holder of a student visa, has breached condition 8202(2)(b) of Schedule 8 to the Migration Regulations 1994 (the Regulations). If the applicant has breached that condition, under s.116(1) of the Act, the visa *may* be cancelled.

Did the applicant comply with Condition 8202?

7. Condition 8202 provides as follows:

8202

~~(1) The holder is~~ *The holder must be enrolled in a full-time course of study or training if the*

- (a) a Defence Student; or*
- (b) a Foreign Affairs student; or*
- (c) a secondary exchange student.*

(2) A holder not covered by subclause (1):

- (a) must be enrolled in a full-time registered course; and*
- (b) subject to subclause (3), must maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian*

Qualifications Framework that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted; and

[...]

(3) *A holder is taken to satisfy the requirement set out in paragraph (2)(b) if the holder:*

- (a) is enrolled in a course at the Australian Qualifications Framework level 10; and*
- (b) changes their enrolment to a course at the Australian Qualifications Framework level 9.*

8. Paragraph (2)(b) states the visa holder must maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualifications Framework (AQF) that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted.

9. The applicant's visa was granted for the purpose of studying a Bachelor of Community Services at Acknowledge Education which is an AQF level 7 course.

10. Information available to the Department in the Provider Registration and International Student Management System (PRISMS) indicated that **on 21 June 2018 the applicant's enrolment in the Bachelor course was cancelled by the education provider and he has not been enrolled in an AQF level 7 course since this date.**

11. PRISMS indicated that the highest CoE the applicant held thereafter was for a Diploma of Automotive Technology at the Acumen Institute of Further Education. This enrolment is at AQF Level 5. The enrolment was obtained on or around 6 June 2018 and the applicant commenced classes on 18 September 2018.

12. As the applicant was not enrolled in a course at the AQF Level 9 (Masters Degree) or Level 10 (Doctoral Degree), the circumstances of clause 8202(3) do not apply to him.

13. On 25 October 2019, a Notice of Intention to Consider Cancellation of Visa was sent to the applicant.

14. By written response dated 31 October 2019 and 15 November 2019 respectively, the applicant responded to the NOICC.

15. In his response(s), the applicant provided reasons why his visa should not be cancelled, as follows:

- ☐ His family sacrificed and invested a lot of money for his overseas education;

- ☐ If this visa was cancelled, he would have to leave without a degree;
- ☐ This will affect his personal life and also his family; and
- ☐ His parents are having a lot of health issues, which would be compounded by the cancellation which would be detrimental to their health.

16. In his viva voce evidence at hearing, the applicant gave the following further evidence:

- ☐ He realized the visa breach after he received the NOICC and the breach was unintentional on his part;
- ☐ He always intended to study at the Bachelor level;
- ☐ He did not seek to defer his Bachelor of Business degree;
- ☐ The agent he consulted did not tell that changing /downgrading his course was a breach of his visa condition; and
- ☐ He did not contact the Immigration to change his visa when he changed his course.

17. The applicant admitted he breached his visa condition and acknowledged that he was enrolled in a course which once completed, would provide an AQF level 5 qualification. The applicant stated further that he was trying to obtain a CoE in a Bachelor of Business so as to be compliant with the visa condition.

18. Based on the above, the Tribunal finds that the applicant has not complied with sub-clause (2)(b) of condition 8202 as he has not maintained enrolment in a registered course at the same level as, or higher level than, the registered course in relation to which his visa was granted.

Consideration of the discretion to cancel the visa

19. Having found that the applicant has not complied with a condition of the visa, the Tribunal must consider whether the visa should be cancelled. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedural Instruction 'General visa cancellation powers'.

20. In his response to the NOICC, the applicant provided various reasons why he believed his visa should not be cancelled, as follows:

- ❑ He commenced a Bachelor of Business on 20 March 2017 and studied for two semesters but could only pass one subject;
- ❑ Stott College issued him a warning letter for poor academic progress and advised him to change course to Bachelor of Community Services, however, he again could not pass subjects and was issued another warning letter.
- ❑ He then decided to change his study pathway to Automotive courses after a discussion with his friends. He was determined to pursue the new study pathway and got admission in Certificate III, IV and Diploma of Automotive in order to pursue a Bachelor degree in Automotive.
- ❑ He had been unable to gain admission into the Bachelor degree in the Automotive field because of his past failure of subjects in his previous Bachelor level studies.
- ❑ The initial failure at the Bachelor degree level was a huge setback for him both mentally and academically, which took him some time to recover from; and
- ❑ He realised it was very difficult for international students to settle into a new life in Australia, with cultural changes and emotional stress as a result of being away from home for the first time.

Purpose of applicant's travel to and stay in Australia

21. The applicant's TU 500 Higher Education Sector visa was granted on 4 June 2018 for the purpose of studying a Bachelor of Community Services and the visa was granted until 14 October 2020.
22. Information available in PRISMS indicates that this enrolment was cancelled on 21 June 2018.
23. On or around 4 June 2018, the applicant obtained enrolment in the following suite of courses:
 - CoE 9B88F774 - Certificate III in Light Vehicle Mechanical Technology
 - CoE A6538925 - Certificate IV in Automotive Mechanical Diagnosis
 - CoE A6538B76 - Diploma of Automotive Technology
24. The applicant's TU 500 Higher Education Sector visa was granted for the purpose of studying towards completing a course at the AQF level 7 (Bachelor Degree). However, at time of this decision, the applicant's highest level of enrolment is at AQF level 5 (Diploma) which demonstrates that the applicant has not maintained enrolment in a registered course at the same level as, or higher level than, the registered course in relation to which the visa was granted.

25. The Tribunal therefore finds that the applicant's purpose is not for study at AQF Level 7, and therefore not in line with the original purpose and intention of his visa.

26. The Tribunal affords this some weight in favour of cancelling the visa.

The extent of compliance with visa conditions

27. The applicant has not maintained enrolment in a registered course at the same level as, or higher level than, the registered course in relation to which his visa was granted since 21 June 2018, resulting in non-compliance with subclause (2)(b) of condition 8202.

28. The Tribunal is satisfied that the applicant has otherwise complied with other visa conditions attaching to his visa which the Tribunal accepts in the applicant's favour.

29. However, the Tribunal considers that the requirement to maintain the correct level of enrolment, AQF Level 7 (Bachelor Degree), is fundamental to the visa grant. Therefore, the Tribunal finds the extent of his non-compliance with the visa condition to be significant.

30. The Tribunal gives this consideration weight in favour of cancelling the visa.

The degree of hardship that may be caused to the visa holder and any family members

31. The applicant gave evidence as set out above concerning the impact to himself and his family if the visa were to be cancelled.

32. The Tribunal acknowledges that some hardship may befall the applicant as a result of the visa cancellation, however, the Tribunal is not satisfied that the cancellation of the applicant's visa will prevent him from achieving in his home country, his current course of education that he stated was important to him and his family.

33. The Tribunal acknowledges that if his visa is cancelled, he will no longer be able to complete his study in Australia, which may cause him some financial hardship as a result.

34. The Tribunal also accepts that the visa cancellation may result in some emotional or psychological hardship being caused to the applicant. However, it is a visa holder's obligation to be familiar with the conditions that attach to their visa and there is no information before the Tribunal to indicate that the applicant has any immediate family members in Australia who may be impacted by a visa cancellation.

35. The Tribunal therefore gives any hardship suffered by the applicant only minor weight against cancelling the visa.

The circumstances in which the ground for cancellation arose

36. The ground for cancellation arose because the applicant did not maintained enrolment in a registered course at the same level as, or higher level than, the registered course in relation to which his visa was granted, resulting in non-compliance with sub-clause (2)(b) of condition 8202 attached to his visa.

37. The ground for cancellation arose when the applicant ceased to be enrolled in a Bachelor degree course on 21 June 2018, which resulted in non-compliance with condition 8202(2)(b).

38. Based upon the applicant's evidence and NOICC response(s) as set out herein, the Tribunal acknowledges that the applicant faced some difficulties throughout his Bachelor level studies, however, he had the option of applying for a deferral or contacting the Immigration Department to obtain a more appropriate visa type for the purpose of studying at the Vocational Education Sector level, yet did not do so. The Tribunal further finds that the applicant's failure to take these steps were not due to matters that were beyond his control.

39. Further the Tribunal considers that it is reasonable to expect visa holders to be cognizant of the conditions that attach to their visas and it is their responsibility to contact the Department to address changes in their circumstances that effect their ability to maintain compliance with visa conditions.

40. Based on the above, the Tribunal gives this consideration significant weight in favour of cancelling the visa.

The visa holder's past and present behavior towards the Department

41. The applicant responded promptly to the NOICC and there is no evidence before the Tribunal to suggest that the applicant has been uncooperative with the Department or departmental staff.

42. The Tribunal gives this consideration a little weight against cancelling the visa.

Whether there are any persons in Australia whose visas would, or may, be cancelled under s140

43. The circumstances of this case are not such that any person's visa would be consequentially cancelled under s140 of the Act. The Tribunal therefore does not give any weight for or against a decision to cancel the visa for this consideration.

Legal consequences of a decision to cancel the visa

44. If the visa is cancelled, the applicant will become an unlawful non-citizen and may be liable for detention under section 189 and removal under section 198 of the Act if he does not voluntarily depart Australia. The applicant would also be affected by section 48 of the Act, which may prevent him from applying for certain visas while in Australia, and Public Interest Criterion 4013, which may exclude him from being granted a visa for

a specific period of time in the future.

45. However, these are mandatory and intended consequences of the legislation and given that the circumstances giving rise to the breach were not beyond the control of the applicant, the Tribunal does not consider this to be manifestly unfair and the Tribunal therefore gives this consideration little weight against cancelling the visa.

Australia's international obligations

46. There is no evidence before the Tribunal to indicate the applicant has children in Australia, nor whether cancelling the visa would lead to a breach of Australia's non-refoulement obligations.

47. As there is no information before the Tribunal, the Tribunal is unable to give any weight for or against cancelling, or not cancelling the visa due to this consideration.

Any other relevant matters

48. The applicant stated that it was his intention to study a Bachelor of Business and that he was trying to procure a CoE for a Bachelor of Business degree, but he is not able to study at the moment because he does not have study rights.

49. The applicant's agent requested an adjournment of the hearing for one week to enable to applicant to procure a Bachelor of Business CoE.

50. The Tribunal refused the adjournment request on the basis that the applicant has had sufficient time to try and procure a Bachelor of Business CoE before the hearing. Further, the Tribunal stated that even though it was refusing the request for an adjournment, it would take into account the fact that the applicant has made attempts to obtain a CoE prior to the hearing.

51. The Tribunal accepts that the applicant has made genuine and legitimate attempts to obtain enrolment in a Bachelor of Business degree before the hearing, so as to demonstrate that he is no longer in breach of his visa condition. The Tribunal affords this good conduct some minor weight in favour of not cancelling the visa.

52. However, this good conduct does not outweigh the fact that the applicant has been in breach of his visa condition for a significant period in circumstances where the reason for the breach was not due to matters beyond his control.

53. Although the matters set out above do not reveal any bad faith on the part of the applicant, it is clear based on all the evidence set out above, that the reasons for the breach of the visa condition were not matters that were outside the control of the applicant.

54. It is also clear that the considerations I have arrived at, on examining and

weighing all the evidence before me, lean towards the visa being cancelled and I so find.

55. Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled

DECISION

56. The Tribunal affirms the decision to cancel the applicant's Class TU visa.

Vanessa Plain
Member

ATTACHMENT

Migration Regulations 1994

...

Schedule 8

- 8202 (1) The holder must be enrolled in a full time course of study or training if the holder is:
- (a) a Defence student; or
 - (b) a Foreign Affairs student; or
 - (c) a secondary exchange student.
- (2) A holder not covered by subclause (1):
- (a) must be enrolled in a full time registered course; and
 - (b) subject to subclause (3), must maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualifications Framework that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted; and
 - (c) must ensure that neither of the following subparagraphs applies in respect of a registered course undertaken by the holder:
 - (i) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course progress for section 19 of the Education Services for Overseas Students Act 2000 and the relevant standard of the national code made by the Education Minister under section 33 of that Act;
 - (ii) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course attendance for section 19 of the Education Services for Overseas Students Act 2000 and the relevant standard of the national code made by the Education Minister under section 33 of that Act.
- (3) A holder is taken to satisfy the requirement set out in paragraph (2)(b) if the holder:
- (a) is enrolled in a course at the Australian Qualifications Framework level 10; and
 - (b) changes their enrolment to a course at the Australian Qualifications Framework level 9.