Australian Government

Migration Review Tribunal

DECISION RECORD

REVIEW APPLICANT: Mr Henry Kosala Wahyadiyatmika

VISA APPLICANT: Mr David Herman Jaya

MRT CASE NUMBER: 071723048

DIAC REFERENCE(S): Department's papers

TRIBUNAL MEMBER: Susan Pinto

DATE DECISION SIGNED: 5 August 2008

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Return (Residence) (Class BB) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 155 (Five Year Resident Return) visa:

- cl.155. 212 of Schedule 2 to the Regulations.

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 Citizenship to refuse to grant the visa applicant a Return (Residence) (Class BB) visa under s.65 of the *Migration Act 1958* (the Act).

2. The visa applicant applied to the Department of Immigration and Citizenship for a Return (Residence) (Class BB) visa on 7 August 2007. The delegate decided to refuse to grant the visa on 14 August 2007 and notified the visa applicant of the decision and his review rights on 14 August 2007.

3. The review applicant applied to the Tribunal on 14 September 2007 for review of the delegate's decision.

4. The Tribunal finds that the delegate's decision is an MRT-reviewable decision under s.338(6) of the Act. The Tribunal finds that the review applicant has made a valid application for review under s.347 of the Act.

RELEVANT LAW

5. The Resident Return (Class BB) is a visa for Australian permanent residents and certain former Australian citizens or former Australian permanent residents who are seeking to return to Australia after a period of absence. This class of visa contains two subclasses; Subclass 155 (Five Year Resident Return) and Subclass 157 (Three Month Resident Return): item 1128 of Schedule 1 to the Regulations.

6. The criteria for a Subclass 155 visa are set out in Part 155 of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least one member of the family unit who is an applicant for the visa. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.

7. The primary criteria to be satisfied at the time of application for a Subclass 155 visa include that the visa applicant is an Australian permanent resident; or was an Australian citizen but has subsequently lost or renounced Australia citizenship; or is a former Australian permanent resident whose most recent permanent visa was cancelled: cl.155.211.

8. At time of application the visa applicant must also meet one of the following alternate criteria in cl.155.212:

    - The visa applicant was lawfully present in Australia for a total of not less than 2 years in the 5 years immediately before the application for the visa and, during that time, the visa applicant was the holder of a permanent visa or a permanent entry permit or an Australian citizen and was not the holder of certain specified visas: cl.155.212(2)

    - The visa applicant is outside of Australia, and the Minister is satisfied that the visa applicant has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and the visa applicant:

- has not been absent from Australia for a continuous period of 5 years or more immediately before the application for the visa, unless there are compelling reasons for the absence and the visa applicant: holds a permanent visa; or last departed Australia as an Australian permanent resident; or last departed Australia as an Australian citizen, but has subsequently lost or renounced citizenship; or

- was an Australian citizen, or resident, less than 10 years before the application, and has not been absent from Australia for a total of more than 5 years in the period from the date that the visa applicant last departed Australia as an Australian citizen or Australian permanent resident to the date of the application, unless there are compelling reasons for the absence: cl.155.212(3)

- The visa applicant is in Australia and the Minister is satisfied that the visa applicant has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia; and has not been absent from Australia for a continuous period of 5 years or more since the date of the grant of the applicant's most recent permanent visa, or the date on which the visa applicant ceased to be a citizen, unless there are compelling reasons for the absence: cl.155.212(3A)

- The visa applicant is a member of the family unit of, a person who has been granted a Subclass 155 visa and that visa is still in effect; or a person who meets the requirements of cl.155.212(2), (3), or (3A) and has lodged an application for a Return (Residence) (Class BB) visa: cl.155.212(4)

9. The primary criteria to be satisfied at the time of decision are:

   - if the application is made outside Australia, the visa applicant meets special return criterion 5001: cl.155.221

   - the Minister is satisfied that the visa applicant is the holder of a valid passport that was issued to the applicant by an official source in the form issued by the official source; or it would be unreasonable to require the applicant to be the holder of a passport: cl.155.222

CLAIMS AND EVIDENCE

10. The Tribunal has before it the Department's and the Tribunal's files relating to the visa applicant. The relevant evidence is summarised below.

11. When lodging the application to the Department, the visa applicant indicated that he is a citizen of Indonesia. The visa applicant's wife (Mrs Tanty Hestiani) and one of her 5 children (Charles Hugo Wahyadiyatkmika) were resident in Indonesia at the time of application, having last departed Australia as the holder of a Subclass 155 visa on 13 September 2007.

12. The visa applicant's movement records indicate that he has spent approximately 171 days in Australia since he obtained permanent residence in October 1997. The movement records indicate that the visa applicant has travelled to Australia almost every month since that time, staying in Australia for short periods each time.

13. In support of the application, the visa applicant provided documents indicating that 3 of his 4 children, Henry Kosala Wahyadiyatmika (born on 25 May 1983); Adley Enderson Wahyadiyatmika (born on 7 October 1986), Amelia Endorasi Wahyadiyatmika (22 April 1985) are resident in Australia as holders of Subclass 155 visas (valid until 2012) and are studying at university and high school.

14. Documents were also provided to the Department indicating that the visa applicant and his wife (Mrs Tanty Hestiani, also an applicant for a Subclass 155 visa – see 071749837) own property in Russell Street, Melbourne; the World Tower, Liverpool Street, Sydney; and Southbank, Melbourne. Bank records were also provided to the Department indicating that the visa applicant and his wife have approximately $80,000 in Australian bank accounts.

15. The delegate refused to grant the visa. The delegate found that the visa applicant was lawfully present in Australia for a period of only 126 days in the period of 5 years immediately before the application for the visa and therefore did not meet cl.155.212(2). The delegate also found that the visa applicant does not have substantial personal ties with Australia which are of benefit to Australia. The delegate did not consider that the visa applicant's bank savings and 4 children in Australia were evidence of substantial personal ties with Australia and considered that the visa applicant had provided no evidence that he is a participating member of the Australian community and no evidence that he is likely to become a participating member in the future. Accordingly, the delegate found that the visa applicant does not meet cl.155.212(3). The delegate also found that the visa applicant is not a member of the family unit of a person who holds a Return (Residence)(Class BB) visa or meets the requirements of subclause (2), (3) or (3A) and has lodged either a combined application or a separate application for a Return (Residence)(Class BB) visa. Accordingly, the delegate found that the visa applicant does not meet cl.155.212(4). The delegate also found that the visa applicant could not meet cl.155.212(3A) because he was not in Australia at the time of application.

16. Following the lodgement of the application to the Tribunal, the review applicant's representative provided a submission to the Tribunal, including a statement by the visa applicant; and letters of enrolment in relation to Charles Wahyadiyatmika (the visa applicant's son who has also made a separate application for a Subclass 155 visa) in Foundation Studies and a Bachelor of Engineering at RMIT.

17. In his statement, the visa applicant states that he is married to Mrs Tanty Hestiani and they have 5 children. He states that Charles Wahyadiyatmika lives with himself and Mrs Tanty Hestiani in Indonesia and has recently been accepted into a course of study in Australia at RMIT and will soon commence the course. He also states that his other 4 children, Henry (the review applicant); Amelia, Adley and Medwin all live in an apartment that he owns in Melbourne and that they are studying at different tertiary institutions in Melbourne and that all 4 children intend to remain in Australia following completion of their studies. He further states that his children are dependent upon him and have their own ATM accounts to access his bank accounts in Australia. The visa applicant names the 5 properties that he owns in Australia and names a number of bank accounts operated by himself and his children in Australia. He also states that he has previously had a business in Australia. Although he has ceased that business, he is currently looking for further investments in Australia. The visa applicant further states that he and Mrs Tanty Hestiani have businesses in Indonesia, including an auto body manufacturing and die stamping business and a restaurant and mini market.

18. In a subsequent submission, the review applicant states that his family has substantial personal ties to Australia through their family relationship with 4 family members who are permanent residents of Australia and that these ties are of benefit to Australia because they enrich the lives of the 4 permanent residents.

19. The review applicant states that the visa applicant is a successful businessman who owns an auto body manufacturing and die stamping business in Magelang Indonesia, employing almost 2,000 people with annual turnover of approximately AUD22.5 million. He states that the visa applicant was granted a Subclass 127 Business Owner visa on 7 October 1997 based on his ownership of a company called Herman Jaya Pty Ltd and he had planned to export honey from Australia to Indonesia. However, this business did not proceed because the unexpected price variations made the project unprofitable. The review applicant states that the 4 eldest children have been living and studying in Australia for several years and intend to pursue further studies in Australia, and the youngest son, Charles, will be moving to Australia in the future.

20. The representative submits that the movement records of the visa applicant, and his wife and son indicate that they are regular short term visitors to Australia and indicate that they have visited Australia monthly or bimonthly since 2002.

21. The representative submits that MSI 392 states that substantial personal ties will be met where an applicant owns a home and/or other personal assets in Australia, and where the applicant has close family members who are permanent residents and who reside in Australia. The representative submits that whilst this is relevant to the present matter, the guidelines also suggest that there be some sort of "weighing" of an applicant's ties to Australia and to their other country and that the applicant's personal, physical and emotional ties to Australia should outweigh the applicant's ties to the other country. The representative submits that there is no legislative basis for such a consideration and it is irrelevant and should be disregarded.

22. The representative submits that the visa applicant has personal ties to Australia because of the following reasons:

- Each of the 4 children is a permanent resident of Australia, residing on Subclass 155 visas.
- The visa applicant and his wife have substantial property investments in Australia.
- The family relationship between the visa applicants and their children and siblings alone would clearly amount to a sufficient connection with Australia to meet the requirements of "substantial personal ties". The property investments amount to additional evidence of their ties to Australia.
- The pattern of entry and exit for the visa applicant suggests that there is a close relationship between the visa applicants and their family members permanently residing in Australia.
- The unusually high number of short visits to Australia by the visa applicant and his wife and son mean that there is never more than a month or two when at least one of the Indonesian based family members are visiting the 4 children

in Australia. Such a pattern of visitation would be impossible, were the visa applicants to rely on having to obtain visitor visas.

- The manner in which the Indonesian based family members have been able to maintain their close connection to the 4 children in Australia strongly supports the contention that the visa applicant's presence in Australia "enriches the lives of the other relatives". This has been well recognised as a ground upon with which the Tribunal has regarded there to be a benefit to Australia within the meaning of the regulation (eg. *Re Widrose* [2008] MRTA 210; *Re Hutchings* [2008] MRTA 486 at [29]; *Re Nash* [2008] MRTA 480 at [50]).

23. The review applicant appeared before the Tribunal on 24 July 2008 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant and his wife, Mrs Tanty Hestiani.

24. The review applicant stated that he is the eldest son of 5 children. The review applicant is in his last year of an Engineering Degree. He has 3 other siblings who are studying in Australia. His brother, Charles, the youngest child of the family, is due to come to Australia in August to commence studies at RMIT in Melbourne. All 5 of the children intend to remain permanently in Australia.

25. The review applicant lives in an apartment in Russell Street, Melbourne which was originally 2 apartments. His parents bought both apartments and made them into 1 large apartment so that they would have somewhere to stay when they come to Australia and so that all the children can live together. The visa applicant also owns properties elsewhere in Melbourne and in Sydney.

26. The review applicant is uncertain whether his parents currently have any business interests in Australia. He is aware that they formerly had a business but believes that it is currently on hold. The review applicant is also aware that his parents are exploring future business opportunities in Australia.

27. The visa applicant and his wife own businesses in Indonesia. For that reason, they have only made relatively short visits to Australia in order to visit the children. They intend to retire in Australia, but the review applicant is uncertain when that will be. The family intends to all live in Australia together at some point in the future.

28. The visa applicant's wife told the Tribunal that her son, Charles, will be coming to Australia on 5 August 2008 to commence studies. The visa applicant's wife is currently exploring future business opportunities in Australia. She is hoping that she can purchase a small business buying and selling goods or open a restaurant. The visa applicant's wife intends to spend time in Australia in the next few years monitoring business opportunities and spending time with her children.

29. The visa applicant's wife stated that they intend to retire in Australia sometime in the next 5 to 10 years and sell all of the Indonesian businesses, but in the meantime they will visit Australia at least 5 times per year and will spend about 10 days in Australia each time. The amount of time that they will spend in Australia will increase if they are to commence a business in Australia.

30. The visa applicant told the Tribunal that he intends to live and retire in Australia. He does not know when this will happen as it is dependent upon the wishes and intention of his wife. The visa applicant does not wish to remain in Indonesia by himself and will follow his wife and children to Australia. The visa applicant also intends to visit Australia frequently and will spend about half of his time in Australia and half in Indonesia in the next few years. During his time in Australia he will monitor business opportunities and intends to pursue a business which he previously had in Australia exporting honey from Australia to Indonesia.

31. The representative submitted that it is the intention of the visa applicant to ultimately reside in Australia permanently. However, there are no legislative criteria requiring that they do so and it is clear that the visa applicants have close personal ties to Australia in terms of the close relationship that they have with their Australian permanent resident children.

FINDINGS AND REASONS

32. The Tribunal has considered whether the visa applicant meets cl.155.212(3). As set out above, this criterion requires that the visa applicant is outside of Australia, and has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia, and the visa applicant. This also requires that the visa applicant has not been absent from Australia for a continuous period of 5 years or more immediately before the application for the visa, unless there are compelling reasons for the absence and the visa applicant: holds a permanent visa; or last departed Australia as an Australian permanent resident; or last departed Australia as an Australian citizen, but has subsequently lost or renounced citizenship; or was an Australian citizen, or resident, less than 10 years before the application, and has not been absent from Australia for a total of more than 5 years in the period from the date that the visa applicant last departed Australia as an Australian citizen or Australian permanent resident to the date of the application, unless there are compelling reasons for the absence: cl.155.212(3).

33. The Tribunal firstly finds that prior to the date of application, the visa applicant last departed Australia as a permanent resident on 15 May 2007 when he departed Australia as the holder of a Subclass 155 visa. The Tribunal therefore finds that the visa applicant has not been absent from Australia for a continuous period of 5 years or more before the application for the visa and last departed Australia as a permanent resident.

34. The Tribunal must also consider whether the visa applicant has substantial business, cultural, employment or personal ties with Australia which are of benefit to Australia. The evidence establishes that 4 of the visa applicant's 5 children currently reside in Australia as permanent residents on Subclass 155 visas valid until 2012. The visa applicant's youngest son is also due to arrive in Australia to study at a tertiary institution for several years. The visa applicant's 5 children all intend to remain in Australia following their studies. The evidence further establishes that since 2002, although the visa applicant has not spent considerable periods of time in Australia, he has travelled to Australia at least every month, and on some occasions twice per month, to visit his children. The visa applicant resides with his children when he visits Melbourne and all the visa applicant's children reside in 2 apartments (joined together) on the same floor of an apartment building in Melbourne. The Tribunal accepts, having regard to the visa applicant's considerable trips to Australia to visit his children, the presence of all 4 of his children, and soon to be all 5 of his children in Australia, and the intention of the children to remain in Australia, that the visa applicant has strong personal ties to Australia. The Tribunal accepts that the visa applicant and his family are extremely close and is satisfied that his frequent visits to her Australian permanent resident children visits are

of considerable benefit to the children separately and to their family as a whole. The Tribunal accepts the representative's submission that the visa applicant's presence in Australia "enriches the lives of the other relatives".

35. The Tribunal also accepts that the visa applicant and his wife have considerable assets in Australia, including considerable finances in Australian bank accounts and several properties in Sydney and Melbourne, valued altogether at several million dollars. The visa applicant and his wife also have businesses in Indonesia which have an annual turnover of several millions of dollars. The visa applicant and his wife gave evidence to the Tribunal that they are currently exploring business opportunities in Australia and intend to establish or re-establish an existing business in Australia in the near future. The Tribunal accepts that they have the financial means to do so and that the visa applicant will spend increasing periods of time in Australia if the plans for business opportunities come to fruition. The Tribunal is satisfied that the visa applicant has strong business ties to Australia in terms of his current investment in the Australian property market and the significant financial contribution that he will one day bring to Australia both in terms of his pending businesses and upon his eventual retirement in Australia.

36. The Tribunal has considered the delegate's concerns in relation to the short total period of time that the visa applicant has spent in Australia in the last 5 years. The Tribunal has accepted that although the total period of time spent in Australia is relatively short, the visa applicant has travelled to Australia regularly and frequently for several years. Although the Tribunal has some concerns that the visa applicant does not intend on residing permanently in Australia for some years and considers that the overall legislative intention is for returning residents to reside in Australia, the Tribunal accepts the submission by the representative that there is no requirement in the criteria that an applicant must do so and there is no requirement that there be sort of "weighing" of an applicant's ties to Australia and to their other country. The Tribunal accepts that there is no legislative basis for such a consideration and considers that the policy guidelines in relation to this issue are not consistent with the legislation.

37. Having accepted that the visa applicant has substantial personal and business ties to Australia that are of benefit to Australia, the Tribunal finds that the visa applicant meets cl.155.212(3). Accordingly, the Tribunal finds that the visa applicant meets cl.155.212.

CONCLUSIONS

38. For the reasons given above the Tribunal finds the visa applicant satisfies the requirements of cl.155.212

DECISION

39. The Tribunal remits the application for a Return (Residence) (Class BB) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 155 (Five Year Resident Return) visa:

- cl.155.212 of Schedule 2 to the Regulations

I certify that this is a true copy of the Tribunal's statement of decision and reasons.

Handed down/Sent: 25 August 2008 for District Registrar