SUPREME COURT OF QUEENSLAND

CITATION:	*Re CLA* [2020] QSC 85
PARTIES:	**CLA** (Applicant) **v** **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS** (Respondent)
FILE NO/S:	BS 10977/19
DIVISION:	Trial Division
PROCEEDING:	Bail Variation Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9 April 2020 and 14 April 2020
JUDGE:	Lyons SJA
ORDER:	**1. I will hear from the parties as to the form of the order and wording of the conditions proposed**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where the applicant is currently charged with 18 offences including one count of unlawful stalking, one count of attempting to pervert the course of justice, contraventions of domestic violence orders, a breach of bail and the improper use of emergency call services – where the applicant had been in custody since September 2016 – where the applicant made an application for Supreme Court Bail – where the applicant had no criminal history but was in a show cause position as he had previously breached bail and had been charged with a relevant domestic violence offence – where the application was opposed by the Crown on the basis that the applicant was an unacceptable risk of committing further offences and interfering with witnesses given the stalking charge and the charge he was facing in relation to attempting to pervert the course of justice – where the applicant was granted bail due to the delay in having his matters brought to trial and the fact he had already served more than three years in custody on remand – where the order granting bail contained a number of conditions including a residential condition that after the applicant's release he surrender to Border Force officials – where since the applicant's release

on bail he has been housed in Immigration Transit Accommodation – where, in the context of the COVID-19 pandemic, the applicant filed an application seeking a variation of those bail conditions – where the applicant also sought orders that he be released on "unconditional bail" to permit a bridging visa application and that the court request that the Office of the Director of Public Prosecutions apply for a criminal justice stay visa – whether the applicant's bail conditions ought to be varied – whether the risks the applicant poses can be appropriately managed if the applicant is granted unconditional bail as he seeks

Bail Act 1980 (Qld) s 10, s 11(2), s 11(5), s 16
Mental Health Act 2016 (Qld) s 110(1)(b)
Migration Act 1958 (Cth) s 116, s 189, s 196

COUNSEL: The applicant appeared on his own behalf
N Needham for the respondent

SOLICITORS: The applicant appeared on his own behalf
Office of the Director of Public Prosecutions for the respondent

The Background to this Application

[1] The applicant came to Australia from the United Kingdom in 2012. He is currently charged with 18 offences which are alleged to have occurred over a 16 month period in 2015 and 2016. An indictment charging one count of unlawful stalking and one count of attempting to pervert the course of justice was presented in the Southport District Court on 28 June 2018. The 16 summary charges include contraventions of domestic violence orders, a breach of bail and the improper use of emergency call services. Whilst the applicant faced jury trial in the District Court at Southport in June 2018 on a charge of child stealing, the trial judge directed an acquittal.

[2] The applicant was remanded in custody in September 2016 in relation to the 18 outstanding criminal charges. The maximum penalty for the most serious of those offences is seven years imprisonment. On 9 October 2019 he made an application for Supreme Court Bail due to the delay in having his matters brought to trial and the fact he had already served more than three years in custody on remand. As the applicant's working visa had been cancelled under s 116 of the *Migration Act* 1958 (Cth) he proposed that he reside at the Commonwealth Brisbane Immigration Transit Accommodation Centre (CBITAC).

[3] Whilst the applicant had no criminal history, he was in a show cause position as he had previously breached bail and had been charged with a relevant domestic violence offence. The application was opposed by the Crown on that occasion on the basis that the applicant was an unacceptable risk of committing further offences and interfering with witnesses given the stalking charge and the charge he was facing in relation to

attempting to pervert the course of justice. The proposed place of residence was also opposed by the Crown.

[4] After adjourned hearings on 30 October 2019 and 7 November 2019, Bowskill J granted bail on 15 November 2019. That Order contained a number of conditions including a residential condition that after the applicant's release he surrender to Border Force officials. Since his release on bail he has been housed at the CBITAC at Pinkenba.

[5] By application filed on 6 April 2020, the applicant now seeks a variation of those bail conditions and seeks orders:

(i) That he be released on "unconditional bail" to permit a bridging visa application; and

(ii) That the court request that the Director of Public Prosecutions apply for a Criminal Justice Stay Visa.

[6] The details of the charges the applicant is currently facing are as follows;

(i) 1 x contravention of a domestic violence order on 30/07/2015;

(ii) 7 x improper use of emergency call service – vexatious on 08/09/2016;

(iii) 2 x use of carriage service to menace, harass or cause offence between 28/10/2015 and 29/09/2016;

(iv) 3 x disobedience to a lawful order issued by a statutory authority on 29/09/2016;

(v) 1 x breach of bail condition – domestic violence offence between 01/05/2016 and 29/09/2016;

(vi) 1 x contravention of a domestic violence order between 01/05/2016 and 29/09/2016;

(vii) 1 x unlawful stalking – domestic violence offence between 27/03/2015 and 03/10/2016;

(viii) 1 x attempting to pervert the course of justice on divers dates between 28/09/2016 and 05/11/2016; and

(ix) I x unlawful stalking contravenes/threatens to contravene an order/injunction – domestic violence offence between 01/05/2016 and 29/09/2016.

The History of the Proceedings

[7] Since the applicant was remanded in custody on 29 September 2016, the charges upon which he is currently held have not as yet proceeded to trial. The indictable offences were listed for trial in the week commencing 30 January 2020 but that was delisted when the applicant's legal representatives sought leave to withdraw on the first day of the trial. The applicant's 590AA application is currently listed in the District Court at Southport on 28 April 2020 with a trial listing for 15 June 2020. The summary offences are due for further mention in the Magistrates Court at Southport.

[8] A history of the progress of the charges through the courts has been provided by the Crown. I note that the applicant has disputed some details of the chronology as set out in correspondence to the court sent by the applicant on 14 April 2020, which can be summarised as follows:

(i) The applicant does not agree with the reason for the delay;

(ii) The chronology misses communications with Border Force in 2015 and 2016;

(iii) Two appearances before Boddice J, an appearance before Applegarth J, an appearance before Jackson J and the rejected appeal of Wilson J's dismissal have been omitted;

(iv) It is impossible for a cancelled visa to expire;

(v) Requests for better particulars on 23/06/19 and 11/07/19 were not complied with; and

(vi) The trial date of 02/12/2019 was the sixth listed reserve trial listed for two weeks in a one week slot.

[9] I consider however that the history provided by the Crown is a convenient and accurate summary of the criminal charges currently before the District and Magistrates Court as follows:

Date	**Event**
31.07.2015	First mention in the Southport Magistrates Court re child stealing (458/16)
02.03.2016	Child stealing (458/16) hearing in the Southport Magistrates Court
08.03.2016	Registry committal via Southport Magistrates Court for charges on indictment (458/16) – child stealing
12.08.2016	Child stealing indictment (458/16) presented at the Southport District Court
29.09.2016	**Defendant was remanded in custody**
30.09.2016	First mention stalking offence (378/18) in the Southport Magistrates Court
02.01.2017	Defendant's working visa expired
02.02.2018	Defendant committed for trial in the Southport District Court upon unlawful stalking, possessing dangerous drugs in excess of 2.0 grams and attempting to pervert justice Other summary charges remain for mention in the Southport Magistrates Court (378/18)
11.06.2018	**Acquitted (directed verdict) before Rackemann DCJ in the Southport District Court re: indictment 458/16.**

28.06.2018	Indictment 378/18 presented at the Southport District Court charging 1 x unlawful stalking, with a circumstance of aggravation, and attempt to pervert justice Defence sought adjournment and listing of section 590AA Listed for 17.12.2018 Dates for filing issued to both parties
17.12.2018	Section 590AA hearing before Muir DCJ (defence application – Robertson O'Gorman on the record) Matter listed for mention 07.02.2019
07.02.2019	Mention in the Southport District Court – Change in legal representation occurring – Robertson O'Gorman granted leave to withdraw
07.03.2019	Mention in the Southport District Court – Further change in legal representation occurring
11.04.2019	Mention in the Southport District Court – Adjourned for further six weeks so new legal representatives (Brooke Winter) can review brief and conference with counsel
08.05.2019	Mention in the Supreme Court at Brisbane. Justice Wilson granted the Attorney-General's application to dismiss Mr CLA's application for Statutory Order of Review of the decision of Muir DCJ
23.05.2019	Mention in the Southport District Court – Defence to continue reviewing the brief and send a submission before the next mention
11.07.2019	Mention in the Southport District Court – No submission sent by defence, matter listed for trial w/c 02.12.2019, with trial review on 17.11.2019
30.10.2019	Application for bail was made before Bowskill J – The matter was part heard
07.11.2019	Supreme Court bail application finalised Mention in the Southport District Court – the trial was given a number one listing in the week of 30.01.2020
17.01.2020	Trial review in the Southport District Court – Trial for w/c 30.01.2020 to remain as listed
22.01.2020	Crown provides defendant's legal representatives with a list of the witnesses and exhibits it intends on leading in the trial along with proposed admissions
24.01.2020	Trial review in the Southport District Court – All parties ready to proceed Trial for w/c 30.01.2020 to remain as listed
29.01.2020	Crown updates defendant's legal representatives re the witnesses and exhibits and gives a trial plan

	Later that afternoon the defendant's legal representatives advise the court via email that an issue has arisen and leave to withdraw will be sought
30.01.2020	On day one of the trial listing in the Southport District Court, legal representatives Brooke Winter and David Funch were given leave to withdraw The defendant's trial could not proceed self-represented given it involved a protected witness
31.01.2020	Mention in the Southport District Court by Kent QC DCJ Federal Court hearing listed for 27.02.2020 regarding the defendant's possible deportation Trial re-listed in w/c 17.02.2020 as a reserve trial with trial review on 07.02.2020
07.02.2020	Trial review in the Southport District Court – New legal representative (Ashkan Tai) on the record The Crown informed the court that it was likely to refer the matter to the Mental Health Court Trial to remain as listed
13.02.2020	Dalton J heard an oral application to file a Mental Health Court referral – New representatives opposed the filing The application was refused on an interlocutory basis
17.02.2020	Reserve trial in the Southport District Court – did not commence on this date; another matter proceeded
18.02.2020	Defence filed application for s 590AA hearing on 18.02.2020 – seeking exclusion of 11 bodies of evidence from the trial for various reasons
19.02.2020	Mention in the Southport District Court – Section 590AA hearing listed for 28.04.2020, with dates set for the filing of Outlines
28.02.2020	Mention in the Southport District Court – Matter set down for number one trial in the week of 15.06.2020, with a trial review on 05.06.2020 Matter also given reserve trial listings in the event it cannot proceed for any reason: Reserve listing 13/07/2020 for two weeks Reserve listing 17/08/2020 for two weeks Reserve listing 31/08/2020 for two weeks Reserve listing 07/09/2020 for two weeks Reserve listing 14/09/2020 for two weeks Reserve listing 19/10/2020 for two weeks
28.04.2020	Section 590AA hearing listed in the Southport District Court – Exclusion of evidence and seeking better particulars

05.06.2020 Trial review listed in the Southport District Court

15.06.2020 Trial listed in the Southport District Court

The Application for Bail in November 2019

[10] An application for bail was heard before Bowskill J on 30 October and 7 November 2019. On 7 November 2019 her Honour gave ex tempore reasons stating that bail was to be granted subject to the finalisation of the details of the bail conditions. Whilst the applicant was in a 'show cause' situation, the imposition of those conditions satisfied her Honour that the risks could be appropriately managed and she was therefore satisfied that the applicant had shown cause why his continued detention in custody was not justified.

[11] The relevant aspects of those reasons for the purpose of this application, are as follows:

> "The applicant was the holder of a visa. He otherwise came to Australia in, I think I'm right in saying, about 2012 from the United Kingdom. His visa has been cancelled under section 116 of the *Migration Act*. He applies for bail on the basis that he would, if released, reside in immigration detention. He offers an undertaking to the court that he wouldn't apply for any form of bridging visa. His intention is that he would reside in immigration detention.
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> He makes a number of submissions in support of his application. He emphasises, in particular, that the Crown case against him is weak and, in addition, that as a result of circumstances that have taken place since he was charged, in particular the need for him to challenge the cancellation of his visa and give evidence relevant to the subject matter of the charges in doing that, he considers that he can no longer receive a fair trial of the criminal charges and that the Crown's case is destined to fail for that reason. He has urged this court to dismiss the charges. This court does not have that power. Its jurisdiction was invoked under the *Bail Act*.
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> He also, very strongly, argues that on the basis that he has, in his words, been forced to telegraph his defence to challenge the cancellation of his visa, there can be no fair trial and the trial of these matters cannot proceed. That is a factor which I have taken into account by reference to the High Court authorities referred to by the applicant. It seems to me, though, as a matter of substance, that those are arguments that would appropriately be made on an application to the District Court to permanently stay the proceedings on the basis of the arguments the applicant wishes to make, as opposed to a matter that would be determinative on this application.
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> What is determinative of this application, though, is that the applicant has served this period of time in custody, which is, in my view,

probably unquestionably, longer than he would have served if he had been convicted of the offences in terms of the actual custodial period of any sentence imposed. It may not be the case that it is more than the head sentence that would be imposed given the combination of the charges of stalking and attempting to pervert justice, but it certainly must be coming close to that.

In addition, he would, if released on bail, be released into immigration detention and be subject of conditions prohibiting him from having any contact or communication with the complainant, her children and any other witnesses in relation to the charges.

Taking the circumstances overall, I have formed the view that he has shown cause why his continued detention in custody is not justified, because those conditions ameliorate to an acceptable level the risk of him endangering the safety or welfare of the person claimed to be a victim or anyone else's safety and interfering with witnesses.

…

Those conditions, it seems to me, would ameliorate to an adequate level the risks otherwise posed in relation to the complainant.

I propose to make an order for bail that would require the applicant to reside in a nominated immigration detention facility.

At present, there is not before the court clear material identifying where this is. I require that to be provided so that the order is specific. If there is to be any change to the place where the applicant resides, that is a matter that would need to come back to the court for a variation of the bail order. The bail order will also include, as I have said, a no contact or communication clause. The respondent has indicated it may also seek orders restricting, to some extent, the use of phones or the Internet. However, it would only be, in my view, appropriate for such a condition to be linked to the no contact clause as opposed to more broadly limiting the applicant's ability to use a phone or use the Internet, given that he has these criminal charges that he needs to be able to deal with.

I do not propose to go into more detail in relation to the material before the court, as I do not regard it as necessary. I think what I have said is sufficient to explain the reasons why I have determined that it is appropriate to make an order granting bail in this case, but I will not make the order until I have that more definite information about the specific residence where the applicant will live while on bail. And in addition, the applicant has himself requested that the order not take effect until after the 14th of November when he has a hearing, I understand in the Federal Court in relation to his challenge to the cancellation of his visa.

> So for those reasons, the further hearing of the matter for the purposes of making the order will be adjourned until 10am on 15 November 2019. I will order that a transcript of these reasons be produced, and subject to correcting grammatical errors that will be provided to the parties."[1]

[12] As previously stated the Order which was finalised on 15 November 2019 contained a number of conditions including a requirement that the applicant was to appear for his trial in January 2020 and upon his release he was to surrender into the custody of Australia Border Force and live at the CBITAC at Pinkenba. A further condition specified that he could not live at another address unless he had the written permission of the Office of the Director of Public Prosecutions.

[13] No contact conditions were also imposed together with a condition that he was required to comply with the conditions of any temporary protection order, domestic violence order or any order of the Federal Circuit Court or Family Court naming the applicant as a respondent. The applicant was allowed to possess one mobile phone only and was to provide all relevant information when requested by a police officer. It was a condition of his bail that he not have any encrypted applications installed on his phone including Wickr, Snapchat, Signal or WhatsApp. He was also required to provide all passwords and PIN numbers to police.

The Applicant's Submissions

[14] The current application for a variation of bail came on before me on 9 April 2020. The applicant relied on his affidavit sworn 3 April 2020[2] which contained a number of links to websites setting out material which related to the current COVID-19 pandemic as well as articles which set out conditions in immigration facilities in Australia. Immediately prior to the hearing the applicant also forwarded further material by email including a video he had taken at the CBITAC at Pinkenba which he relied upon to argue that some of the affidavit material relied upon by the Crown was fraudulent as the deponent was not known to a particular Border Force Officer. The applicant's affidavit also contained a number of assertions in relation to a number of Crown prosecutors. Due to the volume of material, particularly the links to various articles and documents as well as some of the serious allegations made, the matter was adjourned on Thursday 9 April 2020 for a further hearing on Tuesday 14 April 2020 to allow me to read the voluminous material. Further material was forwarded by the applicant prior to the hearing on 14 April 2020 which I also read.

[15] I note that much of the material which I was sent before and after the hearings was duplicitous and simply contained numerous articles on the current pandemic and the current situation in immigration detention centres. I note the applicant has attached material in relation to the current COVID-19 situation including deaths in German nursing homes and other institutions. I have had regard to the voluminous material forwarded by the applicant. For the purposes of this application I accept the proposition

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[1] Line 38 at page 101 to line 30 at page 102 and line 45 at page 102 to line 25 at page 103 of the affidavit of Fergus McLaughlin affirmed 8 April 2020.
[2] Court document 16.

that if a detainee at the CBITAC should contract COVID-19 it is likely to spread quickly due to the confined circumstances in which the detainees currently live.

[16] Some of the other material particularly in relation to the Constitution and the Convention debates in 1898 and the repeal of the *Supreme Court Act* 1995 (Qld) are irrelevant to the current application. Some of the allegations and statements made in the affidavit material by the applicant, particularly in relation to hearings before the District Court, are incorrect given the transcript does not state what the applicant alleges. Some allegations are frankly scandalous and unfounded and I will not repeat them.

[17] In this regard I accept that the applicant's behaviour at a hearing in early 2020 led to a concern that he was not fit for trial and a reference was made to the Mental Health Court. That reference was made at a point where the applicant's previous lawyers had withdrawn, the trial was shortly to commence and he was self-represented. That reference to the Mental Health Court was contested. On 13 February 2020, the President of the Mental Health Court determined an application by the Director of Public Prosecutions pursuant to s 110(1)(b) of the *Mental Health Act* 2016 (Qld). That section provides that a relevant person may file a reference if the person has reasonable cause to believe that the person referred is either of unsound mind or unfit for trial. The Director of Public Prosecutions is a relevant person for the purposes of that section. One of the categories of relevant person was the Director of Public Prosecutions. The evidence indicated that a Prosecutor in the District Court at Southport on a review hearing before the trial, formed the view that the defendant's behaviour in court and the depth of conviction with which some paranoid ideas were held were such that the applicant was unfit for trial.

[18] The President was not satisfied that there was reasonable cause to believe that the applicant was "of unsound mind at the time of the offence or that he is now unfit for trial". Given that the matter was seriously contested and there was not presently any real material before the court, her Honour was not satisfied that the provisions of the section had been met. The President noted however that there was a previous report by Dr Frank Varghese dated 6 May 2016 to the Family Court where Dr Varghese had concluded that the applicant had "a disorder of personality with narcissistic traits, antisocial traits and paranoid traits. His report is very clear that he did not diagnose any mental illness in Mr CLA."[3]

[19] When the matter came on for mention before Judge Kent on 19 February 2020 the solicitors acting for the applicant indicated that Counsel had been briefed but that there were some pre-trial issues that needed to be determined prior to the trial proceeding. The trial was then de-listed and the pre-trial 590AA hearing was listed for 28 April 2020. At a further review on 28 February 2020 the matter was listed for trial commencing 15 June 2020.

[20] Against that background, I discern from the voluminous material forwarded to me that the applicant's submissions on his current application can be summarised as follows:

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[3] At page 124, lines 9 to 11 of exhibit "P-H" to the affidavit of Fergus McLaughlin affirmed 8 April 2020.

(i) Because of the corona virus outbreak the trial set down for 15 June 2020 is unlikely to occur;

(ii) He has served his head sentence already having been in custody for three and a half years;

(iii) It is impossible for people in immigration detention to maintain social distancing or be given the appropriate hygiene requirements to prevent the spread of the outbreak;

(iv) Since 23 March 2020 all legal visits to the detention centre have been cancelled;

(v) The laws of murder have changed and a reckless act can result in a murder charge. As such the Office of the Director of Public Prosecutions are attempting to harm him or are recklessly indifferent as to whether he will be harmed. Alternatively he alleges attempted murder;

(vi) He has been the subject of malicious prosecution; and

(vii) He should therefore be granted unconditional bail.

[21] The applicant also argued during the hearing that whilst he could technically make an application for a bridging visa at any point in time, such an application would be of no effect if the Director of Public Prosecutions did not pre approve a residential address for him prior to the visa application being heard.

[22] At the end of the hearing the applicant was asked to provide the address in the community at which he intended to reside so that the address could be assessed by the Director of Public Prosecutions for suitability should the applicant's application for a bridging visa be approved. That address was provided by the applicant after the hearing and was in fact subsequently approved by the Crown as suitable.[4]

The Crown Material

[23] At the hearings Counsel for the Crown relied on the affidavit of Fergus McLaughlin sworn 8 April 2020 which annexes the transcripts of the previous hearings before the Supreme and District Courts together with a number of copies of affidavits.

[24] I have had regard to the affidavit of Stuart Foley sworn 7 April 2020 annexed to the affidavit of Mr McLaughlin. Mr Foley is the applicant's case manager and assists detainees in progressing immigration matters. He states that on 19 March 2020 an email was sent by the applicant to a general address asking whether there were restrictions preventing him applying for a bridging visa. Mr Foley states that on 20 March 2020 he had a conversation with the applicant and advised him that technically there were no restrictions to him lodging a bridging visa application but he would be required to satisfy the grounds for it to be granted including character requirements.

[4] The applicant provided the proposed bail address by email at 1.23pm on 14 April 2020. The Crown responded at 3.50pm on 14 April 2020 indicating that if Mr CLA were granted a visa, the Crown would give written permission for him to reside at the proposed address.

[25] Mr Foley stated that the applicant specifically asked whether his bail conditions indicated he could not apply for a bridging visa and referred to the residential condition which was condition two of his current bail order which indicated that he was required to surrender into the custody of the Australian Border Force and live at the CBITAC and that he was not to live at another address without the permission of the Office of the Director of Public Prosecutions. Mr Foley stated that he informed the applicant that whilst those bail conditions would not prevent him from making an application for a bridging visa, the bail conditions would be taken into account by the assessing officer. On 26 March 2020 Mr Foley states that the applicant asked for materials in relation to an application for a bridging visa and on 31 March 2020 he provided a link to the application form.

[26] I note that in the previous bail application before Bowskill J the applicant gave an undertaking to the court that he would not apply for a bridging visa whilst in immigration detention. That issue has not been addressed by the applicant in the present application, but I accept that at the time he was placed in immigration detention, his trial was scheduled to proceed in January 2020. The circumstances in relation to the expected trial date have clearly changed, and as the affidavit of Mr Foley sets out, the applicant now clearly seeks to apply for a bridging visa so that he can be released into the community, not only due to the delay in his expected trial date, but because of conditions in the immigration detention centre and the likelihood of him contracting COVID-19.

[27] The applicant has objected to the affidavit material exhibited to Mr McLaughlin's affidavit and argues that the affidavit of Adam Powell sworn 2 April 2020 is fraudulent as it was dated prior to the date his application was filed. I have had regard to the affidavit and it would seem to me that affidavit simply refers to factual matters about conditions at the CBITAC since the COVID-19 epidemic. That affidavit states that there are currently three compounds at the transit accommodation and it can accommodate up to 44 detainees. The applicant is currently accommodated in one of the compounds. There are three detainees to a bedroom. He states the bedroom size is 14.1 square metres. He also set out the circumstances in relation to the cleaning of the bathrooms, the fact that detainees have access to a gym and the size of the common area namely 30.1 square metres, the dining area of 31.9 square metres as well as the recreational area of approximately 488 square metres. He stated:

> "11. During the evolving COVID-19 situation additional measures have also been implemented, which include screening of all staff and visitors, additional cleaning of high traffic areas and only two (2) people allowed in the reception area (entry and exit point from the BITA).
>
> 12. Detainees have been frequently advised on social distancing and hygiene measures. If a detainee is unwell with symptoms that include (but are not limited to) fever, cough, fatigue, sore throat, and/or shortness of breath they are consulting with International Health and Medical Services (**IHMS**) and avoiding contact with other detainees. If clinically indicated, detainees will be isolated and tested in line with advice from health professionals."

[28] I do not consider that there is any basis for an allegation of fraud. The affidavit sets out purely factual matters in relation to the living conditions at the CBITAC as at the date the affidavit was sworn and contains factual matters about the size of various rooms, the number of detainees and the strategies that have been put in place to contain the spread of COVID-19 should a detainee at the CBITAC contract the virus. That affidavit is clearly contemporaneous with the applicant's stay in the CBITAC and the deponent has simply set out measurements and data relevant to this application given they go to issues raised by this and other applicants about conditions at the Centre. It may not have been prepared with the current application specifically in mind, as the applicant argues, given the date it was sworn, although it would seem that the applicant had foreshadowed his application prior to filing it. That does not detract from the facts contained therein.

[29] The material before me also indicates that the applicant is not currently lawfully in Australia because his visa has been cancelled. In this regard I note that the previous bail order was not to take effect until after 14 November 2019 when the applicant had a hearing in the Federal Court in relation to the cancellation of his visa. I infer that the application was not successful.

Should the Current Bail Conditions be Varied?

[30] There is no doubt that the applicant was in custody from September 2016 until his release on bail and that he is being held currently in immigration detention. There can be no doubt that there has been significant delay in having his charges proceed to trial. Some of that delay is no doubt due to the applicant changing legal representatives on a number of occasions and the fact that the applicant has pursued remedies in relation to a number of issues in a number of jurisdictions including the Federal Court, the Supreme Court and the Queensland Court of Appeal.

[31] As the affidavit of Mr Foley makes clear the applicant can apply for a bridging visa now. He does not need a variation of bail to apply but wishes to have a bail address pre-approved by the Crown prior to making a bridging visa application. It would also seem that the applicant now seeks unrestricted bail on the basis that because of the COVID-19 outbreak, a trial date is unlikely to occur as jury empanelling has ceased. Unless the applicant applies for a 'judge alone' trial I accept that the trial currently listed for 15 June 2020 may not proceed.

[32] The applicant also refers to the circumstances in which he is required to live in the light of the pandemic conditions and accordingly, seeks to be released on unconditional bail to permit him to make a bridging visa application. He also seeks an order that the court require the Director of Public Prosecutions to apply for a criminal justice stay visa in the interests of justice.

[33] As I have previously noted, in his application, outline of submissions, affidavit and correspondence to the court, the applicant makes a number of scandalous assertions against various people which I shall not repeat. It is clear that the applicant makes a whole series of allegations in relation to his previous trial in the District Court before Rackemann DCJ which resulted in a directed verdict, which are not relevant to the

current application before me. I also accept the submissions of the Crown that many of the allegations and assertions are irrelevant for the purpose of this application and will determine the application on the basis of the relevant factual matters before me. The material before me indicates that the applicant has significantly breached court orders in the past, particularly orders prohibiting him from contacting the complainant and it is quite clear that he has not abided by court orders on numerous occasions in the past given the contraventions of the domestic violence orders.

[34] It is also important to remember that this is not a re-hearing of the application that was heard before Bowskill J but rather a fresh application due to the current circumstances which the applicant finds himself in. Section 10 of the *Bail Act* 1980 (Qld) provides that this court may grant, vary or revoke bail.

[35] Section 16 also provides that the court must refuse bail if the court is satisfied that that there is an unacceptable risk that if the applicant were released on bail he would fail to appear and surrender into custody or he would while released on bail, commit an offence, endanger the safety or welfare of a victim or interfere with witnesses or obstruct the course of justice as follows:

> "**16 Refusal of bail generally**
>
> (1) Notwithstanding this Act, a court or police officer authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court or police officer is satisfied—
>
> (a) that there is an unacceptable risk that the defendant if released on bail—
>
> (i) would fail to appear and surrender into custody; or
>
> (ii) would while released on bail—
>
> (A) commit an offence; or
>
> (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or
>
> (C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or
>
> (b) that the defendant should remain in custody for the defendant's own protection.
>
> (1A) Where it has not been practicable to obtain sufficient information for the purpose of making a decision in connection with any matter specified in subsection (1) due to lack of time since the institution of proceedings against a defendant the court before which the defendant appears or is brought shall remand the defendant in custody with a view to having further information obtained for that purpose.
>
> (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court or police officer shall have regard to all matters appearing to be relevant

and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant—

(a) the nature and seriousness of the offence;

(b) the character, antecedents, associations, home environment, employment and background of the defendant;

(c) the history of any previous grants of bail to the defendant;

(d) the strength of the evidence against the defendant;

(e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—

(i) the defendant's relationship to the defendant's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services in which the community justice group participates;

(f) if the defendant is charged with a domestic violence offence or an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2)—the risk of further domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, being committed by the defendant;

Note—

See section 15(1)(e) for the power of a court to receive and take into account evidence relating to the risk of further domestic violence or associated domestic violence.

(g) any promotion by the defendant of terrorism;

(h) any association the defendant has or has had with—

(i) a terrorist organisation within the meaning of the Criminal Code (Cwlth), section 102.1(1); or

(ii) a person who has promoted terrorism.

(2A) However, in assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) a court must not have regard to the effect on the risk of imposing a condition under section 11(9B).

…

(3) Where the defendant is charged—

(a) with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; or

(b) with an offence to which section 13(1) applies; or

(c) with an indictable offence in the course of committing which the defendant is alleged to have used or threatened

to use a firearm, offensive weapon or explosive substance; or

(d) with an offence against this Act; or

Note—
For this paragraph, a person proceeded against under section 33(3) *is taken to be charged with an offence against this Act—* see section 33*(6).*

(e) with an offence against the *Penalties and Sentences Act 1992*, section 161ZI or the *Peace and Good Behaviour Act 1982*, section 32; or

(f) with an offence against the Criminal Code, section 359 with a circumstance of aggravation mentioned in section 359(2); or

(g) with a relevant offence;

the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified and, if bail is granted or the defendant is released under section 11A, must include in the order a statement of the reasons for granting bail or releasing the defendant.

Note—
See also section 16A(6).

(4) In granting bail in accordance with subsection (3)—

(a) a court may impose conditions under section 11 or 11AB; or

(b) a police officer may impose conditions under section 11.

…

(7) In this section—

domestic violence offence see the Criminal Code, section 1.

relevant offence means—

(a) an offence against the Criminal Code, section 315A; or

(b) an offence punishable by a maximum penalty of at least 7 years imprisonment if the offence is also a domestic violence offence; or

(c) an offence against the Criminal Code, section 75, 328A, 355, 359E or 468 if the offence is also a domestic violence offence; or

(d) an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2) if—

(i) the offence involved the use, threatened use or attempted use of unlawful violence to person or property; or

(ii) the defendant, within 5 years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or

(iii) the defendant, within 2 years before the commission of the offence, was convicted of another offence

against the *Domestic and Family Violence Protection Act 2012*, section 177(2)."

[36] In terms of the factors the court is required to take into account in assessing whether there is an unacceptable risk, s 16(2) sets out the relevant considerations that the court must have regard to. In this case the offences are serious not only because of the maximum penalty which could be imposed (particularly in relation to the charge of attempting to pervert the course of justice) but also due to the allegations of the protracted and obsessive nature of the stalking charges in relation to the applicant's ex-partner which occurred over a period of 18 months in breach of court orders. The allegations of the applicant's offending are set out in the factual overview of the charges annexed to the affidavit of Mr McLaughlin.[5] Aspects of the applicant's alleged offending as set out in that overview are of particular concern, namely:

(i) On each occasion that the complainant and her children moved to a different address, the applicant conducted an internet search of the new address days after the complainant had moved, despite not being advised of the new addresses;

(ii) The applicant remotely accessed the complainant's daughter's Apple ID and Gmail accounts and reset the passwords and security questions to those accounts, allegedly in order to switch on the Find my IPhone application on the complainant's daughter's phone;

(iii) On one occasion the complainant and her children moved to a new address which was not communicated to the applicant. Six days later the applicant conducted an internet search of that address and about a month and a half later the applicant made two applications to rent an apartment in the same complex (which were refused by the complex manager). He subsequently informed police that he knew the complainant was living at that address – at that time, a temporary protection order existed prohibiting the applicant from entering or attempting to enter premises, or approaching to within 100m of premises where the complainant lived;

(iv) On multiple occasions the applicant sent correspondence indicating his knowledge of the complainant's movements and whereabouts the day before. For example:

(i) the applicant emailed the complainant's lawyer noting his concern about her "breaking bonds" the day after she had broken a lease in order to move from an address that had been ascertained by the applicant;

(ii) the day after the complainant and her children had attended a tavern with some friends and their children for a family birthday party, the applicant sent correspondence to a legal practitioner voicing his concern over her consumption of alcohol the evening before; and

(iii) following an email sent by the applicant to the complainant's lawyer which said "please do not put me in a position where I need to intervene in the defence of another" the complainant moved her son to a new kindergarten. On that same day the applicant wrote an email to a private investigator

[5] At exhibit "P-A" p 1.

asking how much it would cost to locate the child's "new kindy". A document created the next day, which was located on the applicant's computer, outlined surveillance from the previous day and included pictures of the child's new kindergarten; and

(v) The applicant made multiple complaints to police and Crime Stoppers via phone and email concerning the complainant, and on 8 September 2016 made seven calls to 000 concerning the complainant which revealed he had been following her.

[37] In respect of that alleged offending, the overview of the charges annexed to the affidavit of Mr McLaughlin indicates that there are emails, messages and internet searches which support the allegations of stalking. In relation to the allegations of attempting to pervert the course of justice the Crown intends to lead the Arunta calls from the prison as direct evidence of those attempts. I conclude therefore that there is objective material to support the Crown case.

[38] The applicant is clearly in a show cause position due to s 16(3), given it is alleged he committed further offences whilst on bail and he is alleged to have committed a relevant domestic violence offence. The very real concern in the present case is that the applicant will continue to stalk his ex-partner whilst on bail or would make further attempts to pervert the course of justice by interfering with witnesses.

[39] The real issue before me is whether the risks the applicant poses can be appropriately managed if the applicant is granted unconditional bail as he seeks. In my view the answer is clearly in the negative given his history of breaching court orders in the past. The next question is whether the risks the applicant poses can be appropriately managed by the imposition of bail conditions. Justice Bowskill was satisfied that the risk the applicant posed could be addressed by the imposition of conditions which included a residential requirement that he reside at the CBITAC or a place approved in writing by the Director of Public Prosecutions. Section 11(2) provides that special conditions can be imposed as follows:

"**11 Conditions of release on bail**

…

(2) Where a court or a police officer authorised by this Act to grant bail considers that the imposition of special conditions is necessary to secure that a person—
  (a) appears in accordance with the person's bail and surrenders into custody; or
  (b) while released on bail does not—
    (i) commit an offence; or
    (ii) endanger the safety or welfare of members of the public; or
    (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to the person or another person;

Examples of special conditions for paragraph (b)(ii)—

- a special condition that prohibits a person from associating with a stated person or a person of a stated class
- a special condition that prohibits a person from entering or being in the vicinity of a stated place or a place of a stated class

that court or police officer shall impose such conditions as the court or police officer thinks fit for any or all of such purposes."

[40] Section 11(5) also makes clear that any special conditions imposed shall not be more onerous for the person than those that are, in the opinion of the Court, necessary having regard to the nature of the offence, the circumstances of the applicant and the public interest. The applicant's circumstances have changed in that he is currently being held at the CBITAC and should he insist on his right to a jury trial rather than request a 'judge alone' trial a jury trial is not certain to proceed in 2020.

Can the Current Conditions Adequately Address any Risk that the Applicant Poses?

[41] I consider that the current bail conditions with some adjustments for the current COVID-19 pandemic, as outlined below, can address the risk that the applicant currently poses.

Condition 1 – Court Appearances

[42] This condition requires the applicant's attendance at court. It would seem clear to me that there is no reason why the current condition requiring him to attend all his court appearances should be changed. That condition is required and should remain given the applicant's previous failure to comply with and abide by court orders. During the oral hearing on 9 April 2020 the applicant made strong assertions that as he has served what he considers to be his time, he is being held illegally and cannot be required to undergo a trial. He is clearly mistaken in this regard and irrespective of the time he has served on remand, he must attend at his trial and all court matters where his appearance is required. The conditions of his bail will make this manifestly clear. I consider such a condition is required to ensure he will attend at any court appearances including his 590AA application and his trial.

Condition 2 – Residential Condition

[43] The condition is currently in the following terms:

"Immediately upon your release from custody, you are required to surrender into the custody of Australian Border Force authorities and you must live at the Brisbane Immigration Transit Accommodation at Pinkenba.

You cannot live at another address unless, before you move to the other address, you have the written permission of the Office of the Director of Public Prosecutions to live at the other address."

[44] A consideration of the current condition in relation to the applicant's residence indicates that it is not a condition of bail that he resides in immigration detention as the condition allows the Director of Public Prosecutions to approve another address. He is at liberty to apply for a bridging visa; nothing in his bail conditions prevent him from doing so. If his visa status changes then the Director of Public Prosecutions can approve a change of address. The applicant is in immigration detention because of the provisions of the *Migration Act* 1958 (Cth) which were outlined in the material provided to Bowskill J. Section 189 requires that unlawful non-citizens must be detained. The applicant is currently an unlawful non-citizen as he is not a citizen of Australia and his visa has been cancelled. Section 196 then provides that he must be kept in immigration detention essentially until he is removed, deported or granted a visa. Those provisions provide as follows:

> **"189 Detention of unlawful non-citizens**
>
> (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
>
> **196 Duration of detention**
>
> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
>
> (a) he or she is removed from Australia under section 198 or 199; or
>
> (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
>
> (b) he or she is deported under section 200; or
>
> (c) he or she is granted a visa.
>
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
>
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.
>
> (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, 501A, 501B, 501BA or 501F, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
>
> (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
>
> (5) To avoid doubt, subsection (4) or (4A) applies:

> (a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
> (b) whether or not a visa decision relating to the person
>
> (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
>
> (6) This section has effect despite any other law.
>
> (7) In this section:
>
> ***visa decision*** means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa)."

[45] The evidence is the applicant is currently an unlawful non-citizen detained under s 189 of the *Migration Act*. Pursuant to the provisions of that Act, he must be kept in immigration detention until he is granted a visa. This is not however a strict requirement of his current bail conditions as he can live at another address if he has the permission of the Office of the Director of Public Prosecutions. It is s 196 of the *Migration Act* which requires him to stay at his current address at the transit accommodation at Pinkenba until he is granted a visa, not his bail conditions.

[46] Whilst he is currently living at the transit accommodation at Pinkenba he can apply for a bridging visa. That is set out clearly in the affidavit of Mr Foley who states that in assessing that application, the applicant's character will be considered as will his bail conditions. It is clear those bail conditions indicate that the Director can consent to another bail address. No doubt the fact that the Director of Public Prosecutions has specifically approved such an address will be considered at the time the application for a bridging visa is determined.

[47] Accordingly the material before me indicates that the applicant can currently apply for a bridging visa which would allow him to reside in the community if he satisfies the requirements of the relevant legislation. One such requirement would be whether he can comply with his current bail conditions if granted a visa. Those conditions currently require that any address at which the applicant is to reside be approved in writing by the Director of Public Prosecutions. Such an address has been approved. He already has the forms required to make the application and has had them for three weeks. I consider therefore that he could forward that application as soon as possible given he now has all the information he requires including an approved bail address. Accordingly I consider that the current residential condition should be varied as follows:

"You must reside at the Brisbane Immigration Transit Accommodation at Pinkenba until you are granted a visa to stay in Australia and to reside at [redacted] which is an address which has currently been approved in writing by the Director of Public Prosecutions.

You cannot live at another address unless before you move to the other address, you have the written permission of the Office of the Director of Public Prosecutions to live at the other address."

Condition 3 – No Contact

[48] The condition is in the following terms:

> "You must not contact or communicate with, or attempt to contact or communicate with, either directly or indirectly:
> - [redacted];
> - [redacted]; or
> - Any Crown witness.
>
> You must not go within 100m of any address at which the above named persons may reside.
>
> You must not approach, enter or remain in any place where the above named persons may be employed.
>
> You must not contact, approach, enter or remain in any place where the above named persons may attend educational facilities.
>
> If you see the abovenamed persons in public, you must leave the area.
>
> **Note: "contact or communicate with" includes –**
> **meeting;**
> **speaking to;**
> **telephoning;**
> **sending a text or social media message to;**
> **sending or delivering a written or typed note or letter to;**
> **contacting on social media; or**
> **getting in contact with in any other way.**
>
> **"directly" means you contacting or communicating, or attempting to contact or communicate;**
>
> **"indirectly" means getting someone else, such as a private investigator, to contact or communicate, or attempt to contact or communicate, for you.**"

[49] These conditions are standard and relevant. There is no reason why they should be changed. They relevantly address the risk of the applicant interfering with witnesses or committing further offences whilst on bail. The named persons are the complainant or witnesses. Given the previous history of breaches such a condition must be imposed in order to ameliorate the risk the applicant currently poses in this regard. The requirements of s 16 cannot be addressed without such a condition.

Condition 4 – Miscellaneous Conditions

[50] This condition is in the following terms:

> "You must adhere to the requirements or conditions of any Temporary Protection Order, Domestic Violence Order or any order of the Federal Circuit Court or Family Court naming you as the respondent."

[51] Given the applicant makes this application for variation of bail during the current COVID-19 emergency, I consider he should be required to comply with the standard conditions which are now being required for grants of bail during the current crisis. Those conditions are as follows:

1. General directive – COVID-19

   You must comply with all Government (Queensland and Federal) directives in relation to COVID-19.

2. Release requirements

   You must, prior to your release, satisfy any medical or quarantine requirements of the Immigration Transit Accommodation at which you are residing.

3. Home Confinements

   You must comply with the Home Confinement direction dated 29 March 2020 or any subsequent direction from the Queensland Chief Health Officer and only leave your residence for one of the purposes as outlined in the attached Direction:

   - Shopping for essentials – food and necessary supplies;
   - Medical or health care needs, including compassionate requirements;
   - Exercise with no more than one other person (unless from your household);
   - Providing care or assistance to an immediate family member;
   - Work and study if you cannot work or learn remotely;
   - Attendance at court and/or to comply with court orders.

Condition 5 – Mobile Phone

[52] This condition is in the following terms;

> "You must only possess one (1) mobile phone when on bail for these offences.
>
> You must provide all identifying information, which is included but not limited to; the contact number, make, model, service provider (for example Telstra, Optus etc.) and IMEI number, when requested by a police officer who holds the rank of Sergeant or higher.
>
> You must not have any encrypting applications installed on your phone. These applications include (but are not limited to) Wickr, Snapchat, Signal and Whatsapp.

> When requested by a police officer of the rank of Sergeant or higher, you must hand over your mobile phone and provide all passcodes/passwords or PIN numbers to the device and any applications installed on that device."

[53] Similarly, I consider that the conditions in relation to the applicant's mobile phone are appropriate given the requirements of s 16 of the *Bail Act* and after a consideration of s 11(5). I consider such a special condition is necessary in order to address the risk of him contacting witnesses or committing further offences given the various strategies he has adopted in the past to stalk the complainant as elaborated in the factual overview of the stalking charge contained in the annexure to the affidavit of Mr McLaughlin.[6]

Additional Conditions

[54] In the hearing before Bowskill J, submissions were made that conditions requiring a curfew and reporting requirements were not necessary. I note the following exchange:

> "HER HONOUR: Yes. I've brought up the standard bail conditions document and it seemed to me if the residential condition involves immigration detention, then you don't really need a curfew or reporting to a police station."[7]

[55] If the applicant is successful in his visa application I consider that a curfew would be necessary given the seriousness of the charges on the indictment and the concerning allegations in relation to the applicant's stalking behaviour. I consider that a curfew requiring him to be at his residence between 7pm and 7am would give him sufficient time to attend any court hearings at Southport. That condition should be imposed in the following terms:

Condition 6 – Curfew

Should you be granted a visa to reside at [redacted] you must not leave your residence or any subsequent residence (approved in writing by the Director of Public Prosecutions) between 7pm and 7am.

[56] If the applicant is granted a visa, a reporting condition is also required to ensure that he does not leave the jurisdiction. The following additional condition should therefore be imposed:

Condition 7 – Reporting

You must report three times a week, each Monday, Wednesday and Friday, to the Police Station at Cleveland.

Bridging Visa and Criminal Justice Stay Visa

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[6] See Annexure "P-A" at pp 1-13

[7] Lines 31 to 35 at page 97 of the affidavit of Fergus McLaughlin affirmed 8 April 2020.

[57] The applicant also seeks an order that the court direct the Director of Public Prosecutions to apply for a Criminal Justice Visa. In this regard I note the following matters and legislative requirements in respect of the criminal justice stay visas.

Bridging Visa

[58] In email correspondence sent by the Australian Border Force to the Crown on 12 November 2019,[8] it was noted that:

> "Mr CLA had a substantive visa cancelled under s 116(1)(e) of the Act on 10 November 2016. As such, there is a limited class of visas for which he could apply, one of which is a Bridging visa E".

[59] Irrespective of the class of visa the applicant applies for, if such an application is made, in order for a visa to be granted he must meet the character requirements set out in s 501 of the *Migration Act.* Relevantly, that section provides as follows:

> "**MIGRATION ACT 1958 - SECT 501**
>
> **Refusal or cancellation of visa on character grounds**
> Decision of Minister or delegate--natural justice applies
>
> (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.
>
> Note: ***Character test*** is defined by subsection (6).
>
> (2) The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test.
>
> Decision of Minister--natural justice does not apply
>
> (3) The Minister may:
>
> (a) refuse to grant a visa to a person; or
>
> (b) cancel a visa that has been granted to a person;
>
> if:
>
> (c) the Minister reasonably suspects that the person does not pass the character test; and

[8] Pages 1 to 10 of exhibit A to the Affidavit of Courtney Pallot affirmed 13 November 2019.

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

…

(4) The power under subsection (3) may only be exercised by the Minister personally.

…

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

…

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way;

…

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person."

Criminal Justice Stay Visa

[60] Criminal justice visas are dealt with in Subdivision D of the *Migration Act*, with s 155 (2) providing that a criminal justice visa "may be a visa permitting a non citizen to remain temporarily in Australia, to be known as a criminal justice stay visa".

[61] Sections 157 to 159 of the Act set out the criteria for and procedure for applying for a criminal justice stay visa. Relevantly, those sections provide:

"**Section 157 Criterion for criminal justice stay visas**

A criterion for a criminal justice stay visa for a non-citizen is that either:

(a) a criminal justice stay certificate about the non-citizen is in force; or
(b) a criminal justice stay warrant about the non-citizen is in force."

Section 158 Criteria for criminal justice visas

The criteria for a criminal justice visa for a non-citizen are, and only are:

(a) the criterion required by section 156 or 157; and
(b) the criterion that the Minister, having had regard to:
  (i) the safety of individuals and people generally; and
  (ii) in the case of a criminal justice entry visa, arrangements to ensure that if the non-citizen enters Australia, the non-citizen can be removed; and
  (iii) any other matters that the Minister considers relevant;

has decided, in the Minister's absolute discretion, that it is appropriate for the visa to be granted.

159 Procedure for obtaining criminal justice visa

(1) If a criminal justice certificate, or a criminal justice stay warrant, in relation to a non-citizen is in force, the Minister may consider the grant of a criminal justice visa for the non-citizen.
(2) If the Minister, after considering the grant of a criminal justice visa for a non-citizen, is satisfied that the criteria for it have been met, the Minister may, in his or her absolute discretion:

(a) grant it by causing a record of it to be made; and
(b) give such evidence of it as the Minister considers appropriate."

[62] On the material before me, it does not appear that a criminal justice stay certificate has been issued in respect of the applicant. Section 148 of the *Migration Act* provide as follows:

"**148 State criminal justice stay certificate**

(1) If:
(a) an unlawful non-citizen is to be, or is likely to be, removed or deported; and
(b) an authorised official for a State considers that the non-citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence against a law of the State; and
(c) that authorised official considers that satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for those purposes or the non-citizen or both will meet the cost of keeping the non-citizen in Australia;
the official may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice by the State.
(2) For the purposes of paragraph (1)(c), the cost of keeping the non-citizen in Australia does not include the cost of immigration detention (if any)."

[63] Pursuant to s 148, it is a matter for an authorised official as to whether to exercise the discretion to "give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice by the State".[9]

[64] Accordingly it is clear that the question as to whether a request for a criminal justice stay should be applied for is a matter for an authorised official and not this Court.

[65] If that discretion were to be exercised, it is then, pursuant to s 159(1) of the *Migration Act*, within the Minister's discretion to consider the grant of a criminal justice visa and, pursuant to s 159(2), within the Minister's "absolute discretion" to grant a criminal justice stay visa, if satisfied that the criteria set out in ss 157 and 158 have been met.

[66] The applicant's request for further orders is refused.

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[9] Section 142 of the *Migration Act* provides that "***authorised official***, in relation to a State, means a person authorised under section 144 to be an authorised official for that State". Section 144 provides that the Minister may, in writing, appoint as an authorised official for a State for the purposes of Division 4 of the Act the Attorney-General of the State; or a person holding an office under a law of the State that is like the office of the Director of Public Prosecutions; or the highest ranking member of the police force of the State.

[67] I will allow short written submissions from the parties in relation to the form of the order and the wording of the conditions proposed.