

**Loaiza Esguerra (Migration) [2020] AATA 3593 (28 July 2020)**

**DECISION RECORD**

<b>DIVISION:</b>	Migration & Refugee Division
<b>APPLICANT:</b>	Mrs Marina Loaiza Esguerra
<b>CASE NUMBER:</b>	2004464
<b>DIBP REFERENCE:</b>	BCC2020/330295
<b>MEMBER:</b>	Rosa Gagliardi
<b>DATE:</b>	28 July 2020
<b>PLACE OF DECISION:</b>	Australian Capital Territory
<b>DECISION:</b>	<p>The Tribunal remits the application for a Visitor (Class FA) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 600(Visitor)(Class FA) visa:</p> <ul style="list-style-type: none"><li>• cl.600.215 of Schedule 2 to the Regulations.</li></ul>

Statement made on 28 July 2020 at 11:38am

**CATCHWORDS**

*MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – Tourist stream – remain in Australia beyond 12 months – exceptional circumstances – support and assistance to daughter – COVID-19 pandemic situation in Columbia – nationwide lockdown – escalating medical crisis – cartel problem – decision under review remitted*

**LEGISLATION**

*Migration Act 1958 (Cth), s 65  
Migration Regulations 1994 (Cth), Schedule 2, cl 600.215*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 February 2020 to refuse to grant the visa applicant a Visitor (Class FA) Subclass 600 visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 6 February 2020. At the time the visa application was lodged, Class FA contained one subclass, Subclass 600 (Visitor), with a number of different streams. In this case, the applicant applied for the visa seeking to satisfy the primary criteria in the Tourist stream.
3. The criteria for a Subclass 600 visa are set out in Part 600 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevantly to this case, they include cl.600.215, which requires the visa applicant to satisfy the Minister that if the applicant has previously held one or more Visitor visas or is on a Bridging visa, there are exceptional circumstances for the grant of the visa.
4. The delegate refused to grant the visa on the basis that the visa applicant did not meet cl.600.215.
5. The applicant, Ms Marina Loaiza Esguerra, did not appear by telephone before the Tribunal on 24 July 2020. However, her daughter, Ms Lina Ramirez, gave evidence on behalf of the applicant.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### CONSIDERATION OF CLAIMS AND EVIDENCE

7. At issue in this case is cl.600.215:
  - (1) *If subclause (2) applies – exceptional circumstances exist for the grant of the visa.*
  - (2) *This subclause applies if the grant of the visa would result in the applicant being authorised to stay in Australia as the holder of one or more of the following visas for a total period of more than 12 consecutive months:*
    - (a) *One or more visitor visas;*
    - (b) *A Subclass 417 (Working Holiday) visa;*
    - (c) *A Subclass 462 (Work and Holiday) visa;*
    - (d) *A bridging visa.*
8. The applicant is a 63-year-old Colombian national whose usual place of residence is Armenia in that country. She previously visited Australia in November 2008 for three months and there does not appear to be any infringement in terms of her breaching her Visitor visa conditions on that occasion as she departed within the expiry of her visa.
9. The applicant then returned to Australia on 7 February 2019 on a Visitor visa that expired on 7 February 2020. She is currently on a Bridging visa in association with this review.

*Are there exceptional circumstances?*

10. In her application, the applicant wrote that her reason for wanting to remain in Australia beyond the 12 months' rule (until 6 February 2021) is because she was "*helping my daughter with her kids*". The applicant's daughter submitted a statement to the Department dated 5 February 2020 indicating that she had a second child and the presence of her mother would be of assistance as she had since returned to work in the Canberra Hospital in February 2019. Her mother had been of support and assistance to her with the children.
11. At hearing the applicant's daughter, Ms Ramirez, stated that she was not sending her youngest to childcare as she had concerns about COVID 19 and her mother, the applicant, being at home, had facilitated her being able to be at work for longer hours.
12. Ms Ramirez explained that she is an essential worker, working for the Cytology Department, ACT Pathology, ACT Health. Her employer has provided a letter dated 8 July 2020, confirming that Ms Ramirez was a full-time employee who "*due to the unprecedented situation of COVID-19, has had to work overtime*".
13. Ms Ramirez has also relied on the fact that in late October 2019 she had an accident at work and broke her left wrist. Her general practitioner has prepared a report dated 9 June 2020, stating that Ms Ramirez was unable to perform some of the basic home duties, including looking after her smallest child, some of the personal care and house chores. Her G.P also emphasised that Ms Ramirez has no immediate family support in Australia except her mother and that, in his/her opinion, "*her mother's ongoing support will be beneficial for Lina's physical and emotional health*".
14. The Tribunal has considered the above matters but is not convinced that of themselves they constitute exceptional circumstances. The Tribunal has no doubt that Ms Ramirez's mother is providing her with emotional and other household assistance, but the purpose of the Visitor visa is not to engage in long-term care for grandchildren. It is a fact of life that many working mothers are required to make arrangements for after-hours care for their children. The Tribunal also sympathises with Ms Ramirez's concerns about her child attending childcare but objectively the risk of an adverse event in terms of COVID-19 in the ACT currently is not high.
15. Ms Ramirez's employer has also alluded to her seeking compensation for her injury, indicating that she may be able to have support from relevant health agencies paid for in terms of her recovery, after which time it could not be argued that she would need her mother to be in Australia to help her with her children.
16. As the Tribunal noted at hearing the Visitor visa could not be used by the applicant as a means of maintaining her presence onshore to continue providing support to her daughter and her family. How Ms Ramirez managed her household arrangements could not be contingent on a migration outcome.
17. In addition to these less than persuasive arguments about the need for her mother to stay in Australia for a few months into the future, Ms Ramirez did advance arguments that in the view of the Tribunal, do give rise to exceptional circumstances.
18. In the first instance, Ms Ramirez stated that she was very frightened about her mother returning to Colombia during the COVID-19 pandemic. While she was not in the highest risk age category, the Tribunal had genuine concerns that her mother would be vulnerable in a country where medical resources are scarce, and the pandemic continues to keep the community in lockdown. The nationwide lockdown period started in March 2020, has been

extended six times. It was due to be lifted on 15 July 2020, but given the rate at which cases have accelerated and grown, the latest lockdown has been extended until 1 August 2020.<sup>1</sup>

19. July 2020 has proven a particularly difficult month for the nation's population as numbers of cases have increased significantly. As at 27 July 2020, there have been 248,976 cases detected, with 8,525 deaths.<sup>2</sup> The trajectory of the virus in July is of concern as the number of cases has approximately doubled since June 2020.<sup>3</sup>
20. Country reports show that the healthcare system in Colombia is on the verge of collapse in dealing with the acceleration of cases:

Colombia's healthcare system found itself on the brink of collapse on Wednesday as hospitals in Medellin and Cali reported they were all but saturated, days after healthcare in the capital Bogota collapsed.

The situation is most critical in the capital where the Bogota Medical College said that no intensive care units were available due to the COVID-19 pandemic, followed by Cali.

#### **Healthcare in Colombia's three largest cities all but collapsed**

According to President Ivan Duque, 91% of the 701 intensive care units in Colombia's third largest city were full on Tuesday evening. The Health Secretary of Colombia's second largest city, Medellin, reported on Wednesday morning that more than 88% of the city's 695 intensive care units were occupied, a day after the National Health Institute reported a record 1,850 new infections in the surrounding Antioquia province.

Colombia's government is racing to expand hospital capacity but unable to keep up with the speed of the coronavirus' contagion. In Bucaramanga, the country's fifth largest city, local authorities sent out an SOS, claiming the healthcare system had collapsed.

Locals reported on social media that family members were no longer able to receive emergency healthcare. Medical professionals claimed statistics are being manipulated and beds are reserved for VIPs. These four cities and their metropolitan areas are home to approximately one third of Colombia's population.<sup>4</sup>

21. Ms Ramirez at hearing emphasised that her mother is of limited means, living on a small pension, and would struggle to obtain adequate health care during the pandemic. Ms Ramirez stated that the thought of her mother returning to Colombia to be on her own, without resources, during an escalating medical crisis was causing her significant anxiety. She wanted her mother to be able to remain in Australia for a further period so that she could remain safe in the ACT. The applicant was reliant on Ms Ramirez and her husband financially, it was argued, and the applicant did not need to work, and was not intending to work in Australia. Given Ms Ramirez's health responsibilities the family was already observing a very careful lifestyle to ensure that no family member was a source of transmission of COVID-19.

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<sup>1</sup> The Jakarta Post, News Desk, Reuters, "Colombia coronavirus lockdown extended until Aug.1, <https://www.thejakartapost.com/news/2020/07/08/colombia-coronavirus-lockdown-extended-until-aug-1.html>, accessed on 27 July 2020.

<sup>2</sup> World Coronavirus Countries, Colombia, <https://worldometers.info/coronavirus/country/colombia/>, accessed on 27 July 2020.

<sup>3</sup> Ibid.

<sup>4</sup> Colombia Reports, <https://colombiareports.com/covid-19-colombias-healthcare-capacity-and-collapses/>, accessed on 27 July 2020.

22. In addition to these concerns, the Tribunal's research also reveals that there is a further complicating factor involving Colombia's well-known cartel problem:

Drug cartels and rebel groups are imposing their own bloody coronavirus lockdowns across Colombia – and killing those who do not obey, according to a new report by Human Rights Watch (HRW).

At least eight civilians have been murdered by the armed groups, some of them holdovers from Colombia's half-century civil war, which are using Whatsapp chats and pamphlets to warn citizens of the lockdowns in the rural areas where they operate.

In Tumaco, an impoverished and violent port city on the Pacific coast, residents are banned by gangs from fishing, limiting their ability to earn money and food. A 5pm curfew – far stricter than the measures imposed by the government – is also forcing street vendors inside.

Across the country, violent gangs are stopping people from leaving their homes at all, even when sick, according to humanitarian workers cited in the report. In two provinces, Cauca and Guaviare, armed groups have torched the motorcycles of those of those who ignored their restrictions.

"They have shut down transport between villages, and when someone is suspected to have Covid-19 they are told to leave the region or they will be killed", one community leader in Colombia's southern Putumayo province told the Guardian, on condition of anonymity for fear of reprisal. "And people have no choice but to obey because they never see the government here".

On 8 June, Edison Leon Perez, a community leader and activist, was murdered in the Putumayo town of San Miguel by La Mafía, a drug trafficking gang with ties to rightwing paramilitarism, days after he called on local authorities to address the gang's lockdown orders.

Like much of South America, Colombia, is bracing for the worst of the coronavirus pandemic...

The government has imposed lockdowns, both nationwide and locally, but they have never been as strict as those decreed by armed groups, and the consequences for breaking them nowhere near as grave.

Colombia was supposed to be turning a chapter on such violence. A historic peace accord signed with the Revolutionary Armed Forces of Colombia (Farc), then South America's largest rebel group, in 2016 formally ended over five decades of civil war that killed more than 260,000 people and forced 7 million to flee their homes. But that has not translated to peace on the ground.

At least 271 community leaders have been killed since the peace deal was implemented in early 2017, while armed groups continue to jostle over territory the Farc left behind.

Some of the armed groups are dissident Farc fighters who refused to hand in their guns; others belong to smaller rebel armies and rightwing paramilitary militias. All make their money in part from the cocaine trade.

HRW called on the government of Ivan Duque to do more to protect those at the mercy of myriad armed groups during the lockdown.

"Draconian 'punishments' imposed by armed groups to prevent the spread of Covid-19 mean that people in remote and impoverished communities across Colombia risk being attacked and even killed if they leave their homes", Jose Miguel Vivanco, HRW's America's director, said in a statement on Wednesday, morning. "The government should urgently ramp up its efforts to protect these communities, ensuring they have adequate food and water, and protect their health from the effects of Covid-19".<sup>5</sup>

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<sup>5</sup> The Guardian, "Colombian cartels killing those who don't obey their Covid-19 lockdowns, Human Rights Watch calls on government to do more to protect civilians after at least eight murdered by armed groups", <https://www.theguardian.com/global-development/2020/jul/15/colombia-cartels-rebel-groups-coronavirus-lockdown-human-rights-watch>, accessed on 28 July 2020.

23. The Tribunal has also taken into account Mrs Ramirez's credible account at hearing regarding her own traumatic and violent past in Colombia which has left her with emotional difficulties. The Tribunal accepts that the particular circumstances of Colombia currently, together with Ms Ramirez's own past, these give rise to exceptional circumstances and that the applicant's presence in Australia for a longer period is not inconsistent with such exceptional circumstances.
24. At hearing, however, the Tribunal made it clear to Ms Ramirez that a Tourist visa is not a long-term solution to her mother's situation, if it is the family's intention to secure a permanent migration outcome for the applicant, given she has no family in her own home country.
25. Having had regard to the evidence submitted at hearing and the available country information, the Tribunal is satisfied that there are exceptional circumstances for the grant of the visa.
26. As such, the applicant meets the requirements of cl.600.215.

### **DECISION**

27. The Tribunal remits the application for a Visitor (Class FA) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 600(Visitor)(Class FA) visa:
  - cl.600.215 of Schedule 2 to the Regulations.

Rosa Gagliardi  
Member